No. 102892-0
Court of Appeals No. 37557-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

FERNANDO MARCOS GUTIERREZ,

PETITIONER.

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the respondent in this petition and the plaintiff below.

B. ISSUES PRESENTED FOR REVIEW

1. Defendant deliberately sought out jurors who displayed potential bias against undocumented immigrants, and tried to exploit that bias during trial. May they now complain about it?
2. Does an accomplice have to be present at the scene of an aggravated homicide when the case law expressly holds they do not?
3. Did the trial court accurately instruct the jury by following the WPIC's and case law regarding accomplice liability?
4. Did the Court correctly allow a defense attorney to testify about the timing of discovery in the case in order to rebut a claim of altered testimony to match the State's discovery?

C. STATEMENT OF THE CASE

The State primarily relies on its statement of facts in the Court of Appeals. Specific facts will be discussed in the relevant sections.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The juror's statements did not show unequivocal bias against the defendant, and any bias was intentionally exploited by the defense.

The State's first motion in limine in this case was that "no party may raise the immigration status of any witness or party." State's supplemental designation of clerk's papers. However, despite not complying with ER 413, Mr. Gutierrez declared that he would raise the issue of the surviving victim's U-visa request. RP 29, 49. The State did not object to the raising of the U-visa, as a U-visa request is generally admissible as impeachment evidence. See *State v. Romero-Ochoa*, 1 Wn. App. 2d 1059 (2017)(unpublished), rev'd on other grounds, 193 Wn.2d 341, 440 P.3d 994 (2019). A U-visa is used by a crime

victim to remain in the United States after an illegal entry by providing proof of cooperation with law enforcement. *Id.* It arguably gives a crime victim a motive to fabricate a crime or be overly helpful to the police, and thus is admissible as impeachment evidence. *Id.*

Thus Mr. Gutierrez made immigration an issue in the case. Mr. Gutierrez agreed that discussing immigration in voir dire was fair and appropriate. RP 29-34. The prosecutor argued that it would be important for the State to know if someone would disbelieve the victim because of his immigration statute, and the defense would want to know about any prejudice to his client. RP 31. Mr. Gutierrez's attorney took issue with that and felt that it would only be proper for the defense to be concerned about prejudice to the defendant, and that the issue did not run both ways. RP 33. During voir dire both sides addressed the issue.

During the State's voir dire jurors expressed concern about crime and police officers. RP 395-402. One juror brought up the immigration system as a small part of the discussion. Mr. Gutierrez's co-defendant, Mr. Tapia, followed up on this issue. RP 508. He noted that immigration might be brought up during the case. One juror, who was a Ukrainian immigrant and was concerned about immigration, said they might hold it against the defendant, but was "willing to listen." RP 510.

As the trial went on it became apparent that one defense strategy was to play to anti-immigrant bias. During cross examination of the surviving victim by Mr. Gutierrez's attorney, the victim was asked if he was an illegal immigrant, and whether he was seeking legal status. He did not ask any other questions, tie the issue to a U-visa or do anything to bring in evidence to relate the issue to the victim's credibility, but simply stated he had no other questions. It was only after the State objected that defense counsel tied the issue to a U-visa.

RP 897. The campaign to show that the defendants were legal, and the State's witnesses were mostly illegal, continued through the trial.

The State planned on introducing Mr. Tapia's fingerprint card from when he was booked into the jail to establish a comparison to a fingerprint found on the scene. That card contained a false name, that Mr. Tapia's defense counsel asked to be redacted, and a false place of birth, in Brownsville, TX, that defense counsel strongly objected to redacting, even though defense counsel was well aware of the fact that it was a false place of birth. RP 1201-02, 1243-47. It was only after the State brought in evidence that Mr. Tapia was not born in the United States that the Court excluded the false evidence of Mr. Tapia's place of birth. RP 1250-62. The defense also brought in evidence of false social security card and fake permanent resident card that demonstrated the State's key cooperating witness, Julio Albarran Varona, was an undocumented immigrant. RP 951-969.

