FILED
SUPREME COURT
STATE OF WASHINGTON
9/22/2017 4:32 PM
BY SUSAN L. CARLSON
CLERK

NO. 94882-8

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN J. MUNZANREDER,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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2. Whether the Court should grant review of the published opinion affirming denial of Munzanreder's motion to change venue where the trial court required Munzanreder to be tried in a county where over 80 percent of jurors had been exposed to continuous, inflammatory pretrial publicity that included information about the case not presented at trial, where three jurors who actually sat on Munzanreder's jury, and many more who did not, admitted to having already formed opinions on guilt, where the government was involved in the dissemination of some of the information, where the charge was among the most serious in the state, and where jurors spent only four hours deliberating? RAP 13.4(b)(1), (3), (4).
3. Whether the Court should grant review of the published opinion affirming the process employed to select the jury in this context of salacious, extensive pretrial publicity and a saturated jury pool which led to the seating of a jury with three individuals who admitted to preformed opinions on guilt, one of whom Munzanreder unsuccessfully challenged for cause and the remaining two who at best narrowly passed the lenient and ineffectual rehabilitation standards employed? RAP 13.4(b)(1), (3), (4).
4. Whether this Court should review the to-convict instructions for first degree murder and the lesser included offense of second degree murder where the instructions are inconsistent on an element that should be identical between them, creating ambiguity and confusion that misled the jury on a material element? RAP 13.4(b)(1), (3).

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A. INTRODUCTION.

This matter was tried to a jury, the defendant was found guilty of First Degree Murder – Domestic Violence. RCW 9A.32.030(1)(a), 9A.08.020, 10.99.020, 9.94A.533(3) and 9.94A.825

The Court of Appeals affirmed the conviction. Munzanreder filed a Motion for Reconsideration which was denied by the Court of Appeals Division III.

ISSUES PRESENTED BY PETITION

1. Whether article I, sections 21 and 22 more broadly protect an accused person's right to a fair trial by an impartial jury than the federal constitution and whether this Court should accept review where the published Court of Appeals opinion holds article I, section 21 is not even relevant, let alone more protective? RAP 13.4(b)(1), (3).
2. Whether the Court should grant review of the published opinion affirming denial of Munzanreder's motion to change venue where the trial court required Munzanreder to be tried in a county where over 80 percent of jurors had been exposed to continuous, inflammatory pretrial publicity that included information about the case not presented at trial, where three jurors who actually sat on Munzanreder's jury, and many more who did not, admitted to having already formed opinions on guilt, where the government was involved in the dissemination of some of the information, where the charge was among the most serious in the state, and where jurors spent only four hours deliberating? RAP 13.4(b)(1), (3), (4).
3. Whether the Court should grant review of the published opinion affirming the process employed to select the jury in this context of salacious, extensive pretrial publicity and a saturated jury pool which led to the seating of a jury with three individuals who admitted to preformed opinions on guilt, one of whom Munzanreder unsuccessfully challenged for cause and the

remaining two who at best narrowly passed the lenient and ineffectual rehabilitation standards employed? RAP 13.4(b)(1), (3), (4).

4. Whether this Court should review the to-convict instructions for first degree murder and the lesser included offense of second degree murder where the instructions are inconsistent on an element that should be identical between them, creating ambiguity and confusion that misled the jury on a material element? RAP 13.4(b)(1), (3).

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not meet the edicts of any section of RAP 13.4(b).
2. The Court of Appeals correctly addressed constitutional aspects of whether the process used to select the jury was fair and impartial. Therefore, review of that portion of the opinion is not warranted.
3. The Court of Appeals opinion affirming the trial court's denial of the defendant's motion for change if venue is correct. There is no basis for this court to grant review of that portion of the opinion
4. The Court of Appeals correctly affirmed the extensive and in-depth method used to pick the jury. There is no basis for review.
5. The Court of Appeals correctly stated that "to convict" instruction allegation regarding the lesser included charge was could not have affected the trial and was not manifest.

B. STATEMENT OF THE CASE

The facts have been set out by all of the parties on numerous occasions. The Court of Appeals issued its opinion on June, 1, 2017, in that opinion the court upheld the defendant's conviction but remanded the matter for correction of two technical corrections to the judgment and sentence. Munzanreder moved the court for reconsideration of its opinion on June 6, 2017, that motion was denied on July 11, 2017.

