Supreme Court No.: _____
Court of Appeals No.: 33328-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN MUNZANREDER,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

John Munzanreder, petitioner here and appellant below, asks this Court to grant review pursuant to RAP 13.4(b) of the partially published decision of the Court of Appeals in *State v. Munzanreder*, No. 33328-1-III, filed June 1, 2017. In the published portion of the opinion, the Court of Appeals recognized that "local media extensively covered [Munzanreder's] case from arrest through trial," yet affirmed the trial court's denial of Munzanreder's motion to change venue. In evaluating the state constitutional claim, the court declined to consider article I, section 21's "inviolate" right to 12-person jury trials even though this Court has consistently interpreted together sections 21 and 22 in regard to a criminal defendant's right to jury trial.

Munzanreder's motion to reconsider was denied on July 11, 2017. A copy of the opinion is attached as Appendix A; a copy of the order denying the motion to reconsider is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

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).

C. STATEMENT OF THE CASE

Cynthia Munzanreder died from a single shot to the head as she returned to her vehicle outside the Union Gap movie theater after seeing a movie with her husband John.[1] The town of Union Gap, population six thousand, had its third homicide in 15 years; the local media quickly reported the unsolved homicide, and readers began voraciously commenting online.[2]

At the scene where he was sobbing, and later at the police station where he was held for the night, John Munzanreder told police he did not know who shot his wife. He heard a shot, saw a subject in a dark sweatshirt run through the bushes, chased after him, fell, returned to the

[1] 1/20/15 RP 13-17, 1319, 1322-23, 1328, 1336. A second bullet entered and exited her left hip without much damage. 1/20/15 RP 1339.

[2] Vol. V RP 426, 431; *see generally* Ex. F (Venue-publicity, March 2013 A, pp.1-8 & B, pp.1-25, 27-28, 32-34). Citations are to the pages of the entire pdf files at Exhibit F, and not to other page numbers listed on various pages of the exhibit.

passenger side of his truck, and found his wife on the ground.[3] Munzanreder had no weapons on him and a small abrasion under his left eye, which developed into a much-publicized black eye; he cooperated with police.[4] Nothing was located in a search of the Munzanreders' vehicle. 1/22/15 RP 1639-40.

Near the scene, police located two men in black, hooded sweatshirts, matching Munzanreder's description.[5] There were not many other people around that night. 1/20/15 RP 1382. The neighboring stores did not have surveillance video. 1/20/15 RP 1376.

The police began interviewing other people who worked at the Valley Ford car dealership with Munzanreder, and eventually arrested Juan Ibanez for possession of a firearm.[6] Ibanez then told police Munzanreder had promised him $20,000 if Ibanez helped kill his wife.[7] He told police he had purchased the murder weapon and returned it to the dealership, in an area where he worked; the police found a gun there.[8]

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[3] *E.g.*, 1/20/15 RP 1364-65, 1385-88; 1/21/15 RP 1546-47, 1552-54, 1626, 1631-32; 1/22/15 RP 1799-1800; 1/29/15 RP 2571, 2574-80, 2650.

[4] 1/20/15 RP 1366-6, 1377, 1392-94; 1/21/15 RP 1611, 1613-14; 1/22/15 RP 1799-1800; 1/29/15 RP 2577-78; 2/2/15 RP 2727-28; Exs. F, 41, 50.

[5] Ex. 117; 1/20/15 RP 1374-75; 1/21/15 RP 1601-02, 1624-25; 1/22/15 RP 1795-97; 1/30/15 RP 2648-49, 2774-78.

[6] 1/21/15 RP 1564-67, 1573-74, 1576-77, 1580-82; 1/22/15 RP 1644.

[7] 1/23/15 RP 1835-36, 1841-43; *see* 1/23/15 RP 1929-33 (Ibanez admits to telling many lies to law enforcement).

[8] 1/21/15 RP 1605; *see* 1/23/15 RP 1845-53.

Munzanreder was then arrested and both were charged with first degree murder.[9]

The press covered Munzanreder's arrest in depth and sensationally.[10] For example, the top-of-the-fold headline in the print edition of the Yakima Herald read, "Cops: husband did it" above a large photo of Munzanreder with a black eye, in jail clothes, and with his hands behind his back, presumably in handcuffs. Ex. F (Venue-publicity, Venue in the news, p.5); Ex. G.

Munzanreder moved pretrial for a change in venue. CP 9-17. The court determined it would consider the motion after jury selection. Vol. III RP 226-30; 1/6/15 RP 546. The press covered this as well.[11]

Ibanez and the State then entered into a plea agreement, which included Ibanez's commitment to testify against Munzanreder. Vol. XII RP 1119-23. These developments were also covered by the media.[12]

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[9] 1/21/15 RP 1575; 1/6/15 RP 512-13, 522, 526.

[10] *E.g.*, Ex. F (Venue-publicity, Ibanez plea, p.6); Ex. F (Venue-publicity, March 2013 A, pp.9, 14 ("Upon interviews with those who knew John and Cynthia Munzanreder, it was made clear John was openly having an affair 'for more than a couple months.'"), 29); Ex. F (Venue-publicity, March 2013 B, pp.42, 50); 1/23/15 RP 1962-77, 1981-83 (Davis's testimony that she did not know Cynthia and Mr. Munzanreder never promised he and Davis would have a future together and she did not ask him to promise a future for them together).

[11] 5/22/14 RP 144-45 (ABC News); Ex. F. (Venue-Publicity, Venue in the news).

[12] Ex. F (3.5 public comment); Ex. F (Venue-publicity, Ibanez plea) (pp.1-45). Counsel for Munzanreder was even contacted by Good Morning America. 5/22/14 RP 144-46, 163-64.

Mere days before jury selection, Yakima's CBS affiliate, KIMA TV, broadcast a provocative story about the upcoming trial on television and online.[13] The video shows in-life pictures of Cynthia Munzanreder, reports that the Union Gap police were "not buying" John Munzanreder's "story," falsely states that Munzanreder has access to guns, and mischaracterizes the burden at a Criminal Rule 3.5 hearing (stating Munzanreder challenged admissibility).[14] While reporting that Munzanreder "through it all maintains his innocence," the video shows him smiling, perhaps laughing, towards his attorney. Ex. F (KIMA video at 01:30-37).

Over 82 percent of jurors responded in the juror questionnaire that they knew of the case from pretrial publicity and/or from hearing about it from friends, colleagues, or family; a quarter of them admitted they had formed an opinion based on what they heard, with almost all reporting their opinion was that Munzanreder was guilty of murder. CP 199-1481 (completed questionnaires).[15] In addition, many venire members reported knowing people involved in the case. *Id*.

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[13] 1/6/15 RP 609-17; Ex. F (KIMA video). The story and video remain available on KIMA's website, http://kimatv.com/news/local/pre-trial-motions-begin-for-man-accused-of-killing-wife-in-union-gap (last visited Mar. 13, 2016).

