FILED
SUPREME COURT
STATE OF WASHINGTON
11/27/2023
BY ERIN L. LENNON
CLERK

FILED
Court of Appeals
Division I
State of Washington
11/27/2023 1:22 PM

SUPREME COURT NO. 1025874
COURT OF APPEALS NO. 83688-9-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

ROBERT JAMES,

Petitioner.

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

The Honorable Melinda Young and
Sandra Widlan, Judges

PETITTION FOR REVIEW

DANA M. NELSON
Attorney for Petitioner

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

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3

1. Joinder Issue and Court of Appeals Decision 4

2. Juror Bias Issue and Court of Appeals Decision 9

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT 11

1. THIS COURT SHOULD ACCEPT REVIEW OF THE JOINDER ISSUE BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN BLUFORD 11

2. THIS COURT SHOULD ACCEPT REVIEW OF THE JUROR BIAS ISSUE BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST 18

TABLE OF CONTENTS

Page

3. THIS COURT SHOULD ACCEPT REVIEW OF THE SUFFICIENCY ISSUE BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS. 24

4. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE $500 VPA FROM THE JUDGMENT AND SENTENCE. 28

F. CONCLUSION 31

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Yates,
177 Wn.2d 1, 296 P.3d 872 (2013) 21

State v. Bluford,
188 Wn.2d 298, 393 P.3d 1219 (2017)... 1, 6, 8, 11-13, 18

State v. Brett,
126 Wn.2d 136, 892 P.2d 29 (1995)
Cert. denied, 516 U.S. 1121 (1996) 21

State v. Davis,
175 Wn.2d 287, 290 P.3d 43 (2012),
Cert. denied by, Davis v. Washington,
571 U.S. 832 (2013) 21-22

State v. Duncan,
185 Wn.2d 430, 374 P.3d 83 (2016)...............................29

State v. Fisher,
165 Wn.2d 727, 202 P.3d 937 (2009)............................15

State v. Gordon,
172 Wn.2d 671, 260 P.3d 884 (2011) 22

State v. Guevera Diaz,
11 Wn. App. 843, 456 P.3d 869 (2020).....................10, 20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Holmes,
122 Wn. App. 438, 93 P.3d 212 (2004)..................... 15-16

State v. Irby,
187 Wn. App. 183, 347 P.3d 1103 (2015)................21, 23

State v. Kirkman,
159 Wn.2d 918, 155 P.3d 125 (2007).............................14

State v. Lawler,
194 Wn. App. 275, 374 P.3d 278 (2016)..........................19

State v. Magers,
164 Wn.2d 174, 189 P.3d 126 (2008) 17

State v. McNeal,
145 Wn.2d 352, 37 P.3d 280 (2002)...............................26

State v. Ramirez,
191 Wn.2d 732, 426 P.3d 714 (2018).............................30

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992) 26

State v. Slater,
197 Wn.2d 660, 486 P.3d 873 (2021) 17

State v. Stith,
71 Wn. App. 14, 856 P.2d 415 (1993) 15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Talbott,
200 Wn.2d 731, 521 P.3d 948 (2022) 2, 11, 18, 22

State v. Ward,
148 Wn.2d 803, 64 P.3d 803 (2003) 26-28

State v. Wemboff,
24 Wn. App. 2d 198, 519 P.3d 297 (2022)......................30

FEDERAL CASES

Hughes v. United States,
258 F.3d 453 (6th Cir. 2004) 20

In re Winship,
397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed. 2d 368 (1970)... 25-26

Frazier v. United States,
355 U.S. 477, 69 S. Ct. 201,
93 L. Ed. 187 (1948)...21

Miller v. Webb,
385 F.3d 666 (6th Cir. 2004) 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Taylor v. Louisiana,
419 U.S. 522, 95 S. Ct. 692,
42 L. Ed. 2d 690 (1975) 21

United States v. Gonzalez,
214 F.3d 1109 (9th Cir. 2000) 22

RULES, STATUTES AND OTHERS

Const., article I, section 22 19

CrR 4.3(a) 12

CrR 6.4(c) 19

Engrossed Substitute House Bill 1169 29

Fourteenth Amendment 25

Laws of 2023, ch. 449, sections 1, 4, 27 30-31

RAP 2.5(a)(3) 10, 21, 23

RAP 13.4(b) 1-3, 11, 18-19, 23-24, 28, 31

RAP 18.17 32

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHERS

RCW 4.44.130 19

RCW 4.44.170 19-20

RCW 7.68.035 29

RCW 43.43.7541 29

RCW 10.101.010 29

Sixth Amendment 19

A. IDENTITY OF PETITIONER

Petitioner Robert James asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion in State v. James, COA No. 83688-9-I, filed on September 9, 2023, and the Order Denying Motion for Reconsideration, filed on October 27, 2023, attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. (i) Whether the court erred in joining two cases pending against James for trial where they involved separate incidents, separate witnesses and the evidence was not cross-admissible? (ii) Whether this Court should accept review because the court of appeals opinion conflicts with this Court's opinion in State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017)? RAP 13.4(b)(1).

2. (i) Whether James' constitutional right to a fair and impartial jury was violated where the record demonstrates six jurors with actual bias were allowed to sit on his jury? (ii) Whether this Court should accept review because this case presents a significant question of law under the state and federal constitutions? RAP 13.4(b)(3). (iii) Whether this Court should accept review because the appellate court failed to consider whether James showed manifest constitutional error, a question left open by this Court's decision in State v. Talbott, 200 Wn.2d 731, 742, 521 P.3d 948 (2022), and therefore an issue of substantial public interest that should be resolved by this Court? RAP 13.4(b)(4).

3. (i) Whether the evidence was insufficient to prove James violated the no contact order in September 2020 where the letters he wrote were addressed to the protected party's cats at the neighbor's address and the neighbor never gave them to the protected party? (ii)

Whether this Court should accept review because this case presents a significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

4. Alternatively, should this Court remand for the trial court to strike the $500 victim penalty assessment (VPA) from the judgment and sentence?

D. STATEMENT OF THE CASE

James was charged with the following 7 counts: (1) residential burglary on May 10, 2021; (2) felony violation of a no contact order (FVNCO) on May 10, 2021; (3) FVNCO on May 7, 2021; (4) FVNCO on August 22, 2020; (5) felony harassment on August 22, 2022; (6) FVNCO on or about the period between September 14, 2020 and September 23, 2020; and (7) FVNCO on or about the period between November 23, 2020 and November 25, 2020. CP 45-48.