FACTS

It is the State’s position that the facts set forth by the Court of Appeals as the basis for the opinion that they issued are the best facts to present to this court when this court is being asked to review the opinion of the lower court. Therefore, the State will not set forth a separate set of facts but request that is court refer to the facts as set out in the underling opinion of the Court of Appeals.

The State will however set forth ruling by the trial court regarding the requested change of venue. The trial court gave its oral ruling denying Munzanreder's motion to change venue:

> Before we break, I need to put on the record-perhaps it's obvious. There was a motion for change of venue. The motion is denied. I was impressed by the quality of the panel.
>
> I was impressed by their promises and descriptions of how they would stay free of any outside influence or their representations as to how any influences might have impacted them.
>
> There has been coverage on this case. I, frankly, don't think it's as extensive as has been represented. A number of the identifications that have been offered, newspaper headlines, frankly, two of them startled me. I never saw those. I quickly looked at the date. They were approximately two years ago. I didn't recall them personally.
>
> I saw nothing in the dialog we had with the jurors that we've impaneled now that would suggest that they were in any way influenced or biased by the news coverage. I think we have an excellent panel.
>
> I also noted that the nature of the media coverage has changed over the years. The fact that TV might have covered this in the last week or two, I was also interested to see how few people really had seen it. News coverage is

very diverse, and local coverage seems to be left out of the mix to a large extent.

One of the comments that one of the panelists had made was that there have been so many homicides in Yakima that she couldn't tell whether it was this case or another that she was thinking about. Obviously that's not a good thing to say about the community. On the other hand, it certainly added to my belief that there was no particular prejudice by denying the motion.

So the motion is denied.

1 Verbatim Report of Proceedings (VRP) (Jury Selection-Pretrial Motions) at 1231-32.

ARGUMENT

1. The Court of Appeals ruled that our state constitutional right to an impartial jury should be interpreted as providing the same degree of protection as the parallel federal constitutional…(and) that article I, section 22's right to an impartial jury does not provide any more protection than the Sixth Amendment. This opinion does not merit further review by this court.

"Munzanreder extensively argues that jurors are unable to recognize their own bias. That may be so. But here, not even Munzanreder recognized any bias. Based on the record, there is no support for Munzanreder's argument that venire juror 19 was biased." (Slip at 16)

As this court is more than aware this type of petition is governed by RAP 13.4(b), which sets forth the standard an appellant must meet before their case will be accepted by this court for review. Munzanreder claims the Court of Appeals opinion merits review under sections (b) (1), (3) and (4). The court of appeals opinion does not meet any of the criterion set forth in RAP 13.4(b) The Court of Appeals opinion does not

1) Conflict with any decision by this court; **2**) The opinion does not conflict with any opinion of the other two divisions of the Court of Appeals **(3)** the opinion does not address issues that are significant question of law under the Constitution of the State of Washington or of the Constitution of United States and **4**) The issues raised in this petition for review do not involve any issues of substantial public interest that this court should address.

This court of appeals based its ruling on well-founded law which is not in conflict with any case from this court or other courts of appeal in this state. Clearly the opinion of the Court of Appeals address significant questions of law and of substantial interest to Munzanreder but that does it does not meet the criterion that the issues addressed in the opinion are significant questions of law under either constitution or are of substantial public interest.

Munzanreder yet again addresses the Gunwall[1] factors in this petition. This repetition does not make that argument valid. Munzanreder complains that the court did not explain why is was not devoting time to article 1, section 21 as demanded over and over by Munzanreder. The court did explain stating:

> Munzanreder's discussion of this factor, similar to

[1] State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P .2d 808 (1986).

> his discussion of most of the other factors, focuses on article I, section 21 instead of article I, section 22. **To the extent he repeatedly conflates the two constitutional provisions, we disagree with his analysis.** In nearly 100 years, our state has yet to recognize any state or local concern with respect to a defendant's right to an impartial jury that would justify interpreting article I, section 22 differently than how federal courts have interpreted the Sixth Amendment. See Fire, 145 Wn.2d at 163. (Slip at 11) (Emphasis added.)