[14] 1/6/15 RP 612-13; Ex. F (KIMA video); *see* 1/16/15 RP 1289-90, 1292 (Munzanreder did not have guns).

[15] Two jurors did not complete the questions about publicity. CP 669, 779 (questionnaires for jurors 207 & 227). Juror 207 revealed in voir dire that

The publicity infected not only the pool of jurors, but also the jury that decided the case: three of the impaneled jurors had formed the opinion that Munzanreder was guilty.[16]

The trial court denied the motion to change venue after voir dire concluded. 1/15/15 RP 1097-1106; 1/16/15 RP 1231-32. Following about four hours of deliberation, the jury convicted Munzanreder of first-degree murder against a member of the same family or household while armed with a firearm. CP 122-25 (verdict forms); *see* CP 1510 (trial minutes p.15). He is serving a 340 month-term in prison. CP 131-38. Additional facts are set forth in the opening brief filed in the Court of Appeals and in the relevant argument sections below.

D. ARGUMENT

1. The Court should grant review and hold that article I, sections 21 and 22 more broadly protect the right to a fair trial by an impartial jury for purposes of motions to change venue and the selection of jurors.

Munzanreder set forth a full state constitutional analysis in his briefing to the Court of Appeals, arguing article I, sections 21 and 22 more broadly protect the right to a fair trial by an impartial jury. Op. Br. at 55-

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she had read about the case in the Yakima Herald. 1/15/15 RP 1083-88. Juror 227's exposure to pretrial publicity is not in the record, and is therefore not included in the statistics.

[16] CP 970, 1200, 1250 (questionnaires for jurors 19, 51 & 59 at page 9); 1/13/15 RP 802-03 (juror 19); 1/15/15 RP 781-84 (juror 51); 1/13/15 RP 769-71 (juror 59); 1/16/15 RP 1222-23 (jurors 19, 51, 59 impaneled).

61. As the Court of Appeals recognized, the "State, somewhat unhelpfully, d[id] not provide its own *Gunwall* analysis." Slip Op. at 9 (referring to *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). In its published opinion, the Court of Appeals held article I, section 21 should not be considered at all and relied on a footnote from a Court of Appeals opinion to deny the state constitutional claim. Slip Op. at 10, 11 (citing *State v. Rivera*, 108 Wn. App. 645, 648 n.2, 32 P.3d 292 (2001)). This Court should grant review.

First, the Court of Appeals does not explain why article I, section 21's edict that the "right to a trial by [a 12-person] jury shall remain inviolate" does not inform Munzanreder's right to an impartial jury together with article I, section 22. In fact, the Court itself cites to section 21 (and not to section 22) in the next section of its opinion when analyzing the sufficiency of the voir dire process. Slip Op. at 12 (citing Const. art. I, § 21).

This Court has consistently indicated that Article I, section 21 informs a criminal defendant's right to an impartial 12-person jury. *State ex rel. Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 728, 620 P.2d 76 (1980) (section 21 "includes the right to jury trial in criminal cases"). The Court relied upon section 21 to hold that those accused of any crime in Washington are entitled to a jury trial. *City of Pasco v. Mace*, 98 Wn.2d

87, 99, 653 P.2d 618 (1982). "From the earliest history of this state, the right of trial by jury has been treasured, and this right has been protected even in courts of limited jurisdiction." *Id*. The Court continued, "It is our conclusion that, under the concept embodied in the constitution of Washington, enacted as it was in light of the laws of the territory existing at that time, no offense can be deemed so petty as to warrant denying a jury if it constitutes a crime." *Id*.

This Court regularly applies article I, section 21 to interpret and support a defendant's right to an impartial jury and typically considers sections 21 and 22 together. *E.g.*, *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010) (analyzing sections 21 and 22 together to determine jury trial right); *State v. Recuenco*, 163 Wn.2d 428, 443-44 & n.4, 180 P.3d 1276 (2008) (reading constitutional provisions together); *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008) (same); *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citing §§ 21 and 22 for right to a unanimous verdict rendered by an impartial jury); *State v. Hager*, 171 Wn.2d 151, 158-59, 248 P.3d 512 (2011) (citing §§ 21 and 22 for a defendant's constitutional jury trial guarantee); *State v. Brown*, 132 Wn.2d 529, 580-83, 940 P.2d 546 (1997) (analyzing both provisions in conducting *Gunwall* analysis of the state constitutional right to jury trials as applied to jury selection in a capital case); *State v. Smith*, 150 Wn.2d

135, 150-56, 75 P.3d 934 (2003) (analyzing both provisions in conducting a *Gunwall* analysis to determine a criminal defendant's right to a jury determination of his or her persistent offender status); *see Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989) (art. I, § 21 preserves the scope of the right to a jury trial as it existed at the time the constitution was adopted). The Court of Appeals' refusal to consider section 21 is illogical, unexplained, and contradicts the authority from this Court.

Second, a *Gunwall* analysis shows the state constitution more broadly protects an accused person's rights to a fair trial by an impartial jury. *See Recuenco*, 163 Wn.2d at 443-44 & n.4 (Washington's two jury trial provisions render the jury trial right "more extensive than that which was protected by the federal constitution").

Under the first and second *Gunwall* factors, there are significant differences in the language of the pertinent provisions of the state and federal constitutions. *City of Pasco*, 98 Wn.2d at 97; *compare* Const. art. I, §§ 21 *(*right of trial by jury shall remain inviolate), 22 *(*"[i]n criminal prosecutions the accused shall have the right . . . to . . . trial by an impartial jury") *with* U.S. Const. amend. VI. Article I, section 21's "inviolate" jury trial guarantee emphasizes the importance of the right and is without federal counterpart. *Brown*, 132 Wn.2d at 595.

Our state constitutional history confirms the intentionally broad scope of Washington's right to an impartial jury. One drafter "devoted more commentary to his proposed [jury trial] provision than to any other right contained in his proposed bill of rights." Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution 46 (2d ed. 2013). Although impartiality was always a core guarantee, section 22 did not contain explicit language until the constitution was amended in 1922. Laws of 1921, p.79, § 1. Nevertheless, Washington has "always insisted that a guarantee of a speedy and public trial by an impartial jury under Const. art. 1, s 22, both before and after its change by the Tenth Amendment, means a fair trial." *State v. Stiltner*, 80 Wn.2d 47, 53, 491 P.2d 1043 (1971).

Preexisting state law further shows the breadth of our state constitutional right. Our State has long protected the right to for-cause and peremptory challenges. Hill's General Statutes 1891, §§ 340-52 (providing for peremptory and for-cause challenges based on implied and actual bias). The right to a jury trial on the determination of guilt was also protected by the Code of 1881. *E.g.*, *Williams-Walker*, 167 Wn.2d at 914 (Fairhurst, J. dissenting); *Smith*, 150 Wn.2d at 153-55. Cases from the time the constitution was adopted confirm the right to a fair trial by an impartial jury was copiously protected. *State v. Coella*, 3 Wash. 99, 28 P.