The state alleged the charges concerned James' former girlfriend, Paula Hance, for whom an order of

protection had been entered and prevented James from contacting. The state also alleged James had two prior convictions for violating a no contact order. CP 3, 45-48.

Following a jury trial in November and December 2021, James was acquitted of counts (3) and (5)[1] but convicted of the rest. CP 1101.

1. Joinder Issue and Court of Appeals Opinion

The case started out as two separate cases. On May 11, 2021, the prosecutor filed three charges under King County No. 21-1-02818 SEA: (1) residential burglary on May 10, 2021; (2) FVNCO on May 10, 2021; and (3) FVNCO on May 7, 2021. CP 1-2. For these charges, the prosecutor alleged that Hance heard someone breaking into her home on May 10, 2021, fled from the home and called 911. Police subsequently found James in Hance's house. CP 3. For the third count, the state alleged

[1] The court dismissed count 5 at the end of the state's case for insufficient evidence. RP 790-91. The jury found James not guilty of count 3.

Hance's brother video recorded the couple together on May 7, 2021. CP 3.

The state alleged James violated two separate orders. The first was issued pursuant to a 2019 Seattle misdemeanor case in which James pled guilty to misdemeanor VNCO. CP 3.

The other was issued pursuant to a 2018 case in which James pled guilty to witness tampering, misdemeanor VNCO and assault 4. CP 4.

At the time of the current 2021 information, there was another case pending under King County No. 20-1-05979-6 SEA charging: (1) FVNCO on August 22, 2020; and (2) felony harassment on August 22, 2020. For these charges, the state alleged Hance and James got into a fight because Hance did not want to continue consensual sexual activity. Hance left her house in her bathrobe after James reportedly slapped and threatened her. A neighbor called 911. CP 3.

The state subsequently moved to join the two cases. CP 133-39. The state claimed much of its evidence was cross-admissible to prove the "reasonable fear" component of the harassment charge. The state also argued judicial economy favored joinder because Hance's testimony would be duplicative with respect to the nature of the relationship for the state's domestic violence allegation and because the state would have to prove the existence of the no contact orders for both cases. CP 133-39.

James opposed joinder. CP 8-11. As the defense argued, the state's motion was based on outdated notions of judicial economy, overruled in State v. Bluford, 188 Wn.2d 298 (2017). The defense argued that joinder would unduly prejudice James because the state's evidence as to the 2021 cause "is much stronger than as to the 2020 cause, and evidence of neither cause would be admissible at the trial of the other." CP 10. The

evidence was stronger in the 2021 case because police located James inside Hance's home. Moreover, the evidence was not cross-admissible to show Hance's "reasonable fear" because the harassment charge occurred prior to the 2021 charges. As a result, the 2021 charges were only relevant to the 2020 charges for their propensity purpose. CP 10. Nor did judicial economy favor joinder because the nature of the relationship could be established by one or two questions to Hance and the other witnesses for each case would be different. CP 11.

The court granted the state's motion to join, although it agreed the 2021 case was somewhat stronger due to the expected police officer testimony. In addressing juridical economy, the court focused on COVID backlog. Regarding cross-admissibility, the court noted the 2021 case might not be admissible with respect to the 2020 case but that the 2020 case might be admissible to explain the relationship; the court was

unsure. But because Hance was the main witness in both cases, the court found judicial economy favored joinder. RP 17-19.

Thereafter, the state added two more counts of FVNCO: count (6) based on letters James allegedly wrote in September 2020 after he was jailed for the August incident; and count (7) phone calls James reportedly made while still in jail in November 2021. CP 14-15; CP 37-40, 45-48.

On appeal, James argued the court erred in joining the May 2021 case with the August 2020 case because they involved completely separate events and were not cross-admissible. Brief of Appellant (BOA) at 24-31 (citing inter alia State v. Bluford, 188 Wn.2d at 307-311). James argued the prejudicial effect of joinder far outweighed concerns of judicial economy. Appendix A at 1. The appellate court disagreed. Appendix A at 4-11.

2. Juror Bias Issue and Court of Appeals Opinion

Juror #1 expressed an opinion that the existence of a no contact order made it more likely James committed additional offenses. RP 212. Juror #1 also expressed that an innocent person would testify. RP 231.

Juror #25 and Juror #29 likewise agreed that the existence of a no contact order made it more likely James committed additional offenses. RP 210. Juror #46 expressed this same view as well as Juror #1's view that an innocent person would testify. RP 211-12, 231.

Jurors #68 and #69 likewise agreed the existence of a no contact order made it more likely James committed additional offenses. RP 292. Juror #69 also believed James' decision not to testify would cause Juror #69 to think James was guilty. RP 307.

During a break in questioning, defense counsel moved to excuse for cause jurors #1 and 29 but the court ruled the defense had not made a sufficient showing of

bias. RP 214-15. Counsel did not later move to strike these jurors by using a peremptory challenge and accepted the penal without using all of his peremptory challenges. Appendix A at 14. Counsel did not challenge jurors 25, 46, 68 and 69. Appendix at 14.

On appeal, James argued jurors #1, 25, 29, 46, 68 and 69 demonstrated actual bias and should have been excused by the court. BOA at 31-38. Although James challenged only jurors #1 and 29, he argued the error was not waived because the court has an independent duty to insure the defendant's right to an unbiased jury. BOA at 32-33 (citing State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020)). James also argued the biased juror issue could be raised for the first time on appeal as manifest constitutional error. BOA at 33-35 (citing RAP 2.5(a)(3)).

The appellate court held James was precluded from challenging jurors 1 and 29 because he did not use all of

his peremptory challenges. Appendix A at 11 (citing State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022)). With respect to the other challenged jurors, the appellate court found the court did not err in not dismissing them. Appendix A at 11.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW OF THE JOINDER ISSUE BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN BLUFORD.

This Court has directed that when considering joinder, the likelihood of undue prejudice to the accused must be considered. Bluford, 188 Wn.2d at 307. "[T]he joinder of counts should never be utilized in such a way as to unduly embarrass or prejudice one charged with a crime, or deny him a substantial right." Bluford, at 309. Yet, that is precisely what happened here. This Court should accept review. RAP 13.4(b)(1).

If multiple charges were originally brought against a defendant in separate charging documents, the court "may" join offenses on a party's motion. Bluford, 188 Wn.2d at 306. Offenses are eligible for joinder only when they "[a]re of the same or similar character, even if not part of a single scheme or plan" or "[a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a)(1), (2).

After identifying whether joinder is allowable under the rules, the court should balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and the evidence at issue and carefully articulate the reasoning underlying its decision. Bluford, at 310.