The Court of Appeals fully and completely addressed the Gunwall factors:

> Factors 1, 2, and 5… Article I, section 22 provides in relevant part: "In criminal prosecutions the accused shall have the right to ... trial by an impartial jury .... " The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury .... " The relevant language is almost identical in text and structure. (Slip at 10)
>
> …
>
> Factor 3: State constitutional history: Article I, section 22 was taken from the federal constitution. Rivera, 108 Wn. App. at 648 n.2.
>
> …
>
> Factor 4: Preexisting state law: Munzanreder notes that Washington common law had always insisted that a jury be impartial. See State v. Stiltner, 80 Wn.2d 4 7, 491 P .2d 1043 (1971). This observation does not convince us of any difference between the relevant language in the state and federal constitutional provisions-both explicitly emphasize the importance of an impartial jury.
>
> …
>
> Factor 6: Particular state or local concern: Munzanreder's discussion of this factor, similar to his discussion of most of the other factors, focuses on article I, section 21 instead of article I, section 22. To the extent he repeatedly conflates the two constitutional provisions, we disagree with his analysis. In nearly 100 years, our state has yet

> to recognize any state or local concern with respect to a defendant's right to an impartial jury that would justify interpreting article I, section 22 differently than how federal courts have interpreted the Sixth Amendment. See Fire, 145 Wn.2d at 163. (Slip at 11)

The Court of Appeals concludes this section of its opinion by stating

> An analysis of the *Gunwall* factors convinces us that our state constitutional right to an impartial jury should be interpreted as providing the same degree of protection as the parallel federal constitutional right. We agree with *Rivera*. We similarly hold that article I, section 22's right to an impartial jury does not provide any more protection than the Sixth Amendment. (Slip at 11-12)
>
> …
>
> As further explained below, we disagree with [Munzanreder's] argument, with his assertion that there were four biased jurors empaneled, and with his blaming the voir dire process for venire juror 51 being empaneled. (Slip at 12)
>
> …
>
> Munzanreder argues "[t]he process employed for removing biased jurors violated [his] state and federal due process rights to a fair trial by an impartial jury." Appellant's Opening Br. at 1. Munzanreder neither suggests that the trial court used a process that violated due process nor does he point to a process he requested that the trial court denied. (Slip at 13)
>
> …
>
> Munzanreder simply asserts now that the process was insufficient, although he was heavily involved at trial in developing the process used. Because Munzanreder does not show an abuse of discretion, his appeal on this issue fails.
>
> …
>
> Here, Munzanreder used one challenge to remove venire juror 49, but elected not use any of his several other peremptory challenges to remove venire juror 51. He also elected not to request additional peremptory challenges. If the trial court erred in denying Munzanreder' s for cause challenge of venire juror 51, because Munzanreder elected not to remove

> venire juror 51 with his allotted peremptory challenges or by requesting additional challenges, Munzanreder waived that error. *Dean v. Grp. Health Coop. of Puget Sound*, 62 Wn. App. 829, 836,816 P.2d 757 (1991). (Slip at 19-20) Footnotes omitted.

Munzanreder seems to believe that if a court of review does not analyze a case in the manner that he believes it should or does not use all of the avenues possible to address an issue then that in and of itself is an error that would allow this court to grant review.

The Court of Appeals is not, has not, opined that this defendant or for that matter any defendant does not have the right of trial by jury (which) shall remain inviolate. What the court is has written is that in this case the analysis need only look to article 1, section 22 to determine that the process was "impartial" impartiality being the true issue before the court.

This court in cases a significant as State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), a case cited in nearly two-hundred and fifty cases in this state alone, has analyzed the right to a fair and impartial jury without citing to article 1, section 21, the "error" that Munzanreder claims as his basis for this court to review the opinion written by the court of appeals. An opinion which was issued by the court then reviewed by the court when reconsideration was requested. As stated in Brett, 126 Wn.2d 157-8:

> Under the Sixth Amendment and Const. art. 1, § 22, a defendant is guaranteed the right to a fair and impartial jury. *State v. Rupe,* 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934 (1988). To ensure this right, a juror may be excused for cause if his views would " ' "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " *State v. Hughes,* 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)). See RCW 4.44.170(2). A juror with preconceived ideas need not be disqualified if that juror can set those ideas aside and "decide the case on the basis of the evidence given at the trial and the law as given him by the court." *Rupe*, 108 Wash.2d at 748, 743 P.2d 210 (quoting *Mak*, 105 Wash.2d at 707, 718 P.2d 407). "Equivocal answers alone" are not cause for dismissal. *Rupe*, 108 Wn.2d at 749, 743 P.2d 210. The trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial. *Rupe*, 108 Wn.2d at 749, 743 P.2d 210.