28 (1891) (hasty examination of juror who was employed by accused person and had heard of case from the media was insufficient and "his testimony is very unsatisfactory to show his ability to give the defendant a fair and impartial trial"); *State v. Wilcox*, 11 Wash. 215, 39 P. 368 (1895) (reversing where trial court failed to exclude juror for actual bias; the charge of murder in the first degree for an offense that caused public outrage provided "the strongest reason for according him a trial by an impartial and unprejudiced jury, totally uninfluenced by public sentiment,- a jury every member of which could without question pass upon his guilt or innocence solely and exclusively from the testimony presented at the trial."). In sum, "the right of trial by jury has been treasured, and this right has been protected" from the "earliest history of this state." *City of Pasco*, 98 Wn.2d at 99.

The fifth *Gunwall* factor—the structural distinctions between the two constitutions—generally compels a broader interpretation of our State's constitution. *E.g.*, *Gunwall*, 106 Wn.2d at 66-67.

Finally, under the sixth factor the means of ensuring the right to an impartial jury in criminal cases is a matter of particular state or local concern. *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) ("The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be

fairly said that the jury lists or panels are representative of the community."); *see Smith*, 150 Wn.2d at 152 (holding that providing jury trials for adults is matter of local concern).

2. The Court should grant review and hold that Munzanreder's trial should have been held in a different venue due to the extensive local media coverage of this sensational crime and the level of saturation of the jury pool.

The Court should grant review to determine whether Munzanreder showed a probability of unfairness, partiality or prejudice, which necessitates a change in venue. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987); *State v. Crudup*, 11 Wn. App. 583, 586-87, 524 P.2d 479 (1974) (moving party need not show actual prejudice to justify change of venue).

Munzanreder was denied his right to a fair trial by an impartial jury because over 80 percent of jurors had been exposed to the persistent and provocative pretrial publicity, which portrayed Munzanreder negatively and ascribed him guilt.[17] The Court of Appeals recognizes "there was substantial and meaningful adverse pretrial publicity soon after the shooting." Slip Op. at 22. "The local paper and television stations ran stories that all but declared Munzanreder guilty." Slip Op. at 22; *see, e.g.*,

[17] See Op. Br. at 22-45 for a complete analysis of the factors governing this Court's review of the change in venue motion.

Ex. F (Venue-publicity, Venue in the news, p.5) (above-the-fold headline "Cops: husband did it" above a large photo of Munzanreder with a "a very dark black eye," in jail clothes, and with his hands behind his back, presumably in handcuffs.); Ex. F (KIMA video at 00:57-01:22) (manipulated footage (combining images from one context with audio from another), describing Munzanreder's "crocodile tears" the night of the shooting, and showing Munzanreder smiling with his attorney in court while "reporting" he "through it all maintains his innocence"). In fact, "The Munzanreder story was one of Yakima County's most significant news stories of 2013." Slip Op. at 22.

As the Court of Appeals also recognizes, "Several people used the media's Facebook page to make comments showing their disdain for Munzanreder. The comments reflected an attitude that Munzanreder was guilty, wondered why the public had to provide him an attorney, and called for severe punishment." Slip Op. at 22; *see, e.g.*, Ex. F (Venue-publicity, Ibanez plea, p.42 ("The guy who took the plea deal . . . was being black mailed by the killer (his boss at work) in order to get him the hide the gun.")); *id*., p.43 ("the husband better get more time than that"); *id*. ("I know [Juan Ibanez]. . . . He was beat up and threatened by his boss."); Ex. F (Venue-publicity, Venue in the news, p.3 ("he killed

someone and now he wants something to be 'fair'?? lol"); *id*. ("Try him and fry him. Next.").

"Munzanreder accurately notes that 82 percent of the venire panel had heard of the case and, of these, 12 venire jurors concluded he was guilty." Slip Op. at 22; *see* 1/13/15 RP 812-13 (one juror comments, "It's been plastered all over the news . . . it's been so widely publicized. There isn't a person that I know that hasn't, you know, read or seen something about it."). Three jurors who actually sat on the jury acknowledged they had predetermined Munzanreder's guilt. *See* 1/15/15 RP 1194; 1/16/15 RP 1216-23; CP 187 (peremptory challenge sheet). Munzanreder's for cause challenge of juror 51 was denied and the other two jurors arguably passed the lenient rehabilitation standards Munzanreder challenges in the next section. Although the trial encompassed several weeks, the jury deliberated for only four hours before declaring a guilty verdict. *See* CP 1510 (trial minutes p.15).

The Court of Appeals conceded, "These factors weigh heavily in favor of granting Munzanreder's motion to change venue." Slip Op. at 22.

Nevertheless, the published opinion holds the process employed was sufficient to seat an impartial jury. Slip Op. at 22. The Court recognized additional peremptory challenges would have assisted the seating of an impartial jury. Slip Op. at 23. Yet, the trial court did not

rule on the motion to change venue until after the jury was selected, denying the motion to change venue without providing additional peremptories. 1/16/15 RP 1231-32. The Court of Appeals finds assurance in its claim that Munzareder did not request additional peremptory challenges, Slip Op. at 25, but Munzanreder told the trial court a change in venue was preferable and the trial court indicated it would decide the motion before peremptories were exercised, 1/15/15 RP 1105-06. The trial court denied the motion, however, only after the jury was selected. 1/16/15 RP 1231-32. At that point, a request for additional peremptory challenges was moot. Munzanreder had to apportion his peremptory challenges among the jurors, including those who had concluded from media coverage that Munzanreder was guilty.

The Court of Appeals also notes a trial court would be justified in more readily granting for cause challenges, yet as discussed more thoroughly below, that also did not occur here. Slip Op. at 23-24. The constitutional fair trial guarantees must mean more than that a defendant can be forced to allocate peremptory challenges among jurors who should have been excused for cause or should never have been called because an impartial venue was necessary.

3. The Court should grant review to determine whether the voir dire process employed was sufficient to root out bias.

Absent a change of venue, constitutional guarantees required a more rigorous voir dire process in order for Munzanreder to have a fair trial by an impartial jury. The Court should adopt a more stringent rehabilitation standard and a more lenient burden to demonstrate actual cause to remove jurors who appear to express bias. Despite the extensive publicity and the presumption of Munzanreder's guilt, the trial court followed only the minimum standards for rehabilitation. Neither the process nor the result instills confidence in the impartiality of the jury actually selected.

