SUPREME COURT NO. 97894-8

NO. 77856-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GUAJARDO,

Petitioner.

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

The Honorable John McHale, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Sebastian Guajardo asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Sebastian Guajardo, filed October 28, 2019 ("Opinion" or "Op."), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

In questionnaires, prospective jurors 33 and 42 revealed felony convictions of undetermined age or occurring far in the past. But the trial court misinformed the prospective jurors regarding restoration of rights and thus engaged in a flawed inquiry regarding qualification to serve.

1. Was the defective procedure, which led to immediate dismissal of the prospective jurors, a serious violation of state jury selection statutes?

2. Did the procedure the trial court employed in striking the prospective jurors also violate state and federal equal protection?

D. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentence

[1] This petition refers to the verbatim reports as follows: 4RP – 9/27/17.

The State charged petitioner Guajardo with second degree murder for the shooting death of Jesse Dacanay. The State alleged alternative theories of intentional second degree murder and second degree felony murder based on assault. The State alleged Guajardo was armed with a firearm at the time. CP 1 (count 1). The State also charged Guajardo with first degree unlawful possession of a firearm (UPFA). CP 1-2 (count 2).

A jury convicted Guajardo as charged. CP 86-88. At sentencing, the trial court found Guajardo had two prior assault convictions occurring in 2000 and 2001, when Guajardo was 19 and 20 years old. Because, like those convictions, count 1 was a "strike" offense, the court imposed a sentence of life without the possibility of release under the Persistent Offender Accountability Act (POAA). CP 236-44; RCW 9.94A.570.

2. Jury selection

During jury selection, the court individually questioned two prospective jurors, Juror 33 and Juror 42, ultimately releasing them based on prior felony convictions. 4RP 231-33, 245-46.

The juror questionnaires asked each juror if they, a family member, or a close friend had ever been "reported for, arrested for, accused of, or convicted of a crime." Appendix B.[2] Juror 33's questionnaire indicates

[2] Undersigned counsel inadvertently designated an incorrect document—the second half of the jury questionnaires (sub no. 86) rather than the first half (sub no.

"yes." Id. The questionnaire requests a brief explanation. Juror 33's questionnaire states, "Myself, 3rd degree burglary at 17 years old. [Several] drug [possessions], drug court, multiple DUIs. [Pled] guilty to all." Id.

Juror 33 was brought in. Questioning occurred as follows:

> THE COURT: . . . You didn't indicate that you wanted to talk to us outside the presence of other jurors, but there are a couple things that we wanted to talk to you about. . . . In response to question number two, when you were asked about if you or a family member or close friend has ever been arrested or accused or convicted of a crime, your response reads, myself, third degree burglary at 17 years old, several drug possessions, drug court, multiple DUIs, pled guilty to all; is that correct?
>
> PROSPECTIVE JUROR NO. 33: That's right.
>
> THE COURT: Okay. And so as to that, were any of those felony offenses, do you know?
>
> PROSPECTIVE JUROR NO. 33: Yes.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR NO. 33: Couple of the drug offenses and the burglary, yes, felonies.
>
> THE COURT: *And at any point, have you gone back to court or had a court expunge or address those since conviction*?
>
> PROSPECTIVE JUROR NO. 33: No.

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85)—in the Court of Appeals. The Court of Appeals appears not to have noticed. If review is granted by this Court, however, undersigned counsel will ask that that the record be supplemented with sub no. 85 under RAP 9.6(a).

THE COURT: Okay. All right. *I think per juror qualifications under state law here, you can't be a convicted felon, unless you've actually gone through a court process of having those taken off your record.* So as to your ability to serve on this jury, you would not be able to serve, so I'm going to excuse you from service on this case – from service in general here today. And if – you know, it's entirely up to you, if those are things that you want to pursue to ultimately have the opportunity to serve as a juror, you're free to do that. But I appreciate your time in showing up for the process and being here with us all day yesterday and then for coming in this morning.