2. Applicable law

"[D]enial of a juror challenge for cause lies within the discretion of the trial court and will not constitute reversible error absent a manifest abuse of that discretion." *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). "[T]he trial court is in the best position to determine a juror's ability to be fair and impartial." *Id.* at 839.

a. Legal Principles on Review

Both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant's right to a trial by an impartial jury. The Sixth Amendment also implicitly guarantees "the defendant's right to control his defense." *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). "[A] trial court should exercise caution before injecting itself into the jury selection process." *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016). Legitimate tactical reasons can support a defense decision not to challenge a juror whose responses suggest some bias.

Lawler, 194 Wn. App. at 285. "A trial court that sua sponte excuses a juror runs the risk of disrupting trial counsel's jury selection strategy." *Id.*

Despite its duty under both statute[1] and court rule[2] to dismiss biased jurors, a trial court's legitimate exercise of discretion may include reluctance to dismiss a juror sua sponte without a for-cause challenge. *Lawler*, 194 Wn. App. at 288.

"Actual bias" supports a for-cause challenge only when the trial court concludes a juror cannot set aside a pre-formed opinion, and not merely because a juror discloses the existence

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[1] RCW 236.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

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

of such an opinion. RCW 4.44.190. Actual bias exists when the court is satisfied a potential juror's state of mind concerning the action itself or about either party is such that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the challenging party. RCW 4.44.170(2).

Once the jury is empaneled, however, "the law presumes each juror sworn is impartial and qualified to sit on a particular case, otherwise he would have been challenged for 'cause.'" *State v. Manzanreder*, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017) (citing *State v. Latham*, 30 Wn. App. 776, 781, 638 P.2d 592 (1981)).

b. Lawler Factors

The facts here are similar to the facts in *State v. Lawler*, 194 Wn. App. 275, 281, 374 P.3d 278, 281 (2016), where a prospective juror stated he would have difficulty remaining fair and impartial. 194 Wn. App. at 277. In *Lawler*, after the juror at issue in the appeal had described several family experiences,

the prosecutor asked whether those experiences would make it difficult for him to be fair and impartial. *Id.* at 279. The juror responded, "'I don't see how I could be objective with all that past experience.'" *Id.* When the prosecutor then asked whether the juror would be able to set aside his family's experiences and follow the judge's instructions, the juror responded, "'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 280. There were no further follow-up questions from either party or from the trial court and the juror never expressly stated he could be fair and impartial. *Id.* at 280, 283.

Division Two of the Court of Appeals held the trial court did not abuse its discretion when it did not sua sponte excuse the juror. *Id.* Six factors led to this conclusion: (1) the trial court was in the best position to evaluate whether the juror was unfit to serve as a juror; (2) the juror's answers were slightly equivocal; (3) the record established the trial court was alert to the possibility of biased jurors; (4) the record established

defense counsel was alert to the possibility of biased jurors; (5) defense counsel had a preemptory challenge available to use; and (6) the trial court must be careful not to insert itself into the defense's trial strategy. *Id.* at 287–89.

c. Other Illustrative Cases

In *State v. Phillips*, 6 Wn. App. 2d 651, 431 P.3d 1056 (2018), a juror was held to have expressed equivocal bias when, although he candidly recognized his preconceptions against African American males stemming from an incident in which an African American male assaulted him, he explained he knew his bias was wrong and believed he could be objective and fair. 6 Wn. App. 2d at 659-60. This same juror also expressed that, due to his family's experience with domestic violence, it was an emotional issue for him, and he did not know how he would react if deciding a case with domestic violence issues. *Id.* at 666. Division One found neither of these disclosures were

"unqualified statement[s] expressing actual bias." *Id.* (alteration in the original).

The opposite conclusion was reached on different facts in *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854, 858, 456 P.3d 869 (2020), where the reviewing court did find an unqualified expression of actual bias in a juror's "no" answer to the question: "Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?". The record did not clearly show anything other than the juror's unrehabilitated statement that she could not be fair. *Id.* at 877. Nothing in the record established this juror responded to the trial court's request to the entire panel for assurance they could follow the law regardless of what they thought the law was or should be, nor to the series of questions the State asked the panel about their ability to be fair. *Id.* at 857. The Court concluded she exhibited actual bias. *Id.* at 877.

d. Application to Current Case.