"The underlying goal of the jury selection process is 'to discover bias in prospective jurors' and 'to remove prospective jurors who will not be able to follow instructions on the law,' and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness." *State v. Saintcalle*, 178 Wn.2d 34, 76, 309 P.3d 326 (2013) (Gonzalez, J. concurring) (quoting *State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000)) (alteration in original). "One primary purpose of the voir dire process is to determine whether prospective jurors harbor 'actual bias' and are thus unqualified to serve in the case." *Saintcalle*, 178 Wn.2d at 77-78 (Gonzalez, J. concurring). This aspect of voir dire is intended to determine whether a

juror can "set aside personal beliefs, opinions, or values insofar as is necessary to follow the law and decide the case fairly;" "adjudicate disputed factual issues based solely on the evidence that is allowed and presented at trial;" and "be free from the undue influence of any special relationships or personal interests (even if such relationships or interests do not qualify as implied bias)." *Id*.

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, sat on Munzanreder's jury.[18] Juror 51 is a former corrections officer familiar with the case from the media. 1/13/15 RP 781. He had formed the opinion that Mr. Munzanreder "was the responsible one. . . . That's what the paper was telling you." 1/13/15 RP 783-84. It would be up to the evidence to change Juror 51's mind. 1/13/15 RP 784. The court asked, "Can you be fair and unbiased in this case?" To which Juror 51 responded, "I believe I could." 1/13/15 RP 786. The defense motion to dismiss for cause was denied. 1/13/15 RP 786-88.

[18] CP 970, 1200, 1250 (questionnaires for jurors 19, 51 & 59 at page 9); 1/13/15 RP 802-03 (juror 19); 1/15/15 RP 781-84 (juror 51); 1/13/15 RP 769-71 (juror 59); 1/16/15 RP 1222-23 (jurors 19, 51, 59 impaneled).

Juror 59 formed the opinion from what he had read that "this was a violent crime and justice needs to be served appropriately." 1/13/15 RP 769-70. He tends to believe what sees in the news. CP 1250 (questionnaire for juror 59, p.9). But he also said "All statements need to be heard for me to form a solid opinion of guilt or innocence." 1/13/15 RP 770. His opinion was "not set in stone." 1/13/15 RP 770. He answered the court affirmatively that he could follow instructions and be fair and unbiased to both sides. 1/13/15 RP 771. Once he was prompted by the court that his decision as a juror would be based on evidence that has not been presented yet, he said he would not be able to definitively vote on guilt or innocence now. 1/13/15 RP 771-72.

Juror 19 looks at the internet, newspapers, radio and television. 1/13/15 RP 801. He had formed an opinion from what he saw about this case that Mr. Munzanreder was guilty. 1/13/15 RP 801-03.

> THE COURT: . . You said that, in answer to question 39, you have formed opinions about this case.
>
> JUROR NO. 19: From what I already known I had formed an opinion, yes.
>
> THE COURT: What is that opinion? Again, keep in mind you haven't heard any evidence about anything.
>
> JUROR NO. 19: No, I haven't been part of the case, just from what I've read.
>
> THE COURT: What is that opinion?

JUROR NO. 19: I thought he was guilty.

THE COURT: From what you have read?

JUROR NO. 19: Just based on the news media.

THE COURT: Just based on the news media?

JUROR NO. 19: Just based on the articles I've read, yeah.

1/13/15 RP 802-03. In response to questioning about his ability to act fairly and impartially in individual voir dire, he said his opinion was not "set in stone. . . . I think you can change my mind. . . . but you would have to change my mind." 1/13/15 RP 803-04. He would "certainly try" to afford Mr. Munzanreder the presumption of innocence and base his decision just on the evidence. 1/13/15 RP 804-06. "I could make that commitment." 1/13/15 RP 803-06. Eventually he said in response to the court that he would only consider the evidence presented in the courtroom and will follow the court's instructions, right before he asked "Am I done?" 1/13/15 RP 809-10.

Juror 33, another seated juror, "read the newspaper article stating that the defendant hired a co-worker to commit the crime." CP 1080 (questionnaire p.9). Juror 33 reported she had not formed an opinion about this case, but she generally believes what she reads in the newspaper. *Id*.

The questioning of jurors who were eventually struck also shows the fallibility of the process employed here. For example, Munzanreder moved to strike juror 29 for cause twice, each challenge being denied by the court. Eventually, however, juror 29 got emotional enough that the court decided to excuse her. 1/13/15 RP 831-41 (motion on juror 29 denied); 1/15/15 RP 1187-89 (second motion on juror 29 denied); 1/15/15 RP 1193 (court *sua sponte* excuses juror 29). How many other veniremen and women were capable of the same response, due to relationships with people involved in the case or exposure to publicity, yet happened not to show it during voir dire? *See, e.g.*, 1/13/15 RP 863-74 (motion on juror 89 denied despite relationship with law enforcement); 1/15/15 RP 993-99, 1002-03 (motion on juror 49 denied) (same).

Minimal rehabilitation procedures are simply not robust enough to root out bias in a case like this. "[J]urors may not fully appreciate or accurately state the nature of their own biases." *Saintcalle*, 178 Wn.2d at 78 (Gonzalez, J., concurring). Prejudice "may go unrecognized in those who are affected by it." *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996). Therefore, "a juror's mere assertion that she or he is impartial . . . is not dispositive." *Id.* "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin v.*

Dowd, 366 U.S. 717, 727, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *accord Patton v. Yount*, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) ("Jurors cannot be expected invariably to express themselves carefully or even consistently."); *Wainwright v. Witt*, 469 U.S. 412, 424-25, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

Eighty-two percent of Munzanreder's venire admitted they had been exposed to provocative pretrial publicity. Slip Op. at 22. "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Murphy v. Florida*, 421 U.S. 794, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). In this context, "jurors' assurances of impartiality simply are not entitled to [a] sort of talismanic significance." *Skilling v. United States*, 561 U.S. 358, 457-58, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) (Sotomayor, J. concurring in part and dissenting in part).

Where extrajudicial activity suggests outside influence and information lurks in the minds of the venire, voir dire is not well-suited to single out actual prejudice. *Stiltner*, 80 Wn.2d at 54-55. Counsel is justifiably loath to pressure a juror to recall the negative publicity that jeopardizes her client's rights to a fair and impartial jury. *Id*. Similarly, while rehabilitation through a few questions likely to receive an affirmative response may be sufficient to show a threshold lack of "actual

prejudice," the probability of subconscious and pervasive prejudice in that juror and the others on the panel remains. A "juror may have an interest in concealing his own bias ... [or] may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22, 102 S. Ct. 940, 948, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring); *accord Saintcalle*, 178 Wn.2d at 119 (Chambers, J., dissenting) (jurors' "deep seated prejudices may not be easily developed during voir dire to support a for-cause challenge").