So you're free from service[.]

4RP 231-32 (emphasis added).

Juror 42's questionnaire also indicates "yes" and, as explanation, states "felony drug possession 1998-99." Appendix C.

Juror 42 was also brought in. Questioning occurred as follows:

THE COURT: Okay. So we received your questionnaire yesterday. [I]n response to question number two, you indicated that you, a family member, or close friend had been arrested or accused of or convicted of a crime, and you had felony drug possession, 1998, 1999.

PROSPECTIVE JUROR NO. 42: Yes.

THE COURT: Who was that?

PROSPECTIVE JUROR NO. 42: Me.

THE COURT: It was you, okay. And you say it's a felony drug possession. *Since then, 1998, '99, have you taken any steps to have that expunged or to have your civil rights restored*?

PROSPECTIVE JUROR NO. 42: No.

> THE COURT: Okay. . . . I'm sorry, there's confusion, but per Washington State law, there's a list of what jury qualifications are, and one of the disqualifying factors is if one has been convicted of a felony and hasn't had their civil rights restored. *So what that means is that you right now as you sit are not qualified to serve as a juror on our case. And entirely your call, but you can take steps if you like at some point to have your civil rights restored.* Sorry if there's confusion.
>
> PROSPECTIVE JUROR NO. 42: Okay. Because I'm also schizophrenic [and] I take meds for that.
>
> THE COURT: Okay. All right. . . . I think as I said in the orientation yesterday, we appreciate your just showing up[.] So you're . . . released.

4RP 245-46 (emphasis added).

3. Appeal

Guajardo raised several issues including those identified above. The Court of Appeals rejected each of his arguments, except that it agreed a DNA fee should be stricken. Op. at 5-12 (addressing issues related to Jurors 33 and 42); Op. at 18 (DNA fee). Guajardo now asks that this Court grant review and reverse the Court of Appeals on the issues identified above.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(3) AND (4) BECAUSE THE TRIAL COURT VIOLATED STATE STATUTES REQUIRING RANDOM JURY SELECTION AND CONSTITUTIONAL EQUAL PROTECTION WHEN IT STRUCK JURORS 33 AND 42.

In their juror questionnaires, Jurors 33 and 42 revealed felony convictions of undetermined age. But the trial court misinformed the prospective jurors regarding restoration of rights and thus engaged in a flawed inquiry regarding the jurors' qualifications. The defective procedure, which led to immediate dismissal of the jurors, was a serious violation of state statutes as well as the state and federal constitutions. The error may be raised for the first time on appeal. Because prejudice is presumed, reversal of Guajardo's convictions is required.

1. Standard of review

This Court reviews claims of constitutional violation de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). A trial court's statutory authority is also an issue of law that is reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

2. Jury service is an important aspect of citizenship even for those who have committed felonies; resumption of the right to jury service is a crucial component of reintegration.

Jury service is an important component of citizenship even for individuals who have committed felonies. Resumption of the right to jury service after these citizens pay their debt to society is a crucial component of reintegration into society.

The Sixth Amendment ensures that criminal defendants "'enjoy the right to . . . trial, by an impartial jury.'" State v. Latham, 100 Wn.2d 59, 62,

667 P.2d 56 (1983). The language of article I, section 22 of our state constitution is similar and has been construed to ensure and protect one's right to a fair and impartial jury. State v. Davis, 141 Wn.2d 798, 855, 10 P.3d 977 (2000). In addition, article I, section 21 states that an accused person has a right to be tried by an impartial 12-person jury. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995).

Meanwhile, the purpose of Washington's jury selection statutes is to promote efficient jury administration and the opportunity for widespread participation by citizens. Laws of 1988, ch. 188, § 1.

"Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." Powers v. Ohio, 499 U.S. 400, 402, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Under Washington law, this includes those previously convicted of a felony who have discharged their debt to society and are entitled to be reintegrated into the life of responsible citizenship. See RCW 2.36.070.[3]

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[3] Under that statute

> A person shall be competent to serve as a juror in the state of Washington *unless* that person:
> (1) Is less than eighteen years of age;
> (2) Is not a citizen of the United States;
> (3) Is not a resident of the county in which he or she has been summoned to serve;
> (4) Is not able to communicate in the English language; or

With the modern trend of mass incarceration, reintegration into society becomes even more important. Our legislature implicitly recognized the need for even felons to participate in the democratic process when it mandated that, upon restoration of civil rights, a convicted person is again qualified to serve on a jury. Former RCW 9.94A.637(1), (5) (2009).[4]

> (5) Has been convicted of a felony *and has not had his or her civil rights restored.*

RCW 2.36.070 (emphasis added).

[4] Former RCW 9.94A.637(1) provides that

> (a) When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the [Department of Corrections], the secretary or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.
>
> (b)(i) When an offender has reached the end of his or her supervision with the department and has completed all the requirements of the sentence except his or her legal financial obligations, the secretary's designee shall provide the county clerk with a notice that the offender has completed all nonfinancial requirements of the sentence.
>
> (ii) When the department has provided the county clerk with notice that an offender has completed all the requirements of the sentence and the offender subsequently satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court, including the notice from the department, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

Based on the trial court's flawed understanding of the law of eligibility, two prospective jurors did not receive that opportunity.

3. Exclusion of the jurors was a material departure from Washington law and a violation of Guajardo's right to a randomly selected jury.

The trial court's dismissal of the prospective jurors, following a flawed inquiry into their qualifications, violated Washington law designed to guarantee jury impartiality by random selection of jurors. As stated, under RCW 2.36.070, all persons are competent to serve on juries except those disqualified for one of the specific reasons listed, including a person who "has been convicted of a felony *and has not had his or her civil rights*

> (c) When an offender who is subject to requirements of the sentence in addition to the payment of legal financial obligations either is not subject to supervision by the department or does not complete the requirements while under supervision of the department, it is the offender's responsibility to provide the court with verification of the completion of the sentence conditions other than the payment of legal financial obligations. When the offender satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court that the legal financial obligations have been satisfied. When the court has received both notification from the clerk and adequate verification from the offender that the sentence requirements have been completed, the court shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

Former RCW 9.94A.637(5) provides that, "[t]he discharge shall have the effect of restoring all civil rights not already restored by RCW 29A.08.520[, addressing restoration of voting rights for felons], and the certificate of discharge shall so state." The statute was amended while this appeal was pending.

restored" (emphasis added). Indeed, courts are required by law to determine, by means of a declaration from the juror, whether each summoned person meets the statutory qualifications. RCW 2.36.072. But, other than those who are disqualified under RCW 2.36.070, "*no person may be excused* from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court." RCW 2.36.100 (emphasis added).

Although felons may be temporarily disqualified from service, all civil rights may be restored with discharge of a criminal sentence. Former RCW 9.94A.637(5). The superior court initiates restoration after all terms and conditions of a criminal sentence, including payment of all LFOs, have been satisfied. See former RCW 9.94A.637(1) (full statute set forth in note 4, supra). Under several scenarios, no affirmative step need be taken by the offender; only where the terms of the sentence (not including LFOs) are completed following a term of supervision is action by the offender required before restoration of rights may occur. Id.

This is because former RCW 9.94A.637(1)(a) is unambiguous. It *mandates* that a court issue a certificate of discharge when it receives notice that the offender has completed all the requirements of his or her sentence. State v. Johnson, 148 Wn. App. 33, 38, 197 P.3d 1221 (2008). Once the superior court has determined the offender is eligible for a certificate of

discharge, the court's duty to issue the certificate is ministerial and applies as of the date the court received notice. Id. at 39.

Here, the trial court erred by misinforming the prospective jurors they could not have had their rights restored unless the jurors themselves initiated action. This was patently incorrect. It is unclear why, then, the Court of Appeals was so willing to accept the responses resulting from such a flawed inquiry. Op. at 9-10.