While judicial economy is a factor the court may consider, it can never outweigh a defendant's right to a fair trial. Bluford, at 311. There are four factors to

consider when determining whether joinder causes undue prejudice: (1) the strength of the state's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. Bluford, at 311-312.

Regarding factor (1), James argued (and the trial court agreed) the strength of the state's case on the 2020 case was much weaker than the 2021 case. BOA at 27. As opposed to the 2021 case, where police found James in Hance's home, police in the 2020 case found James up the street. He may not have been within 500 feet or the prohibited distance of Hance's residence. But James could make no such argument regarding the 2021 case.

In discounting this factor, the court of appeals held:

> James cites no authority for his assertion that civilian witness testimony is weaker evidence than police testimony. And

> here, the jury received a standard instruction that they alone could judge the credibility of testimony. Regardless of the type of witness, each incident involved an eyewitness capable of testifying about the events that transpired. In the 2021 case, police found James inside Hance's apartment. And in the 2020 case, a neighbor witnessed Hance fleeing her apartment in a bathrobe and also saw James leaving the apartment shortly thereafter.

App. A at 6-7 (footnote omitted).

But police officer testimony "often carries a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Thus, it makes perfect sense for the trial court to recognize this necessarily made the state's evidence stronger with respect to the 2021 case. The appellate court was wrong to discount this factor.

Regarding factor (2), James argued he may have wanted to testify and/or offer an explanation for his location in the 2020 case; whereas, he might not have wanted to offer an explanation for why he was in Hance's home when she purportedly told him he was no longer

welcome. BOA at 27. In discounting this factor, the appellate court held:

> But the decision to testify is not the same as a defense. Moreover, the court noted that if James wanted to testify as to one case, but not the other, the court could accommodate him.

Appendix A at 8.

But this fails to take into account the likely prejudice stemming from such a forced choice. James' testimony about one incident and not the other could be viewed by jurors as an admission to the 2021 case. Why would James offer an explanation for one case but not the other? He must be guilty.

Regarding factor (3), James pointed out there are plenty of cases recognizing jurors do not necessarily follow instructions, particularly when it comes to prejudicial evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993); see also State v. Holmes,

122 Wn. App. 438, 446, 93 P.3d 212 (2004) (recognizing a curative instruction is "a course of action that frequently does more harm than good"). In discounting this factor, the appellate court merely held "we presume that jury instructions are followed." Appendix A at 8. If this factor does not weigh in favor of James, however, it neither weighs in favor of joinder. There are authorities on both sides of the aisle.

Regarding factor (4), James pointed out that Hance's "reasonable fear" was only relevant as to the felony harassment charge in the 2020 case. It was not relevant to establish the burglary or FVNCO charges in the 2021 case. BOA at 28. In discounting this factor, the appellate court held "the 2020 felony harassment charge and prior violations of no-contact orders would likely come in to give the jury context for understanding the parties' relationship dynamic." Appendix A at 9. But this Court has held that prior instances of misconduct by the

accused against an alleged victim are not relevant unless the victim recants. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Although this was pointed out in James' brief (BOA at 29), the appellate court failed to acknowledge it in its opinion. This was error.

Regarding prejudice, James pointed out that most of the charges involved violations of a court order. He argued there is therefore higher than normal prejudice in trying the charges together. BOA at 30 (citing State v. Slater, 197 Wn.2d 660, 679, 486 P.3d 873 (2021)). The court of appeals decision distinguishes Slater on a factual basis. Appendix A at 10 (noting that "flight evidence is not at issue here"). But it was the fact that the charges were so similar that made the denial of the motion to sever prejudicial in Slater. Similarly here, the admission of the charges from one case into the other increased the likelihood of conviction in both due to their similarity (yet unrelatedness). The court of appeals missed the point.

The court of appeals analysis conflicts with this Court's directive in Bluford to carefully consider prejudice. This Court should accept review. RAP 13.4(b)(1).

2. THIS COURT SHOULD ACCEPT REVIEW OF THE JUROR BIAS ISSUE BECAUSE IT INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBTANTIAL PUBLIC INTEREST.

The appellate court held James was precluded from challenging on appeal jurors 1 and 29 because he did not use all of his peremptory challenges. Appendix A at 11 (citing State v. Talbott, 200 Wn.2d 731 (2022)). The court did not consider whether James established manifest constitutional error with respect to these jurors, although James made the argument and Talbott left open the possibility the issue could be so raised. State v. Talbott, 200 Wn.2d at 742. This case presents an opportunity to resolve this open question and therefore an issue of substantial public interest. RAP 13.4(b)(4).

With respect to the other challenged jurors, the appellate court found the court did not err in not dismissing them. Appendix A at 11. Resolution of this issue involves a significant question of law under the state and federal constitutions that merits review. RAP 13.4(b)(3).

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution both guarantee a criminal defendant the right to a fair and impartial jury.[2] To protect this right, a party may challenge a juror for cause. CrR 6.4(c); RCW 4.44.130. Actual bias provides a basis to challenge a juror for cause. RCW 4.44.170; State v. Lawler, 194 Wn. App. 275, 281, 374 P.3d 278 (2016). A juror demonstrates actual bias when he or she exhibits "a state

---

[2] The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Article 1, section 22 of the Washington Constitution states, "[T]he

of mind ... in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). If the court has only a "statement of partiality without a subsequent assurance of impartiality," a court should "always presume juror bias." Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004) (quoting Hughes v. United States, 258 F.3d 453, 460 (6th Cir. 2001).

The trial judge has an obligation to excuse a juror where grounds for a challenge for cause exist, even if neither party challenges that juror. State v. Guevara Diaz, 11 Wn. App.2d at 855. "When a trial court is confronted with a biased juror, … the judge must, either sua sponte or upon a motion, dismiss the prospective juror for cause." Miller, 385 F.3d at 675 (citing Frazier v.

---

accused shall have the right to … a speedy public trial by an impartial jury."

United States, 335 U.S. 477, 511, 69 S. Ct. 201, 93 L. Ed. 187 (1948)).

Furthermore, under RAP 2.5(a)(3), a party may raise for the first time on appeal a "manifest error affecting a constitutional right." Criminal defendants such as James have 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), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). The error alleged here – seating a biased juror – violates this right. State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015) (citing In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)). A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193 (citing State v. Davis, 175 Wn.2d 287, 316,

290 P.3d 43 (2012), cert. denied by, Davis v. Washington, 571 U.S. 832 (2013)).

A constitutional error is manifest where there is prejudice, meaning a plausible showing by appellant that the asserted error had practical and identifiable consequences in the trial. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice. United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). Thus, if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error.