See also, In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013) “A defendant is guaranteed a fair trial before an impartial jury by the Sixth and Fourteenth Amendments. *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).”; State v. Lawler, 194 Wn.App. 275, 280, 374 P.3d 278 (2016), “The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to trial by an impartial jury. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012).”

Once again in this petition Munzanreder claims that the jury that

sat on his trial was not impartial, but he cannot get past the fact that his own, highly experienced trial counsel did not excuse the juror that Munzanreder now claims tainted his panel. The decision in trial whether to keep a prospective juror or whether to dismiss a juror often is based on the trial counsel's experience, intuition, strategy, and discretion. State v. Lawler, 194 Wn.App. 275, 285, 374 P.3d 278, review denied, 186 Wn.2d 1020, 383 P.3d 1027 (2016). All jury pools are selected randomly and those jurors in that pool therefore represents a cross-section of the varied population from which they have been drawn. One aspect of a juror might suggest to the trial attorney that he or she should exercise a preemptory challenge or challenge for cause, another aspect of that same juror might counter or override this consideration. The court and all courts of review can only look at the record. A lawyer may even keep someone on the jury panel despite his voir dire responses because of his background, other personal characteristics, mannerisms, or nonverbal communication. State v. Lawler, 194 Wn.App. at 290.

2. The Court of Appeals affirmed the trial court's decision to deny a change of venue. The trial court did not abuse its discretion. The is no basis under RAP 13.4(b) for this court to accept review.

"[T]the trial court's findings of impartiality are reversible only for manifest error. Id.; Rupe, 108 Wn.2d at 751." Similarly, this court reviews a trial court's denial of a change of venue motion for an abuse of

discretion. *Rupe*, I 08 Wn.2d at 750. A trial court abuses its discretion when it bases its decision on untenable grounds or for untenable reasons. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). We are reluctant to overturn a trial court's discretionary decision to deny a change of venue motion. Rupe, 108 Wn.2d at 750." (Slip at 21)

No matter how Munzanreder emphasizes or colors the facts of this issue "**voraciously** commenting online, **much-publicized** black eye; press covered Munzanreder's arrest in depth and **sensationally.** and with his hands behind his back, **presumably in handcuffs**; broadcast a **provocative** story; **The publicity** **infected** not only the pool of jurors." the simple **fact** remains the Court of Appeals, a neutral body, looked at the acts and actions of the trial court and cited to and used as a basis for finding the actions of the trial court long standing law.

The court went through the list of factors this court set out in State v. Rupe, 108 Wn.2d 734, 750, 743 P.2d 210 (1987). The Court of Appeals addressed each and

The court then went on to address the factors in Rupe finding that the information before the trial court was such that the decision by that court to deny the motion for change of venue was not an abuse of discretion. Munzanreder "cherry-picks" one or two factors and side-steps his obligation to request the proffered additional preemptory challenges.

This was not inexperienced trial counsel.

Mr. Dold has practices in front of the author of this opinion while that jurist sat on the bench in the Yakima County Superior Court. Counsel knew of the trial courts offer for more strikes, strikes that were not for cause but preemptory where there was no requirement of a factual basis for removal and Munzanreder did not take those proffered strikes.

"If venire juror 51 was biased, Munzanreder had the opportunity to remove him. Munzanreder elected not to use any of his peremptory challenges to remove venire juror 51, and he did not request additional peremptory challenges. These two facts strongly suggest that even Munzanreder believed the empaneled jury was fair and impartial. We conclude the trial court did not abuse its discretion when it denied Munzanreder's motion to change venue." (Slip at 25.) None of this portion of this opinion meets the edicts of RAP 13.4(b).

3. This court should not grant review to "determine whether the voir dire process…was sufficient…"

Voir dire was very lengthy and very extensive. The process took over five days to complete. This totality of the voir dire by the parties and the court is so extensive that is comprises nearly the entirety of RP 011215, RP 011315, RP 011415, RP 011515, RP 011615

The parties and the court were able to drill into many of the individual members of the pool because a large number of them were questioned privately. Many had requested “private” interviews and many because the court and the parties determined that a private interview would allow for more in-depth questioning and at the same time reduce the other members of the pool from exposure from other juror’s knowledge about the case.