A prospective juror cannot be presumed to understand the important legal meaning of bias, fairness or impartiality. For this reason too, a juror's affirmative response that she can be "fair and impartial" cannot simply be taken at face value. *Mu'Min v. Virginia*, 500 U.S. 415, 442-43, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (Marshall, J. dissenting); *accord State v. Patterson*, 183 Wash. 239, 246, 48 P.2d 193 (1935). Studies prove that bias cannot be determined by asking a juror yes or no questions. *E.g.*, *Saintcalle*, 178 Wn.2d at 49 (quoting Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System (2011) (citing Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. Personality & Soc. Psychol. 2297, 2297, 2304 (1979))). Thus, accepting a prospective juror's spontaneous assurance to be fair and impartial does not resolve pervasive prejudice.

The Court of Appeals held, in the published portion of its opinion, that although Munzanreder exhausted his peremptory challenges, he should have used them to root out the biases that the standard process failed to address. Slip Op. at 12-20. Due process required more protection from latent prejudice and actual bias than in the typical criminal case. Here, a twenty year minimum sentence was at issue and continuous pretrial publicity had saturated the community, including the venire. By narrowly applying the test for excusal, the trial court denied Munzanreder a fair trial before an impartial jury. This Court should grant review and hold a more rigorous process was required under the state or federal constitution.

4. The Court should grant review to determine whether conflicting language in the to-convict instructions rendered the instructions misleading or confusing.

Jurors may presume that each instruction has meaning. *State v. Hutchinson*, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998). Ambiguous to-convict instructions deprive accused persons of a fair trial. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Jury instructions are erroneous if they mislead the jury. *Barnes*, 153 Wn.2d at 382. The "to convict" instruction, in particular, serves as the yardstick by which the jury

measures the evidence to determine guilt or innocence. *Smith*, 131 Wn.2d at 263.

The State charged Munzanreder with first degree murder. CP 5 (information). On the State's request at trial, and over Munzanreder's objection, the trial court instructed the jury on second-degree murder as a lesser-included offense. CP 111 (jury instruction); 2/3/15 RP 2928-38, 2940, 2958 (discussion of instruction); 2/3/15 RP 2966-68 (to-convict instructions read to jury). The two instructions are inconsistent on an element that should be identical between them.

For murder in the first degree, the jury could have found Munzanreder's wife died either as a result of his actions, as a result of his actions and an accomplice's actions, or as a result of an accomplice's actions. CP 110 (element 3). But with regard to murder in the second degree, the to-convict instruction only permitted conviction if the jury found the death was caused by either Munzanreder's actions or his accomplice's actions, and not by a combination of both. CP 113 (element 3). The contradictory language in the second-degree murder instruction created a conflict with the to-convict instruction on murder in the first degree.

The distinction between the elements in these instructions must be given meaning. *Hutchinson*, 135 Wn.2d at 884. Further, the jury was read

every instruction, including the conflicting to-convict instructions, before deliberations began. And, in closing argument, the prosecutor emphasized that "[a]ll of the instructions are equally important." 2/3/15 RP 2977-78. Accordingly, the jury was well aware of the distinct requirements, even if it never deliberated on the lesser offense.

A jury instruction that misstates the law amounts to a violation of due process. *See* U.S. Const. amend. XIV; Const. art. I, § 3; *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element." *Smith*, 131 Wn.2d at 263.

E. CONCLUSION

The Court should grant review of these important issues.

DATED this 9th day of August, 2017.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. JOHN JOSEPH MUNZANREDER, Appellant, JUAN PABLO IBANEZ-CORTEZ, Defendant.	)	No. 33328-1-III OPINION PUBLISHED IN PART

LAWRENCE-BERREY, J. — John J. Munzanreder appeals his conviction for the first degree murder of his wife. Because of the sensational nature of the alleged crime, local media extensively covered his case from arrest through trial. His principal arguments on appeal are the trial court abused its discretion when it denied his motion to change venue, and the voir dire process used by the trial court failed to protect his constitutional right to an impartial jury.

In the published portion of this opinion, we hold that the state constitutional right to an impartial jury is not more protective than the corresponding federal constitutional

right, that the voir dire process used by the trial court protected Munzanreder's constitutional right to an impartial jury, and that the trial court did not abuse its discretion when it denied Munzanreder's motion to change venue. We affirm Munzanreder's conviction, remand for two technical corrections to the judgment and sentence, and deny the State an award of appellate costs.

FACTS

Background facts

Munzanreder worked with Juan Ibanez at Valley Ford in Yakima, Washington. In early February 2013, Ibanez approached Munzanreder and asked him for money for a toolbox. Munzanreder agreed to give him the money if he helped get rid of somebody. Munzanreder told Ibanez that he wanted help killing his wife, Cynthia, and would give him $20,000. Ibanez said he would help, but he would not kill her.

Munzanreder gave Ibanez cash and directed him to purchase a gun. Munzanreder told Ibanez his plan: Munzanreder and his wife would go the movies, he would shoot her with the new gun, he would then throw the gun to Ibanez in some nearby bushes, and Ibanez would run away with the gun.

On February 28, 2013, the Munzanreders went to see a movie at the Majestic Theater in Union Gap, Washington, a small city immediately south of Yakima. Ibanez

received a prearranged text message from Munzanreder that the plan would be executed and went to the theater and waited in the bushes adjacent to the theater's parking lot. After the movie, as the couple approached their car, Munzanreder shot his wife with the gun purchased by Ibanez. Munzanreder then threw the gun into the bushes where Ibanez waited. As Ibanez left the scene with the gun, he ran past a couple near his car.

Law enforcement arrived and questioned witnesses. Munzanreder told law enforcement he heard a shot and saw a man in black clothes running away. Munzanreder said he had followed the man, but fell and injured himself, developing a black eye.

Munzanreder's wife later died from her injuries.

Law enforcement continued to investigate. They interviewed Ibanez, whose car had been reported at the crime scene. Ibanez quickly confessed and told law enforcement of the details of the crime. Media coverage of both the murder and the arrests quickly saturated Yakima County.

Procedural facts

The State originally sought to try Munzanreder and Ibanez together. But due to the difficulty in excising references to Munzanreder from Ibanez's confession, the court ordered the trials severed. The State and Ibanez later reached a plea deal that involved Ibanez pleading guilty and testifying against Munzanreder.

Munzanreder's case proceeded to trial. Jury selection began on January 12, 2015, almost two years after the shooting. Of the 243 original venire jurors, nearly half were excused for hardship. The remaining venire jurors completed juror questionnaires.

Defense counsel and the State had worked together to create an agreed juror questionnaire. The purpose of the questionnaire was to uncover juror bias, so that the trial court and the parties could individually interview venire jurors with possible bias in open court but outside the presence of other venire jurors.