James argued manifest constitutional error with respect to each of the jurors identified, #1, 25, 29, 46, 68 and 69) demonstrated actual bias. Yet the appellate court refused to consider the issue with respect to jurors #1 and 29 based on this Court's decision in Talbott. Appendix A at 14. But this Court expressly left open the possibility the

issue could be so raised. This Court should accept review and consider the issue. RAP 13.4(b)(3), (4).

With respect to the other challenged jurors (#25, 46, 68, 69) the appellate court considered the issue under RAP 2.5(a)(3) but disagreed with James. Appendix A at 15-19. James maintains these jurors demonstrated actual bias and not equivocation. BOA at 33-38; State v. Irby, 187 Wn. App. 183 (2015). They all expressed the existence of the no contact order made it more likely James committed the other offenses as well. Numbers 46 and 69 also expressed the belief that an innocent person would testify. This case presents a significant question of law under the state and federal constitutions that should be reviewed by this Court. RAP 13.4(b)(3).

3. THIS COURT SHOULD ACCEPT REVIEW OF THE SUFFICIENCY ISSUE BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

In count (6), James was charged with FVNCO for letters he allegedly wrote in September 2020 after he was jailed for the August incident. At most, however, the evidence showed an *attempted* contact. This Court should accept review. RAP 13.4(b)(3).

Hance's neighbor Jamie Burg brought two letters she received to police. RP 449, 497, 463; Ex 5. One was postmarked September 14, 2020, and one was post-marked September 23, 2020. RP 459, 461, 506. The first was addressed to "Jamie Wanda Murphy" at Burg's address. RP 506. The second was addressed to "Wanda P. Murphy" at Burg's address. RP 459, 461, 507. The name in the upper, lefthand corner for both was Robert James. RP 459, 506. Wanda and Murphy are Hance's

cats. RP 499-500; Ex 5. The cats eat snacks on Burg's porch. RP 499.

Burg opened the letters but did not read them. RP 508, 519. The letter salutations were "hello" and did not include a name. RP 520. Burg reportedly told Hance about the existence of the letters. RP 508. After Hance indicated she did not want them, Burg took them to work, which happened to be the sheriff's office administration. RP 496, 508.

The due process clause of the Fourteenth Amendment guarantees, "No state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove "beyond a reasonable doubt ... every fact necessary to constitute the crime with which [a

defendant] is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). In challenging the sufficiency of the evidence, the appellant admits the truth of the state's evidence and all inferences that can reasonably be drawn from it. State v. McNeal, 145 Wash.2d 352, 360, 37 P.3d 280 (2002).

At issue in count six was whether the cat letters constituted indirect contact. The most analogous case is State v. Ward, 148 Wn.2d 803, 64 P.3d 803 (2003). In the companion case Rickey Baker was convicted of violating a court order that prohibited contact with his former lover Oleg Ivanov. Ward, 148 Wn.2d at 808-809. The state alleged the violation occurred when Baker

telephoned Ivanov's home. The telephone call was answered by Ivanov's wife Doreen Cornwell, who resided with Ivanov. Cornwell testified that Baker told her Ivanov had been leaving notes for Baker to call. Cornwell said, "thank you for the information" and hung up. Ward, at 809.

Although Baker never spoke to Ivanov, the court held the violation established:

> The no contact order prohibited Baker from contacting Ivanov by telephone or through an intermediary, and the evidence shows that Baker telephoned Ivanov's home and conveyed information about Ivanov to his wife. Based on this conduct alone, a jury was entitled to find that Baker violated the order.

Ward, at 816.

In contrast, James did not mail the letters to Hance's home. The letters were mailed to a neighbor and addressed to cats who snacked at Burg's home. The contents of the letters were never revealed to Burg or

Hance. Even if James intended the letters to reach Hance, he failed.

The court of appeals held *attempted* contact is sufficient to establish the violation. Appendix A at 21. Contrary to the appellate court, Ward found *indirect* contact, not *attempted* contact. This case may be close to the line, but it is on the insufficient evidence side. This Court should accept review. RAP 13.4(b)(3).

4. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE $500 VPA FROM JAMES' JUDGMENT AND SENTENCE.

Finally, even if this Court does not grant review on the substantive issues, James respectfully requests that this Court remand for the $500 VPA to be stricken from his judgment and sentence. At sentencing on January 28, 2022, the court imposed the $500 Victim Penalty Assessment (VPA). CP 123. It did not impose the DNA fee because James already had his DNA collected. The court indicated its intent to waive all non-mandatory fines

and fees. RP 938. James qualified for court-appointed counsel at trial and the court found him indigent for purposes of the appeal. CP 12-23, 130-32.

At the time of James' sentencing, RCW 7.68.035(1)(a) mandated a $500 penalty assessment "[w]hen any person is found guilty in any superior court of having committed a crime," except for some motor vehicle crimes. RCW 43.43.7541 similarly mandated a $100 DNA collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." Both fees were mandatory regardless of the defendant's indigency or inability to pay. State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016).

In April of 2023, however, the legislature passed Engrossed Substitute House Bill 1169, amending RCW 7.68.035. The amendment provides, "The court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is

indigent" as defined in RCW 10.101.010(3). Laws of 2023, ch. 449, § 1. The new law also eliminates the $100 DNA collection fee for all defendants. Laws of 2023, ch. 449, § 4. These amendments took effect on July 1, 2023. Laws of 2023, ch. 449, § 27.

Under this Court's decision in State v. Ramirez, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018), and the court of appeals' decision in State v. Wemhoff, 24 Wn. App. 2d 198, 201-02, 519 P.3d 297 (2022), costs of litigation are not final until the termination of all appeals. Amendments to cost statutes therefore apply prospectively to cases like James' that are still pending on appeal. Wemhoff, 24 Wn. App. 2d at 201-02. Because the $500 VPA is not final until the termination of James' appeal, he is entitled to the benefit of the legislative amendments.

James recognizes the late hour of this request, but notes that the bill was not signed into law until May 15, 2023, after James filed his opening brief in the court of

appeals. Laws of 2023, ch. 449. He is therefore raising this issue now. And, while the amendments allow for individuals to make a motion in the trial court, James would have to do so without counsel. Since this Court will assess whether or not to accept review of James' case, it would be efficient for this Court to also address the $500 VPA.

F. CONCLUSION

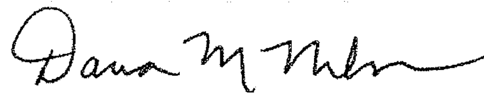
For the reasons stated above, this Court should accept review. RAP 13.4(b)(1), (3), (4). This Court should also strike from the judgment and sentence the $500 VPA.