The dismissal of Jurors 33 and Juror 42 on improper grounds was, moreover, a material departure from our state's law governing jury selection. In Washington, when such a "material departure" occurs, prejudice to the defendant is presumed. State v. Marsh, 106 Wn. App. 801, 807, 24 P.3d 1127 (2001) (citing State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991)); see also Brady v. Fibreboard Corp., 71 Wn. App. 280, 284, 857 P.2d 1094 (1993) (presuming prejudice where judge other than trial judge excused several jurors based on mailed questionnaires).

In Tingdale, for example, the court clerk excused, sua sponte, three jurors it believed to be personally acquainted with the defendant. 117 Wn.2d at 597. Rather than inquiring further, the court relied on the clerk's assertion and ordered the jurors be excused. Id. at 598. This Court reversed the Court of Appeals and found the trial court's ruling an abuse of discretion. Id. at 600.

First, this Court noted the express legislative policy of selecting jurors at random. Id. (discussing former RCW 2.36.090).[5] Many jury selection methods may be proper so long as they substantially comply with the statute by preserving the element of chance. Id. This Court found that the practice of permitting the trial court to excuse jurors based on acquaintance with the accused, without further inquiry, removed the element of chance and essentially permitted the trial court to select a jury of its own choosing. Id. at 601. Moreover, mere acquaintance with the defendant was not a basis to excuse a juror for cause. Id. Because there was nothing in the record to establish the excused jurors were disqualified, the trial court abused its discretion in excusing them. Id. at 602.

The dismissal of the potential jurors was, moreover, a material departure from the statute. Thus, this Court presumed prejudice and reversed Tingdale's conviction. Id. at 600, 602 (citing Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 139 P.2d 714 (1943)); see also Brady, 71 Wn. App. at 283 (pretrial excusal of jurors based on mailed questionnaire violated principle of random selection; prejudice likewise presumed based on material violation of jury selection procedures).

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[5] Current RCW 2.36.080 states, "It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population."

Guajardo's case also involves a material violation of the jury selection statutes. Under Tingdale and Brady, prejudice is presumed. Because the trial court's inquiry was so fundamentally flawed, nothing in the record establishes that Jurors 33 and 42 were unqualified to serve. Mere conviction of felonies did not disqualify them. RCW 2.36.070. With its flawed inquiry, the trial court misled the jurors regarding what was needed to restore civil rights. This permitted the trial court to select a jury of its own choosing. As in Tingdale, the dismissal of jurors without grounds showing disqualification was an abuse of discretion and a material departure from the statutes. Guajardo's convictions should be reversed.

4. Exclusion of Jurors 33 and 42 violated the jurors' constitutional rights to unbiased jury selection procedures and to equal protection.

In addition to violating Washington statutes, the jury selection process in this case violated the jurors' equal protection rights.

The right to equal protection guarantees that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); accord U.S. CONST. amend. XIV, § 1; CONST. art. I, § 12. Washington courts construe federal and state constitutional provisions identically. Manussier, 129 Wn.2d at 672.

For example, a state "may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" Batson v. Kentucky, 476 U.S. 79, 88, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S. Ct. 891, 892, 97 L. Ed. 1244 (1953)).

All citizens enjoy the constitutional right not to be excluded from jury service based on irrelevant factors such as race or employment status. Powers, 499 U.S. at 404; cf. Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (daily wage earners cannot be excluded from jury service "without doing violence to the democratic nature of the jury system"). Jurors may not be rejected on a false assumption that they are not qualified to serve. Powers, 499 U.S. at 404.