In the current case the conversation with Juror 16 concludes:

> Counsel asked, "is there anything we could . . . say to you, even with the judge's instruction," to tell you "that shouldn't be a factor?" RP 510.
>
> Juror 16 said, "I'm ready to listen." *Id.*
>
> Counsel said, "You're ready to listen. Have you judged him already?" *Id.*
>
> Juror 16 said, "To some degree, yes." *Id.*
>
> Counsel said, "To some degree, even though you don't know his status." *Id.*
>
> Juror 16 said, "Like I said, I'm willing to listen." *Id.*

These comments are very similar to those in *Lawler* and *Phillips*, where the juror stated he had a bias, and that it might be difficult to put aside, but he would try. This ambiguous statement of bias has repeatedly not been held to be sufficient to override the defendant's interests in controlling his own defense sufficient to mandate sua sponte dismissal of a juror. It is not sufficient here.

It was also clear both the Court and counsel were alert to the possibility of bias. Mr. Gutierrez's counsel was active in

dismissing jurors for cause. Counsel agreed to dismiss Juror 41. RP 654. He also asked to dismiss Jurors 10 and 45 because they thought Mr. Tapia looked scary. RP 658-60. Jurors 24 and 42 were dismissed for cause based on Mr. Gutierrez's motion because she would have emotional difficulties handling the case. RP 662. The judge brought up a juror who concerned him. RP 666. It was clear the defense was not hesitant to request jurors be dismissed for cause when it suited them.

e. Any Error Was Invited.

In addition, it was clear the defense had a plan to exploit any bias against undocumented immigrants. Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *Matter of Dependency of A.L.K.*, 196 Wash.2d 686, 694–95, 478 P.3d 63, 67 (2020) (citing *In re Det. of Rushton*, 190 Wash. App. 358, 372, 359 P.3d 935 (2015)). To determine whether the doctrine applies, the court considers "whether the defendant affirmatively assented to the error, materially

contributed to it, or benefited from it." *In re Pers. Restraint of Coggin*, 182 Wash.2d 115, 119, 340 P.3d 810 (2014) (plurality opinion); *see also In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 724, 10 P.3d 380 (2000) (requiring knowing and voluntary action for invited error).

Here it is clear that both defendants intended to benefit from any anti undocumented immigrant bias. Both of the State's most important witnesses admitted to being undocumented immigrants. All of the other civilian witnesses were Spanish speaking, and many worked at a business that hired undocumented immigrants. Mr. Gutierrez's counsel, under the guise of asking about a U-visa, simply asked whether the surviving victim was undocumented, without even bothering to ask about the U-visa until the State objected. Mr. Tapia attempted to introduce false information that he was born in Texas into the record, almost succeeded, and was only frustrated when the State brought in evidence outside the presence of the jury that he was subject to deportation. Bias

against undocumented immigrants was more likely to work against the State in this case, especially if Mr. Tapia had succeeded in introducing his false evidence of his place of birth. Even if there was an error, the defendants contributed to it and benefited from it, they cannot now complain.

This case is completely unlike *State v. Zamora*, 199 Wn.2d 698, 701, 512 P.3d 512, 515 (2022). In *Zamora* the defense attorney simply sat silent while the prosecutor made inflammatory statements about immigration, which was simply not an issue in the case. Here the defense actually raised immigration as an issue, and attempted to exploit a bias, largely over the State's objections. There were not the inflammatory statements made by the prosecutor as in the *Zamora* case. There simply is not flagrant or ill-intentioned language by the prosecutor. There is also a question as to the type of bias presented here. In *Zamora* the Court equated bias against immigrants to racial or ethnic bias. Here the juror in question was a Ukrainian immigrant, and specifically limited his

concerns not to race, but to failure to follow the difficult path he had to follow. This brings into question whether this displayed racial animus at all, or was simply a concern about people following the law. Nor is it reasonable that defense counsel should be able to try to exploit biases, and then obtain a reversal based on those very biases. Such a rule would invite significant moral hazard, and further victimize minorities who fall victim to crimes. This is not significant issue of law that needs to be addressed by the Supreme Court, and Mr. Gutierrez does not identify any cases the Court of Appeals decision conflicts with. RAP 13.4

3. The Court of Appeals decision is not contrary to *State v. Roberts*, 142 Wn.2d 471, 505, 14 P.3d 713, 733 (2000) or *In re Howerton*, 109 Wn. App. 494, 500, 36 P.3d 565, 568 (2001).

As the Courts noted in both of these cases, the legislature expressly considered that someone who commits aggravated murder may not be present for the actual killing. This does not

excuse the crime when the person was still a major participant in the crime.