This document contains 4,724 words in 14-point font, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 26th day of November, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



DANA M. NELSON, WSBA 28239
Attorneys for Petitioner

APPENDIX A

FILED
9/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT L. JAMES, Appellant.	No. 83688-9-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — A court order prohibited Robert James from contacting Paula Hance. Following an August 2020 incident in which James hit Hance, the State brought charges for felony harassment and for felony violation of a no-contact order (FVNCO). As that case was pending, James, out on bail, broke into Hance's house. The State initiated a second case, charging James with residential burglary and two additional counts of FVNCO. Before trial, the State added two more FVNCO charges based on letters James sent and phone calls he made to Hance while in jail. The trial court granted the State's motion to join the cases and the jury returned a guilty verdict on residential burglary and four counts of FVNCO but acquitted James of one of the FVNCO charges.

On appeal, James asserts that joinder was improper because the prejudicial effect of joinder far outweighed concerns of judicial economy. He also contends that the court erred in denying two of his for cause challenges and by not sua sponte dismissing four other jurors who James claims exhibited bias. We disagree and affirm.

FACTS

Robert James and Paula Hance dated on and off for several years. In 2018, James pleaded guilty to witness tampering, two counts of violating a no-contact order, and fourth degree assault—all charges involving Hance. At sentencing, the court imposed a five-year no-contact order protecting Hance. In 2019, James violated the newly imposed no-contact order. At sentencing on that violation, the court imposed a second, two-year no-contact order.

James and Hance continued their relationship despite the no-contact orders. Then, in August 2020, James became angry when Hance did not want to continue previously consensual sexual activity. James repeatedly slapped Hance and threatened that he "ought to kill [her] now." Hance fled the apartment in her bathrobe and sought help from a neighbor, who called 911. When police arrived, they found James down the street and arrested him.

James was taken into custody and charged with felony violation of a no-contact order and felony harassment. While in jail, James made over 100 phone calls to Hance, in further violation of the existing no-contact orders. He also mailed letters to Hance's neighbor. The letters were addressed to "Jamie Wanda Murphy" and "Wanda P. Murphy." At trial, the neighbor identified "Wanda" and "Murphy" as Hance's cats and testified that she believed the letters were meant for Hance because "cats don't know how to read." The neighbor also testified that she offered the letters to Hance, but Hance refused to take them. These letters and calls resulted in additional FVNCO charges.

James remained in custody until December 30, 2020, when he posted bond. After he was released from custody, he went back to living with Hance, despite the no-contact orders and his pending charges.

In May 2021, Hance's brother, Roy, spotted James and Hance leaving Hance's residence together. He took a video of the two with his cellphone and called the police. A few days later, after Hance told James that she didn't want to be with him anymore, she woke up to James breaking into her house. Hance fled and called 911 to report that James had broken into her house. Police responded to the scene and found James inside Hance's apartment, sitting on her bed. He was taken into custody and charged under a new cause number with residential burglary and with two counts of violating a no-contact order.

At trial, the State moved to join all pending charges against James.[1] The court granted the State's motion and the State filed an amended information charging James with residential burglary, felony harassment, and five counts of felony violation of a no-contact order.

After the State rested its case, the court dismissed the felony harassment charge for insufficient evidence. The jury then convicted James of residential burglary and four counts of felony violation of a no-contact order but acquitted him of the no-contact order violation based on Roy Hance's video observation. James appeals.

---

[1] The first FVNCO stems from James's August 2020 arrest. The next two relate to his communications with Hance while in jail. The fourth is the result of Roy Hance's video recording before James's May 2021 arrest, and the fifth is from when police discovered James in Hance's house.

ANALYSIS

James raises three issues on appeal. First, whether the trial court abused its discretion in joining two pending cases against James for trial. We conclude it did not. James does not explain how joinder was so manifestly prejudicial so as to outweigh concerns of judicial economy. Second, whether the court erred by not dismissing two jurors for cause or by not sua sponte dismissing four other jurors whom James claims exhibited bias. Because James failed to use all his peremptory challenges, he is precluded from challenging the first two jurors on appeal, and we conclude that the court did not err in not dismissing the other four jurors because they did not demonstrate probable bias. Lastly, whether the letters James wrote to Hance (nominally addressed to her cats) constitute sufficient evidence to support a FVNCO conviction. We conclude that they do. That James intentionally tried to contact Hance via the mail, even indirectly, is sufficient evidence to sustain the conviction.

Joinder

James contends the court erred in granting the State's motion to join the 2021 and 2020 cases because they involved separate events and were supported by evidence of disparate strength, which might lead the jury to conflate the two cases' persuasiveness. We disagree.

We review a trial court's decision on a pretrial motion for joinder for abuse of discretion. State v. Bluford, 188 Wn.2d 298, 305, 393 P.3d 1219 (2017). A trial court abuses its discretion when its decision is unreasonable or based on

untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.3d 615 (1995).

CrR 4.3(a) permits joinder of charges where the offenses are of the same or similar character, are based on the same conduct, or are part of a single scheme or plan. Joint trials are generally preferred over separate trials and we construe the joinder rule expansively to promote judicial economy. State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994); State v. Bryant, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998). But joinder is inappropriate "if it will clearly cause undue prejudice to the defendant." Bluford, 188 Wn.2d at 307.

A defendant contesting joinder must show that a joint trial " 'would be so manifestly prejudicial as to outweigh the concern for judicial economy.' " State v. Wood, 19 Wn. App. 2d 743, 764, 498 P.3d 968 (2021) (quoting State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)). "There are four factors to consider when determining whether joinder causes undue prejudice: '(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.' " Bluford, 188 Wn.2d at 311-12 (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). After considering these four factors, the court then must weigh the prejudice to the defendant against benefits to judicial economy. Wood, 19 Wn. App. 2d at 765.

1. Strength of the State's Evidence

James asserts that the State has strong evidence as to the 2021 case but weak evidence as to the 2020 case for several reasons. First, he claims that the 2021 case is stronger because police witnessed one of the violations firsthand, while establishing the charges in the 2020 case will require civilian witness testimony. Next, he contends that only the 911 call in the 2021 case is admissible as a hearsay exception and that the 911 call in the 2020 case is inadmissible as double hearsay because the neighbor—not Hance—called the police. Finally, he notes that in the 2021 case Hance gave a recorded statement to police and that no such statement was made in the 2020 case. The State counters that because there was an independent witness for each incident, the strength of the evidence is similar. We agree.