The questionnaire contained many questions, including questions focusing on pretrial publicity about the case. Those questions asked the venire jurors to list media sources they used, whether they generally believed the media, whether they thought the media was fair to both sides of a case, and what criminal cases they followed in the media. It also specifically asked about Munzanreder's case. The questionnaire asked venire jurors if they knew information about the case from any sources, and concluded the section by asking if they had formed any opinions about the case. The questionnaire also asked venire jurors if they wanted to discuss their answers separately from other jurors. The completed questionnaires revealed that 105 of the remaining 128 venire jurors knew about the case; of these 105, 24 had formed opinions; and of these 24, most believed Munzanreder was guilty.

The trial court and the parties agreed on which venire jurors would receive individual interviews in open court. The trial court and the parties questioned each venire juror about media exposure, opinions of the case, the presumption of innocence, and the ability to reach a verdict based on the law given and the facts presented at trial. After each interview concluded and the venire juror left the courtroom, the parties had an opportunity to challenge the venire juror for cause. Munzanreder challenged venire jurors 29, 49, 51, 89, 190, and 216 for cause. The trial court denied Munzanreder's for cause challenges to venire jurors 29, 49, 51, and 89, but granted them as to venire jurors 190 and 216. Later, the trial court excused venire juror 29.

Before the remaining venire panel returned to the courtroom, Munzanreder orally moved for a change of venue. The motion was anticipated because Munzanreder had earlier said he would make such a motion, and had provided the trial court and the State with copies of local media stories and media Facebook posts. The State, although opposing Munzanreder's motion, indicated the trial court might give additional peremptory challenges. Munzanreder responded that he might ask for additional peremptory challenges, but would not do so until after the court ruled on his motion. The trial court took the motion under advisement and said it would make its ruling later in the jury selection process.

The parties completed voir dire and then went through the process of selecting the jury. The trial court permitted each party 6 peremptory challenges for the first 12 jurors, and 1 additional peremptory challenge for each of the 3 alternate jurors. Munzanreder never asked for additional peremptory challenges.

The peremptory process began with the venire jurors sitting in numerical order with the lowest 12 numbered panel members being the presumed jurors. The parties alternated each of their peremptory challenges. Because of the number of venire jurors who remained, the number of peremptory challenges allowed, and the number of juror and alternative juror slots, it was not possible for venire juror 89, or any venire juror higher than 89, to be seated as a juror or alternate juror. For this reason, venire juror 89, one of the venire jurors whom Munzanreder had unsuccessfully challenged, could not have sat on the jury.

This left venire jurors 49 and 51 as the only venire jurors whom Munzanreder had unsuccessfully challenged for cause who could have sat as a juror or alternate juror. Munzanreder had six peremptory challenges to remove these two venire jurors. In exercising his six peremptory challenges, Munzanreder removed venire juror 49, but elected not to remove venire juror 51. Venire juror 51 was the only empaneled juror whom Munzanreder had unsuccessfully challenged for cause.

The panel was sworn in. The trial court provided the panel various preliminary instructions and then excused them for lunch. With the panel excused, 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.

Over the next several days, the parties presented their evidence.

After the parties presented their evidence, the trial court conferred with the parties to discuss jury instructions. The State proposed a lesser included offense of second degree murder. Munzanreder objected, and asserted that the evidence did not support the inclusion of the lesser included offense. The trial court granted the State's request. The trial court later asked Munzanreder whether he had any objections or exceptions to the State's instructions, other than its decision to give the lesser included offense instruction. Munzanreder responded that he saw no difference between the State's offered instructions and his own. The trial court adopted the State's instructions, instructed the jury, and the parties gave their closing arguments.

The jury returned a guilty verdict on first degree murder with a firearm enhancement. The trial court sentenced Munzanreder to 340 months of incarceration. Munzanreder timely appealed.

ANALYSIS

In the published portion of this opinion, we address Munzanreder's arguments that (1) the state constitutional right to an impartial jury provides greater protection than the corresponding federal constitutional right, (2) constitutional due process and the right to an impartial jury require a better process than the one used by the trial court to root out

bias, and (3) the trial court abused its discretion when it denied his motion to change venue.

In the unpublished portion of this opinion, we address Munzanreder's other arguments that (4) there was an error in the to-convict instruction for second degree murder, (5) there are two clerical errors in the judgment and sentence, and (6) this court should deny the State an award of appellate costs in the event it substantially prevails.

1. SCOPE OF STATE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY

Munzanreder, providing a *Gunwall*[1] analysis, contends our state constitution provides greater protection for an accused's right to an impartial jury than the Sixth Amendment to the United States Constitution. Although the right to an impartial jury is protected in article I, section 22 of the Washington State Constitution, Munzanreder's analysis relies heavily on article I, section *21*'s right to a jury trial. The State, somewhat unhelpfully, does not provide its own *Gunwall* analysis.

This court engages in a *Gunwall* analysis to determine a claim whether the Washington State Constitution provides greater protection for a right than the United States Constitution. The six *Gunwall* factors are: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal

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

and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Neither party cites to *Rivera*, a case that contains a footnoted analysis of the article I, section 22 right to an impartial jury under the *Gunwall* framework, and concludes that the state and federal constitutions provide the same degree of protection. *State v. Rivera*, 108 Wn. App. 645, 648 n.2, 32 P.3d 292 (2001). Similarly, neither party mentions *Fire*, a case that reaches the same conclusion but without undertaking a *Gunwall* analysis. *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001). Because *Rivera* analyzes the issue in a footnote, and because Fire does not contain a *Gunwall* analysis, we choose to conduct our own *Gunwall* analysis.

Factors 1, 2, and 5: Textual language of state constitutional right to an impartial jury, and textual and structural differences in that language compared to the parallel federal provision: 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.

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 47, 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.

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.

2. SUFFICIENCY OF VOIR DIRE PROCESS

Munzanreder contends the voir dire process employed in his case was insufficient. He argues it is difficult for the trial court or jurors to recognize their own bias, and due process requires a more robust process than the one used by the trial court here. He attempts to punctuate his point by showing how the trial court's voir dire process allowed four biased jurors to be empaneled. As further explained below, we disagree with his 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.

Both the United States and Washington State Constitutions provide a right to trial by an impartial jury, which "requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Boiko*, 138 Wn. App. 256, 260, 156 P.3d 934 (2007); *see* U.S. CONST. amend. VI; CONST. art. I, § 21. RCW 2.36.110 states:

> 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.

a. Voir dire process

A trial court has considerable discretion in conducting voir dire. *Lopez-Stayer v. Pitts*, 122 Wn. App. 45, 50, 93 P.3d 904 (2004). Abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Id.*

The trial court is best able to ensure that the voir dire process is effective for seating an impartial jury. *Lopez-Stayer*, 122 Wn. App. at 50-51. "The primary purpose of voir dire is to give a litigant an opportunity to explore the potential jurors' attitudes in order to determine whether the jury should be challenged." *Id.* at 51. The test is whether the court permitted a party to ferret out bias and partiality. *Id.*

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.