As noted by the Court of Appeals, there was ample evidence that Mr. Gutierrez was involved in the kidnapping, and had his gun pointed at the victims when the premeditated intent to kill was formed. He helped move them into the car where they were being taken to a new site to be executed. The fact that Mr. Gutierrez was in a car following when the victims tried to defend themselves does not mitigate his conduct. In the light most favorable to the State, as the evidence must be interpreted here, there is ample evidence that Mr. Gutierrez was a major participant in the crime. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

4. The Court's accomplice liability instruction accurately tracked the WPIC, and accurately stated the law.

Mr. Gutierrez again misstates the law, the holding of *State v. Roberts* and the language of the Washington Pattern Jury Instructions, this time in regards to accomplice liability.

As he notes, accomplice liability requires intent to commit "the" crime, not "a" crime. However, as *Roberts* and many other cases hold, "the crime" means the general crime, not the specific degree of the crime.

> While an accomplice must have known about the specific crime the principal was going to commit, the defendant 'need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime.' *State v. Roberts*, 142 Wn.2d at 512; see *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999); *State v. Johnston*, 100 Wn. App. 126, 996 P.2d 629 (2000). The accomplice must know that he or she was facilitating the generic crime. The accomplice need not know that the principal had the culpability required for any particular degree of that crime. For example, a person can be convicted as an accomplice to first-degree assault even if the person only knew that he was facilitating a misdemeanor assault. *Sarausad v. State*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001), affirmed, *Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009).

Comment to WPIC 10.01. The WPIC comment provides suggested language for dealing with this issue in regards to assault. "If the defendant is an accomplice in the crime of

assault in any degree, he is deemed to be an accomplice in any other degree of assault." *Id.* "[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed." *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010). The additional paragraphs added to the jury instructions in accordance with the WPIC comment simply apply these well-founded principles to murder and kidnapping.

This instruction does not comment on the evidence. Instead, it clarifies the legal scope of accomplice liability. The scope of appellate liability is a legal, not factual, issue. Because there was no comment on the evidence, and no objection was made, this issue is meritless and not preserved.

The comments to WPIC 10.50 states: "The instruction could be supplemented with a new third paragraph, stating: "If

the defendant is an accomplice in the crime of assault in any degree, he is deemed to be an accomplice in any other degree of assault."" Citing *Sarausad v. State*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001), affirmed, *Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009). That is exactly what the Court's jury instructions said.

The prosecutor said:

> Once you're in that mode and you're working together to commit an assault, any other assault somebody commits that you're helping them with, you're guilty of that assault. So for example, if you and your buddy go up to fight somebody and go up to hit somebody and you hit them and your buddy pulls out a gun and shoots them, you're responsible for that shooting, because you committed a lower level of assault, and your buddy raised it up to the next level. Any level of assault, you're guilty of whatever assault your accomplice commits. The same kind of rules apply for kidnapping and murder. RP 2721-22

Here Mr. Gutierrez misstates the prosecutor's argument. The prosecutor only argued that a lower-level assault gives rise to liability for a higher level assault, consistent with the case law and WPIC. He did not argue that an assault gives rise to

liability for a murder or kidnapping. The prosecutor only asked for the instruction as it relates to assault. While the Court is required to take the facts in the light most favorable to the State in determining sufficiency of evidence, the jury is not so bound. The jury could have found that Mr. Gutierrez only knowingly participated in an assault in the second degree on Mr. Cano Barrientos, that was elevated to an assault in the first degree by Mr. Tapia and Mr. Albarran Varona. Thus, the State's argument was appropriate to the facts of the case. It was Mr. Gutierrez's attorney who added the instructions regarding the kidnapping and murder, not the State. Thus Mr. Gutierrez cannot complain about those.

In any event any error was harmless. The jury necessary found that Mr. Gutierrez was a major participant in the murder and kidnapping, and intended to inflict great bodily harm. Thus, any concerns about concluding the lesser crime gave rise to liability for the greater are unfounded. The discussion was

not so flagrant and ill-intentioned as to overcome the lack of objection by the defense.

5. The trial court did not error in allowing testimony of a former defense attorney to rebut an allegation of fabrication of testimony. There was no prior consistent statement offered or objected to.