James cites no authority for his assertion that civilian witness testimony is weaker evidence than police testimony. And here, the jury received a standard instruction that they alone could judge the credibility of testimony.[2] Regardless of the type of witness, each incident involved an eyewitness capable of testifying about the events that transpired. In the 2021 case, police found James inside Hance's apartment. And in the 2020 case, a neighbor witnessed Hance fleeing

[2] We note that, in some contexts, police officer testimony "may be especially prejudicial because an officer's testimony often carries a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (discussing police officer testimony about the veracity of another witness). But this "special aura of reliability" does not go to weight of the testimony in a joinder analysis, and James does not cite to or argue this principle.

her apartment in a bathrobe and also saw James leaving the apartment shortly thereafter.

James does not address his arguments about the admissibility of the 911 calls and Hance's sworn statement in his briefing on appeal except as to quote from his briefing before the trial court. Regardless, neither the 911 calls nor Hance's recorded statement make the strength of the evidence in the 2021 case substantially stronger than that of the 2020 case. Before trial, the court refrained from ruling on admitting the 911 calls, explaining that whether the calls qualified under a hearsay exception would be largely dependent on the testimony at trial. At trial, though both calls were discussed by witnesses, neither call was admitted into evidence.[3] James's argument as to Hance's recorded statement is similarly unavailing. At trial, police body-camera footage showing Hance speaking to officers following the 2021 incident was shown to the jury. But the contents of the 2021 footage do not outweigh the evidence supporting the 2020 case. On the contrary, the footage contains information also relayed to the jury by other witnesses—Hance telling officers that James crawled through the kitchen window and that she then called police. Similar testimony was elicited from witnesses in support of the 2020 case.

When the State's evidence is strong on each count, there is no danger that the jury will base its finding of guilt as to one count on the strength of the evidence on the other count. Bythrow, 114 Wn.2d at 721-22. Because both

[3] A portion of the 2021 call was played for authentication, but Hance could not identify her voice on the call and the exhibit was ultimately not admitted.

counts were supported by eyewitness testimony, the evidence is similarly strong in both cases and this factor weighs in favor of joinder.

2. Clarity of Defenses

James contends that he may have wanted to testify or explain his location in the 2020 case, but not in the 2021 case, and that this constitutes a difference in defenses. But the decision to testify is not the same as a defense. Moreover, the court noted that if James wanted to testify as to one case, but not the other, the court could accommodate him. Because James does not identify any conflicting defenses, this factor weighs in favor of joinder.

3. Jury Instruction

James contends that juries do not follow instructions, particularly when it comes to prejudicial evidence, and therefore, the jury would not be able to consider the charges separately. We disagree.

Absent indication otherwise, we presume that jury instructions are followed. Dent, 123 Wn.2d at 486. James cites no authority for a contrary proposition. And here, the court gave an appropriate instruction directing the jury to consider the charges separately. This factor weighs in favor of joinder.

4. Cross-Admissibility of Evidence

James focuses primarily on the fourth factor, cross-admissibility of the evidence, and maintains that the evidence from the 2020 case is irrelevant to the 2021 charges.

This factor considers, under an ER 404(b) analysis, whether evidence of each charge would be cross-admissible in separate trials. State v. Slater, 197

Wn.2d 660, 677, 486 P.3d 873 (2021). ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." "The same evidence may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

But a lack of cross-admissibility does not automatically mean the charges cannot be joined. Bluford, 188 Wn.2d at 315. To demonstrate that the trial court abused its discretion in granting joinder, a defendant must show that the prejudicial effect of trying the charges together outweighs the need for judicial economy. Bluford, 188 Wn.2d at 315. On review, we consider only facts known to the trial judge at the time of his or her ruling on a motion to join rather than the events that develop later at trial. Bluford, 188 Wn.2d at 310 ("[A] judge cannot abuse his or her discretion based on facts that do not yet exist.").

Here, the evidence was cross-admissible. James contends that Hance's fear of him would be inadmissible in the 2021 case. But based on the facts before the trial court at the time of the joinder motion, the court correctly noted that the 2020 felony harassment charge and prior violations of no-contact orders would likely come in to give the jury context for understanding the parties' relationship dynamic. See, e.g., State v. Woods, 198 Wn. App. 453, 459-60, 393 P.3d 886 (2017) (evidence that defendant previously forced victim into prostitution against her will relevant in assault trial to explain nature of victim's relationship to defendant). The court explained:

> I do think it's very likely that an explanation for why the alleged victim would be together with Mr. James, potentially voluntarily, certainly not any indication of coercive [sic] in May—two different times of 2021 the [S]tate would likely be able to explain that given the context of the entire relationship.

The court also noted that joinder would be "minimally prejudicial" because "the very fact there is a violation of a no-contact order there is the implication that there is a history of violence between the two parties."

Relying on Slater, James asserts that because the charges involve violations of a court order, there was a higher than normal prejudice in trying the charges together. 197 Wn.2d at 679. But this reliance is misplaced. In Slater, the State attempted to use the defendant's failure to appear in court as flight evidence to infer guilt for an underlying no-contact order violation. 197 Wn.2d at 666. Our Supreme Court concluded that a defendant's failure to appear, unaccompanied by additional evidence of avoiding prosecution, could not be used to infer guilt because it did not amount to a reasonable inference of flight. Slater, 197 Wn.2d at 679. The Court also noted that the only similarity between the charges in Slater was that both involved violations of court orders; they were otherwise "not connected or related in any way." Slater, 197 Wn.2d at 679-80. Therefore, similarity of charges did not weigh in favor of joinder. Slater, 197 Wn.2d at 679-80. But unlike in Slater, flight evidence is not at issue here. Instead, here, James committed several connected court order violations against the same victim but the State did not use one violation to argue guilt as to the others.

James offers no other argument for why joinder was so prejudicial as to outweigh benefits of judicial economy. We conclude that the court did not abuse its discretion in joining the two cases.

Juror Challenges

James contends that six jurors, numbers 1, 25, 29, 46, 68, and 69, displayed actual bias and that the court erred in allowing them to sit. And while James only moved to excuse jurors 1 and 29 during jury selection, he asserts that any error is not waived because the court had an independent duty to ensure his right to an unbiased jury. In light of our Supreme Court's recent decision in State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022) (holding that parties cannot challenge denial of a juror for cause challenge if they fail to use all their peremptory challenges), we conclude that James is precluded from challenging jurors 1 and 29 on appeal. We also conclude that the court did not err in not dismissing the other four challenged jurors.

The Sixth Amendment of the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a fair and impartial jury. U.S. CONST. amend VI; WASH. CONST. art. I, § 22. Seating a biased juror violates this right. State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020).