There was nearly 100% exposure in State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) and even with this lever of exposure this court easily found that a change of venue was not warranted. Rice was also a case from Yakima County. It was a heinous crime were two young men slaughtered an elderly married couple in their own homes. A case surely more “sensational” than a man shooting his wife. An occurrence that is sadly “common” in this day-in-age.

Here the parties worked together to fashion a juror questionnaire. The final questionnaire was based primarily on the questionnaire that was submitted by Munzanreder’s trial counsel. RP 010615 - 010715 – 010815.

Once again, “Munzanreder extensively argues that jurors are unable to recognize their own bias. That may be so. But here, not even Munzanreder recognized any bias.”

…As previously mentioned, Munzanreder had six peremptory challenges, and there were only two venire jurors he had unsuccessfully challenged for cause who could have been empaneled as jurors. Therefore, Munzanreder was able to have a jury empaneled composed entirely of jurors he did not consider biased. "[W]here a defendant exercises a peremptory challenge after the court denies a defense motion to excuse the juror for cause, any potential violation of the defendant's Sixth Amendment right to-an impartial jury is cured." State v. Yates, 161 Wn.2d 714, 746, 168 P.3d 359 (2007)" (Slip at 16-18)

4. The lesser included jury instruction was of no consequence in this trial.

A jury is presumed to follow the instructions of the court. In this case the jury was instructed that they were to only go to the lesser included count if they could not find the defendant guilty of the greater charge. Then found Munzanreder guilty of the great offense so they were instructed to not even consider murder in the second degree, there can be no confusion from something that they are presumed by the law to have not considered. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982);

> Jurors are presumed to follow instructions. State v. Kroll, 87 Wash.2d 829, 558 P.2d 173 (1976). We agree with the observation made in State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911): In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so

> quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

This alleged error is of no consequence and it was not of import to the jury. Clearly the jury did not address the elements instruction of the second degree lesser included instruction because they found the defendant guilty of first degree murder. The jury was given instructions and they would have read the elements instruction for first degree murder, they would then read instruction 14 found at CP 14 which states;

> The defendant is charged in Count 1 with the crime of First Degree Murder. If after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, **then** you will consider whether the defendant is guilty of the lesser crime of Second Degree Murder.
>
> When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he shall be convicted only of the lowest degree.

Because the jury convicted on the greater they would not even have looked at the second set of instructions. Munzanreder acknowledged this in his opening brief:

> It is true that the jury was instructed to consider murder in the first degree first, and to move on to murder in the second degree only if the jury could not agree or believed Mr. Munzanreder was not guilty of first-degree murder. CP 111. However, the jury might have been deadlocked on murder in the first degree

> and moved on to second degree murder only to find that the linguistic distinction in the second element prohibited them from finding Mr. Munzanreder and Mr. Ibanez's conduct together resulted in Mrs. Munzanreder's death. As a result, the jury might have returned to murder in the first degree and then had enough votes to convict Mr. Munzanreder of that crime.

D. CONCLUSION

The Court of Appeals opinion thoroughly and thoughtfully addressed each and every allegation made by Munzanreder. Munzanreder filed a motion for reconsideration citing to ancient cases from this State supporting a parties right to a trial by jury, pointing out once again what he perceived to be error on the part of the court of appeals, that the court had somehow denigrated article 1, section 21 in its analysis. That this "failure" had allowed the court to improperly find that the actions of the defendant, the court and the state had assured the defendant a trial by jury that was fair and impartial. The Court of Appeals denied this motion for reconsideration.

Munzanreder now comes before this court and yet again argues that the process that was put into place by his own attorney, the court and the State was not robust enough to allow him to be tried by an impartial jury. The sad and painful truth was spoken by one of the potential jurors and quoted by the trail court at the time the court denied the motion for

change of venue;

> One of the comments that one of the panelists had made was that there have been so many homicides in Yakima that she couldn't tell whether it was this case or another that she was thinking about. Obviously that's not a good thing to say about the community. On the other hand, it certainly added to my belief that there was no particular prejudice by denying the motion.

This case does not merit further review by this court.

Respectfully submitted this 22nd day of September 2017,

s/David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry, state that on September 22, 2017, I emailed a copy of the State's Answer to: Ms. Marla Zink at wapofficemail@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of September at Spokane, Washington.

__s/_David B. Trefry_______________
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YAKIMA COUNTY PROSECUTORS OFFICE

September 22, 2017 - 4:32 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	State of Washington v. John J. Munzanreder, et al.
Superior Court Case Number:	13-1-00287-1

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