The petitioner misconstrues the record and reason for calling Albarran Varona's defense attorney. It had nothing to do with a prior consistent statement. This case is somewhat unusual. The State made an agreement with its cooperating witness based on a charge in another case. Under normal circumstances a defendant is arrested, the State provides discovery to his defense attorney, the parties work out an agreement, and the cooperating witness gives information and testifies. One of the ways defense attorneys attack the credibility of these witnesses is to point out the State has given the cooperating witnesses' attorney everything it knows, and presumably the attorney shares the discovery with his client so the witness can tailor his testimony to match the State's

evidence. Indeed, Mr. Tapia's defense attorney tried this tactic in this case. RP 945-49. In this case the State had a means to rebut this argument and control the discovery provided to the cooperating witness. Because the agreement was made on the other case, the State did not provide discovery on this case to cooperating witness Albarran Varona's attorney until after he had told the State his story.

The defense also attacked Mr. Albarran Varona's veracity by asking about fake identification cards and an instance of lying to the police. RP 968-69. To rebut an allegation of fabrication based on discovery provided the State called Mr. Albarran Varona's defense attorney, Smitty Hagopian. The State had placed Mr. Hagopian on the witness list in January of 2019, State's list of witnesses, State's first supplemental clerk's papers, approximately eight months before he started with the Douglas County Prosecutor's Office.

The appellant now hangs this issue on two grounds that were not objected to during trial. First Mr. Gutierrez makes an

issue of Mr. Hagopian's employment at the time of trial. While the State did bring up the fact that Mr. Hagopian had been a prosecutor for a month prior to trial as part of his introduction, it was clear he was testifying in his role as Mr. Albarran Varona's former defense attorney. Defense counsel never objected to identifying his current employment. As a matter of fact they joked with Mr. Hagopian about it. RP 1015. If they had objected it would have been an easy issue to avoid. Mr. Gutierrez makes no showing that having a current prosecutor testify about his former role as a defense attorney is manifest constitutional error, thus the Court should not review this issue under RAP 2.5.

In addition, the State did not call Mr. Hagopian to confirm a prior consistent statement. It called Mr. Hagopian to establish that Albarran Varona did not get information about what happened the night of the murder from the State via his attorney. Nor did the Court rule it was a prior consistent statement. "And this is a factual dispute as to when Albarran

Varona had information that the state had gathered, compared to when he gave his free talk. And that goes, in my opinion, directly to the credibility issue." RP 493. Mr. Albarran Varona's story of what happened during those early morning hours closely matched Mr. Barrientos' version of events, but from a different perspective. It was logical for defense counsel to argue that Mr. Albarran Varona tailored his testimony based on what his defense attorney told him about what he learned from discovery. It was equally logical for the State to rebut this argument by establishing that Mr. Hagopian did not have Mr. Barrientos' statement to relay to Albarran Varona before he told his story to the State.

Because the State did not call Mr. Hagopian to provide a prior consistent statement,[3] appellant's argument about prior consistent statement completely misses the point. In any event,

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[3] There is one question that could arguably refer to a prior consistent statement, RP 1013, but it was not objected to, and was not the point of Mr. Hagopian's testimony. It was both unobjected to and harmless.

defense counsel did not object on hearsay grounds. RP 490 (objection based on relevance, not hearsay). "An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985). Hearsay objections are rule based, not constitutional, and thus the exception for manifest constitutional error in RAP 2.5 does not apply. This argument fails both for lack of issue preservation and on the merits.

E. CONCLUSION

Mr. Gutierrez's petition is based on mischaracterizations and selective reading of the record, as well as some misstatements of the law. He does not identify any significant conflict between the Court of Appeals decision and any other Court of Appeals or Supreme Court decision. Nor does he identify any significant question of law or public interest. RAP 13.4(b). The juror in question did not give an indication of absolute bias, and any bias was one the defense intended to

exploit. The jury reasonably found that Mr. Gutierrez was a major participant in the crime, and neither the jury instructions nor the prosecutor misstated the law of accomplice liability. Finally, there was no prior consistent statement, and it was appropriate to call the cooperating witness' defense attorney in order to rebut an implied fabrication of evidence. The petition for review should be denied.

This document contains 4761 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 24th day of April 2024.

Respectfully submitted,
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CERTIFICATE OF SERVICE

On this day I served a copy of the State's Response to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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