During jury selection, parties may seek to remove potential jurors from the jury by making "for cause" challenges. RCW 4.44.120. 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 [their] duties in accordance with the trial

court's instructions and the juror's oath." State v. Lawler, 194 Wn. App. 275, 281, 374 P.3d 278 (2016). Either party may challenge a juror for cause based on the presence of "actual bias." RCW 4.44.170(2); CrR 6.4. "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). To exclude a potential juror for actual bias, "the court must be satisfied, from all the circumstances, that the juror cannot disregard [their bias] and try the issue impartially." RCW 4.44.190; State v. Griepsma, 17 Wn. App. 2d 606, 612, 490 P.3d 239 (2021). "[E]quivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

The party challenging the juror must show more than a "mere possibility" that the juror was prejudiced; the juror's testimony must demonstrate a probability of actual bias. Noltie, 116 Wn.2d at 838-40. But "[i]f the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)). Moreover, the court does not need to excuse a juror with preconceived opinions if the court is satisfied, from all the circumstances, that juror can set those ideas aside and try the issue impartiality. RCW 4.44.190. The trial court has a freestanding obligation to dismiss a biased juror where grounds for a for cause challenge exist

even if neither party challenges that juror. Guevara Diaz, 11 Wn. App. 2d at 855; State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

A trial court is in the best position to evaluate a juror's ability to be fair and impartial because it can assess the juror's "tone of voice, facial expressions, body language, or other forms of nonverbal communication when making [their] statements." Lawler, 194 Wn. App. at 287. Therefore, we review a trial court's decision to not dismiss a juror for abuse of discretion. Guevara Diaz, 1 Wn. App. 2d at 856. The court abuses its discretion when it bases its decision on untenable grounds or reasons. Powell, 126 Wn.2d at 258.

In addition to making for cause challenges, parties may remove potential jurors through the use of peremptory challenges. RCW 4.44.130. "A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror." RCW 4.44.140. Each party receives only a limited number of these challenges. RCW 4.44.130.

1. Jurors 1 and 29

Our Supreme Court recently clarified in Talbott that "if a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause." 200 Wn.2d at 747-48.

In Talbott, the trial court denied defendant William Talbott's motion to excuse a prospective juror for cause. 200 Wn.2d at 735. Rather than remove the juror with a peremptory challenge, Talbott affirmatively accepted the jury panel, including the previously challenged juror, without exhausting his

peremptory challenges on other prospective jurors. Talbott, 200 Wn.2d at 736. After he was convicted, Talbott appealed the denial of his for cause challenge. Talbott, 200 Wn.2d at 736-37. Our Supreme Court reaffirmed "a long line of precedent holding that a party who accepts the jury panel without exhausting their peremptory challenges cannot appeal 'based on the jury's composition.' " Talbott, 200 Wn.2d at 732 (quoting State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001)).

The facts of this case mirror those in Talbott. Here, James's for cause challenges to jurors 1 and 29 were denied. He did not later attempt to strike them by using a peremptory challenge. He then accepted the jury—with jurors 1 and 29 on it—without using all of his peremptory challenges. Under Talbott, he is precluded on appeal from challenging those jurors. On this basis, we reject James's claim as to jurors 1 and 29.

2. Jurors 25, 46, 68, 69

Though James did not challenge jurors 25, 46, 68, and 69 during jury selection, he asserts that these jurors demonstrated actual bias when asked about the no-contact order between Hance and James and James's decision not to testify. He also contends that these jurors did not give subsequent assurances of impartiality and that the court's question to the jury about their ability to follow the law did not sufficiently rehabilitate the jurors. He maintains that it was the duty of the court to dismiss them sua sponte, and that it erred by

not doing so. We conclude that none of the jurors demonstrated actual bias, and that the court did not err in not dismissing them.

While we 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). 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). "Because '[t]he presence of a biased juror cannot be harmless,' " such error mandates " 'a new trial without a showing of actual prejudice.' " Guevara Diaz, 11 Wn. App. 2d at 851 (alteration in original) (internal quotation marks omitted) (quoting United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)). Thus, if the record demonstrates that a juror exhibited actual bias, seating that juror constitutes a manifest error that can be raised for the first time on appeal. Irby, 187 Wn. App. at 193.

James's failure to challenge these jurors for cause before the trial court therefore does not impact his ability to raise this issue on appeal. " '[I]f the record demonstrates the actual bias of a juror, seating the biased juror [is] a manifest [constitutional] error' " that can be raised for the first time on appeal. Guevara Diaz, 11 Wn. App. 2d at 854 (quoting Irby, 187 Wn. App. at 193).

Existence of No-contact Order: During jury selection, counsel asked whether the existence of a no-contact order made it more likely that someone would commit a crime. James asserts that responses from jurors 25, 68, and 69 constitute actual bias.

Juror 25 stated: "Yeah, it seems more likely that an offense was made if—after a contact order is established . . . [it] does seem more likely that that would be a realistic scenario." Defense counsel did not ask juror 25 any further questions and did not move to excuse juror 25.

Juror 68 raised their hand to answer "yes" to counsel's question but qualified their response. They stated:

> I guess I would have to hear more about what the woman is saying about the situation and then add to it the piece that there was like a restraining order. So like I'd have to hear both before I make that decision.

Juror 69 also agreed that the existence of a no-contact order might make it more likely that someone would commit a crime. They explained:

> Well, I think if someone has a restraining order you'd have to say, well, why did they get that restraining order and it would be plying you to think they had done something wrong, I think.

When pressed on the issue, juror 69 clarified: "I think you'd be inclined in that direction, but not to say probable [that they committed the additional crime]."

Here, these three challenged jurors each gave equivocal statements that did not necessitate dismissal by the judge. Though each juror initially expressed that the existence of a no-contact order would make it more likely that someone would commit crimes, their answers were either further qualified or equivocal enough not to indicate actual bias. For example, juror 25's lone statement that the existence of a no-contact order would make it "more likely" an offense would be committed does not show more than a mere possibility that the juror would be prejudiced. And even if this statement qualified as a preconceived opinion, the court did not need to excuse juror 25 unless it believed that juror 25 could not set

aside that opinion and try the issue impartiality. RCW 4.44.190. James does not argue, and the record does not suggest, any other relevant information that would lead us to believe that juror 25 could not try the issue impartially. Likewise, jurors 68 and 69 both gave equivocal answers and neither was questioned further by defense counsel on their ability to be fair and impartial. The record is insufficient to demonstrate that the court erred in not sua sponte dismissing these jurors.