The court summoned 243 potential jurors. The parties worked together to craft an extensive juror questionnaire that satisfied the State, Munzanreder, and the trial court. The trial court granted several dozen individual interviews in open court outside the presence of other venire jurors. The trial court was fully involved with the process, and

asked questions designed to expose bias and to ensure that jurors would reach a verdict based on the evidence presented at trial and on the court's instructions on the law. Jury selection took over four days. Munzanreder did not request additional peremptory challenges, despite knowing he had that option. 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.

b. Specifically challenged jurors

Munzanreder argues the voir dire process used by the trial court was constitutionally deficient. He attempts to punctuate his point by showing that four biased jurors were empaneled.

A party may challenge a juror for cause. CrR 6.4(c); RCW 4.44.170. The trial court is in the best position to determine whether a juror can be fair and impartial because the trial court is able to observe the juror's demeanor and evaluate the juror's answers to determine whether the juror would be fair and impartial. *State v. Birch*, 151 Wn. App. 504, 512, 213 P.3d 63 (2009). For this reason, this court reviews a trial court's denial of a challenge for cause for a manifest abuse of discretion. *Id.*

Actual bias supports a challenge for cause. RCW 4.44.170(2). Actual bias means "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). "[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). A party claiming actual bias must establish it by proof. *Id.* at 838. To prevail, a party must show more than a possibility of prejudice. *Id.* at 840. "[T]he 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. Latham*, 30 Wn. App. 776, 781, 638 P.2d 592 (1981), *aff'd*, 100 Wn.2d 59, 667 P.2d 56 (1983).

i. *Venire juror 19*

During individual voir dire, the trial court elicited statements from venire juror 19 that he was familiar with the case from the media and tended to believe the media. He stated he had listened to the media and had formed an opinion. However, the trial court questioned him on whether he would afford Munzanreder the presumption of innocence,

make a decision based on the evidence presented at trial, and follow all instructions. Venire juror 19 responded that he would. Munzanreder did not challenge venire juror 19:

> THE COURT: Any motions?
> [THE STATE]: Not from the state.
> [MR. MUNZANREDER]: Not from the defense, your Honor.

VRP (Jury Selection) at 810.

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.

ii. *Venire juror 33*

Munzanreder argues that venire juror 33 suffered from actual bias because she read in the newspaper that Munzanreder had hired a coworker to commit the crime, and she tended to believe the newspaper. Venire juror 33 also said she had not formed an opinion in the case. Munzanreder did not believe venire juror 33 was biased, as evidenced by the fact he did not challenge venire juror 33 for cause. There is no support for Munzanreder's argument, here on appeal, that venire juror 33 was biased.

iii. *Venire juror 51*

In the questionnaire, venire juror 51 answered he had formed an opinion about the case through media. The trial court questioned venire juror 51 whether he could set his opinion aside and decide the case based only on the evidence presented at trial. He said he could.

Munzanreder then asked additional questions. Venire juror 51 said he had formed the opinion that Munzanreder was guilty and it would be up to the evidence to change his mind. Munzanreder discussed the presumption of innocence. He asked venire juror 51 if he agreed with the presumption and, if so, whether he could provide the presumption of innocence to him. Venire juror 51 answered he could, and that he believed he could be fair and unbiased in this case.

The trial court then asked venire juror 51 if he could be fair and unbiased in the case. He said he could. After venire juror 51 left, Munzanreder challenged him for cause. The trial court denied the challenge, stating:

> I'm going to deny the motion. I think he was very candid and very open. . . .
>
> I thought he was very candid about his concern for the system, that he would be fair, unbiassed [sic]. . . . He would set aside what he heard in the newspaper and listen to the evidence that was presented in court.
>
> I do not understand, if you're hearing him, his comment, the answer that he had made, that he had, in fact, prejudged anything. I did not understand that to be the case. Motion denied.

VRP (Jury Selection) at 787-88.

iv. *Venire juror 59*

Venire juror 59 also expressed familiarity with media coverage of the case. But he said he could set aside his opinions, be fair and impartial, and follow the trial court's instructions. Munzanreder did not believe venire juror 59 was biased as evidenced by the fact he did not challenge him for cause. There is no support for Munzanreder's argument, here on appeal, that venire juror 59 was biased.

The fact that venire jurors 19, 33, 51, and 59 were empaneled does not support Munzanreder's argument that the trial court's voir dire process was deficient. To the contrary. The fact that defense counsel did not challenge venire jurors 19, 33, and 59 for cause refutes Munzanreder's argument that the trial court's voir dire process was deficient.

c. Even if the trial court erred in denying any one of Munzanreder's challenges for cause, his constitutional right to an impartial jury was not violated

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) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316-17, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)); *see also State v. Roberts*, 142 Wn.2d 471, 518, 14 P.3d 717 (2000). In addition, the fact that a defendant was required to use all of his peremptory challenges to remove jurors who should have been removed for cause does not violate the state or federal constitutions. *Fire*, 145 Wn.2d at 164-65.

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.[2] *Dean v. Grp. Health Coop. of Puget Sound*, 62 Wn. App. 829, 836, 816 P.2d 757 (1991).

3. CHANGE OF VENUE MOTION

Munzanreder contends the trial court abused its discretion when it denied his motion for a change of venue. He primarily argues the pretrial media publicity was overwhelmingly inflammatory, which prejudiced the jury pool against him. We disagree that the trial court abused its discretion.

To prevail on a change of venue motion, the defendant need only show a probability of unfairness or prejudice. *Sheppard v. Maxwell*, 384 U.S. 333, 351-52, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987). In *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984), the United States Supreme Court addressed the problem of pervasive media publicity arising in sensational criminal cases. The *Patton* Court recognized that adverse pretrial publicity can create a presumption in a community that jurors' claims that they could be impartial should not be believed; and partly for this reason, the appellate court

[2] Munzanreder did not assign error to the trial court's denial of his motion to strike venire juror 51 for cause. To the extent that Munzanreder did not waive his challenge as explained above, he has waived his argument by not assigning error to the trial court's denial. *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993).

examines the totality of the circumstances in deciding whether such a presumption arises. *Id.* at 1031. Nevertheless, 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*, 108 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.

The following nonexclusive factors aid our review of whether a trial court abused its discretion in denying a change of venue motion:

> "(1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn."