James claims that this case in analogous to Irby. He is mistaken. 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 [the defendant]'s guilty." 187 Wn. App. at 190. The Irby juror's statement of partiality is a far cry from the statements at issue in this case. The jurors' statements in the present case were all equivocal, did not indicate that they would like to say James was guilty, and to our knowledge, the jurors here are not former employees of the State.

Decision Not to Testify: James asserts that jurors 46 and 69 expressed bias when asked about James's decision not to testify. After questioning another juror, defense counsel summarized that juror's response as follows:

> So in this case if Mr. James chose not to testify it would raise a question in your mind. You would start to think he probably did it because if he was innocent he would have testified.

Defense counsel then asked if any other jurors agreed with that statement and six additional jurors, including juror 46, raised their hands. Defense counsel moved to dismiss all the jurors who raised their hands, but the court directed

counsel to follow-up with each individual juror. Counsel followed-up with several jurors, but did not ask any further questions of juror 46.

Juror 69 agreed with a similar statement. And in response to defense counsel's follow-up question about whether they were "confident [they]'d be able to put that out of [their] mind if instructed by the judge," juror 69 gave an equivocal response: "I suspect that at the end of the day it will be dependent upon the evidence you hear whether your bias comes to the fore or drops away." Counsel pressed further:

> So in other words, if the prosecutor doesn't provide sufficient evidence for you to feel that Mr. James is guilty then you would not hold the fact that maybe he didn't testify against him. You would hold the prosecutor to their burden; is that right? Is that what you're saying?

Juror 69 replied: "Yeah, yes."

Neither juror 46 or 69's statements rise to the level of actual bias. Though juror 69's original answer was equivocal, counsel's follow-up question about holding the prosecution to their burden of proof cemented that the juror could be impartial. Juror 46 was not questioned on the record about their raised hand and James offers no other argument to suggest that juror 46 displayed more than a possibility of bias. Absent such an argument or any indicia from the record that juror 46 exhibited bias, we defer to the trial court's decision not to sua sponte dismiss juror 46. Lawler, 194 Wn. App. at 287 ("[W]e emphasize again that the trial court is in the best position to evaluate whether a juror must be dismissed."). Moreover, on several occasions, the court reminded defense counsel how to make for cause challenges. See Lawler, 194 Wn. App. at 287-88 (noting that the

trial court paying attention during voir dire supported inference that court did not err in not dismissing juror). And when the court listed off the jurors to be seated, including 46, defense counsel did not move to challenge juror 46 again. Under these circumstances, a raised hand is not enough to demonstrate actual bias. Neither juror 46 nor 69 demonstrated bias.

James also contends that the court's blanket question to the jurors about their ability to be fair and impartial cannot rehabilitate biased jurors. He again asserts that this case is analogous to Irby, in which this court concluded that "questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias." 187 Wn. App. at 196. Here, when the judge asked if any jurors had concerns about their ability to be fair and impartial, no jurors raised their hands. But we need not consider this argument as none of the four jurors expressed actual bias.

Sufficiency of Evidence

James asserts that the court erred in denying his motion to dismiss the FVNCO based on the letters to Hance's cats. He claims that the letters were not sufficient evidence to sustain a conviction. We conclude that sufficient evidence supports James's conviction because the letters demonstrate he knowingly tried to contact Hance.

Due process requires the State to prove beyond a reasonable doubt every element of the crimes charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a guilty verdict if, " 'after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (quoting State v. Luvene, 127 Wn.2d 690, 712, 903 P.2d 960 (1995)). In challenging sufficiency of the evidence on appeal, the defendant admits the truth of all the State's evidence. State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). Evidence is viewed in the light most favorable to the State, drawing all reasonable inferences in the State's favor. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We review de novo whether the evidence was sufficient to support a conviction. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

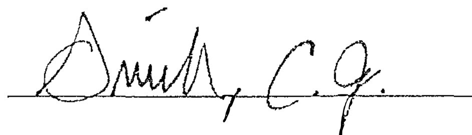
Here, the protection order prohibited James from contacting or attempting to contact Hance "directly, indirectly, in person or through others, by phone, mail, electronic or other means." The State was required to prove that James knowingly violated the provisions of the no-contact order. Former RCW 26.50.110(1) (2019) (elements of FVNCO). That James sent Hance letters—ostensibly addressed to her cats—in an attempt to contact her qualifies as a violation regardless of whether the letters reached her. This is sufficient to sustain a conviction.

This case is analogous to State v. Ward. 148 Wn.2d 803, 64 P.3d 640 (2003). In Ward, our Supreme Court determined that a telephone call to a protected person's house, answered by the protected individual's wife, was sufficient to sustain a no-contact order violation conviction. 148 Wn.2d at 815-

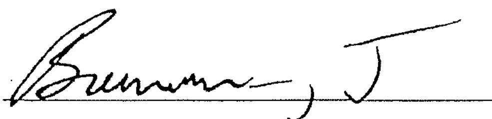
16. The Court expressly rejected petitioner's argument that the evidence was insufficient because it "established no more than an attempted violation." Ward, 148 Wn.2d at 815-16. Instead, the Court concluded that the evidence was sufficient to support a conviction where petitioner was prohibited from contacting (directly or indirectly) the protected party and petitioner called the protected individual's home and conveyed information to their wife. Ward, 148 Wn.2d at 816.

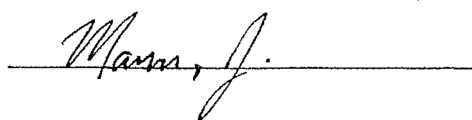
James asserts Ward is distinguishable and contends that an attempted contact is insufficient to sustain a conviction. But Ward expressly rejected this argument. 148 Wn.2d at 815-16. James was prohibited from contacting Hance via any means, including third parties; his admission that he attempted to contact Hance via her neighbor is enough to support a conviction. The evidence was sufficient.

We affirm.



WE CONCUR:





APPENDIX B

FILED
10/27/2023
Court of Appeals
Division I
State of Washington

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

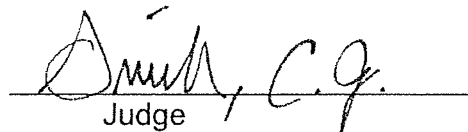
STATE OF WASHINGTON, Respondent, v. ROBERT L. JAMES, Appellant.	No. 83688-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Robert James moved for reconsideration of the opinion filed on September 5, 2023. The respondent State of Washington has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

November 27, 2023 - 1:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83688-9
Appellate Court Case Title:	State of Washington, Respondent v. Robert L. James, Appellant

The following documents have been uploaded:

- 836889_Petition_for_Review_20231127132216D1729746_1832.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Robert James 83688-9-I.PFR.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- amy.meckling@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20231127132216D1729746