Id. at 752 (quoting *State v. Rupe*, 101 Wn.2d 664, 675, 683 P.2d 571 (1984)).

a. *First group of factors: The degree the potential jurors were impacted by adverse media coverage*

Our review of the record establishes there was substantial and meaningful adverse pretrial publicity soon after the shooting. The local paper and television stations ran stories that all but declared Munzanreder guilty. Several people used the media's Facebook page to make comments showing their disdain for Munzanreder. The comments reflected an attitude that Munzanreder was guilty, wondered why the public had to provide him an attorney, and called for severe punishment. The Munzanreder story was one of Yakima County's most significant news stories of 2013. Munzanreder accurately notes that 82 percent of the venire panel had heard of the case and, of these, 12 venire jurors concluded he was guilty. These factors weigh heavily in favor of granting Munzanreder's motion to change venue.

b. *Second group of factors: The process used by the trial court to seat an impartial jury*

It is irrelevant that the great majority of potential jurors have heard of the case. *State v. Jackson*, 150 Wn.2d 251, 269, 76 P.3d 217 (2003). The test is whether a "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

But simply because a juror claims he can lay aside a prior opinion and render a verdict based on the evidence does not make it so. "[J]urors may not fully appreciate or accurately state the nature of their own biases." *State v. Saintcalle*, 178 Wn.2d 34, 78, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man." *Irvin*, 366 U.S. at 727.

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matters designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Id. at 729-30 (Frankfurter, J., concurring).

Therefore, "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard*, 384 U.S. at 362. If a case has received substantial media attention, one strong measure would be for the trial court to grant an accused's request for additional peremptory challenges. Another strong measure would be for the trial court to more readily grant a defendant's for cause challenge to those venire jurors who admit they once held an adverse opinion of

the accused. In sensational cases with extensive media coverage, a trial court would be justified in providing *both* of these strong measures.

The trial court's process allowed the parties to identify possibly biased jurors and then fully question them. We note that there were only four venire jurors whom Munzanreder unsuccessfully challenged for cause. Of these four, the trial court eventually removed one, and another sat outside the group of potential jurors or alternate jurors who could have been empaneled. This left only two venire jurors whom Munzanreder had unsuccessfully challenged for cause. Because Munzanreder could have used two of his six peremptory challenges to remove both suspect jurors, the trial court's process for seating a jury was very satisfactory. These factors weigh heavily in favor of denying Munzanreder's motion to change venue.

c. Third group of factors: Intangibles that impact our analysis

The State charged Munzanreder with first degree murder. This most serious charge impacts our analysis and requires that we be highly confident that the empaneled jury was impartial. Also, the jury pool was chosen from Yakima County. Munzanreder estimated there were 150,000 potential jurors in this geographical area. This relatively large base of potential jurors helps assure that jurors can be found who lack bias.

Although the initial venire pool provided substantial challenges because of the trial court's careful process for selecting a jury, we are highly confident that 11 of the 12 empaneled jurors were impartial. 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.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions as provided in RCW 2.06.040.

4. JURY INSTRUCTION ON LESSER INCLUDED OFFENSE

Munzanreder next contends that an error related to accomplice liability in the to-convict instruction for the lesser included offense of second degree murder requires reversal. The State responds that Munzanreder waived or invited the alleged error by agreeing to the instruction. Munzanreder denies he agreed to the instruction.

a. Invited error

Under the doctrine of invited error, even where constitutional rights are involved, this court will not review jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

Here, Munzanreder objected to the proposed instruction only on the basis that the evidence did not warrant an instruction on the lesser included offense. Minutes later when asked by the trial court whether he had a chance to critique the State's proposed instructions, Munzanreder responded: "I didn't see any difference between theirs and mine, and I thought mine were pretty damn good. It would be like throwing a rock at a glass house to suggest that the [S]tate's needed fixing." 12 VRP (Jury Trial) at 2931. These comments show that Munzanreder did not see any errors in the instruction, which is different than agreeing to the wording of a specific instruction. We conclude that Munzanreder did not invite error in a manner that would preclude our review of the instruction.

b. To-convict instructional error

A party generally waives an issue on appeal when he or she fails to raise the issue at trial. RAP 2.5(a). An exception exists for a claim of manifest error affecting a

constitutional right. RAP 2.5(a)(3). This exception applies if (1) the alleged error is truly of a constitutional magnitude, and (2) the error is manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

1. *Constitutional magnitude*

Munzanreder meets the first part of the RAP 2.5(a)(3) test. Article I, section 3 of the Washington Constitution states: "No person shall be deprived of life, liberty, or property, without due process of law." The right to due process of law includes the right to a fair trial. *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). A defendant does not receive a fair trial if "the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

2. *Manifest error*

An error is manifest if it had practical and identifiable consequences at trial. *Kalebaugh*, 183 Wn.2d at 584. An error is practical and identifiable if, at the time the error was made, the "trial court should have known" of the error. *Id.* Any error in this instruction would not be manifest.

Munzanreder's specific objection to the lesser included instruction is quite nuanced: the court's to-convict instruction on first degree murder included an element

that the victim died as a result of the defendant's *and/or* an accomplice's acts; whereas, the trial court's to-convict instruction on second degree murder included an element that the victim died as a result of the defendant's *or* an accomplice's acts. Such a nuanced argument fails the requirement that the error be manifest.

In addition, any error would have no consequence at trial. The State correctly points out, if there was instructional error, the error was harmless because the jury would not have considered the second degree to-convict instruction after it agreed on the first degree murder charge. The jury was instructed to reach second degree murder only if it could not agree on first degree murder, and we presume jurors follow the trial court's instructions. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 737, 389 P.3d 504 (2017). We agree with the State that any purported error could not have affected trial. We will not review the alleged error because it is not manifest.

5. CLERICAL ERRORS

Munzanreder next contends there are two clerical errors in the judgment and sentence. He first argues the jury returned a guilty verdict on February 4, 2015, not February 2, 2015, as stated in the judgment and sentence. He next argues the special findings section in the judgment and sentence refers to his firearm enhancement but cites the sentencing grid statute. The State concedes these errors should be corrected, and

argues that Munzanreder need not be present in court for such technical corrections. We accept the State's concessions and agree that Munzanreder's presence is not necessary when the trial court makes these two technical corrections to the judgment and sentence.

6. APPELLATE COSTS

Munzanreder asks this court to decline to impose appellate costs in the event the State substantially prevails. During oral argument, the State agreed. Wash. Court of Appeals oral argument, *State v. Munzanreder*, No. 33328-1-III (Mar. 23, 2017), at 15 min., 23 sec. through 15 min., 30 sec. (*audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org). We therefore decline to award the State appellate costs.

Affirmed but remanded to correct two clerical errors.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

APPENDIX B

FILED
JULY 11, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 33328-1-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	
JOHN JOSEPH MUNZANREDER,	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
	)	
Appellant,	)	
	)	
JUAN PABLO IBANEZ-CORTEZ,	)	
	)	
Defendant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of June 1, 2017, is denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
CHIEF JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN MUNZANREDER, Petitioner.	)))))))))	COA NO. 33328-1-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JOHN MUNZANREDER 382019 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF AUGUST, 2017.

X_____

Washington Appellate Project
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