Juror qualification is an individual, rather than a group or class matter, and courts may not use assumptions about categories such as race or employment as a proxy for actual qualifications to serve on a jury. See id. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 161 n. 13, 114 S. Ct. 1419, 1438, 128 L. Ed. 2d 89 (1994).

a. *There was no rational basis to exclude Jurors 33 and 42 based solely on their felony convictions without proper inquiry into their actual qualification to serve.*

There was no rational basis to exclude Jurors 33 and 42 based solely on their past felony convictions and the fact that they had not *themselves* initiated expungement or similar proceedings.

Under the equal protection clause, individual jurors have a right to nondiscriminatory jury selection procedures. J.E.B, 511 U.S. at 140-41, (citing Powers, 499 U.S. at 412; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

Where rational basis scrutiny applies, two factors must be satisfied to establish an equal protection violation. First, an individual must be a member of a class such that the individual is similarly situated to others who are treated differently. State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). Second, where no suspect classification or fundamental right is at issue, there must be no rational basis for the differential treatment. Id.

Jurors 33 and 42 are similarly situated, for purposes of the juror qualification statute, RCW 2.36.070, to those throughout Washington who have been convicted of a felony. But unlike others with felony convictions, they were excluded from jury service solely on that basis, without proper regard for whether their rights had in fact been restored. Additionally, Jurors

33 and 42 are similarly situated to all others summoned for jury service where there may be reason to doubt their qualifications. A juror who appears too young to serve is not excluded without inquiry as to actual age. Those who might appear to be immigrants are not excluded unless they are not, in fact, United States citizens. But Jurors 33 and 42 were excluded because the court erroneously believed that for them to be qualified, the jurors *themselves* must have undertaken court action to restore their civil rights.

Exclusion of all jurors convicted of felonies who do not proactively seek restoration of rights lacks any rational basis. Washington law expressly provides that those convicted of a felony may have their rights restored unilaterally by superior court action. Former RCW 9.94A.637(1)(a), (b). There can be no rational basis for excluding all convicted felons from jury service when the state's explicit objective is that such persons *not* be excluded, so long as their rights have been restored. The trial court's jury selection procedure—which misapplied existing law—obviously lacks a rational basis because it works against our legislature's express goals of reintegrating former felons into the democratic process and ensuring random selection of jurors. See RCW 2.36.080(1) ("It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of

the area served by the court, and that all qualified citizens have the opportunity . . . to be considered for jury service in this state[.]").

Under rational basis scrutiny, the jury selection procedure in this case violated equal protection. The remedy for such a violation is reversal. E.g. J.E.B., 511 U.S. at 146; Powers, 499 U.S. at 416;

b. *Guajardo has standing to raise the prospective jurors' equal protection rights.*

Guajardo has standing to raise this claim. Accused persons have a right "to be tried by a jury whose members are selected by nondiscriminatory criteria." McCollum, 505 U.S. at 46. This is so even if the accused does not belong to the same class as the juror. Id. at 55; Powers, 499 U.S. at 415.

In Powers, a white juror was allowed to challenge the exercise of peremptory challenges against African American jurors. 499 U.S. at 415. The Supreme Court reasoned that (1) there was a cognizable injury to the defendant as well as to the integrity of the courts, (2) there was a sufficiently close relationship between the defendant and the juror based on the relationship of trust created during voir dire, and (3) jurors are unlikely to be able to pursue vindication of their equal protection rights as jurors through any other avenue. Id. at 411-15. Applying this test, the Court of Appeals permitted a male appellant to raise on appeal an equal protection

claim related to the excusal of female prospective jurors. State v. Burch, 65 Wn. App. 828, 837, 830 P.2d 357 (1992). The same considerations mandate permitting Guajardo to raise the prospective jurors' equal protection rights in this case.

Those convicted of a felony are in a unique position to appreciate the seriousness of the juror's role. Admittedly, Guajardo had no *right* to have a convicted felon on the jury. But he did have the right to have the jury selected randomly so that felons were not unlawfully excluded from the pool of potential jurors. The trial court's misunderstanding of the law, leading to a flawed inquiry into the jurors' qualifications, violated Guajardo's, and the potential jurors', statutory and constitutional rights.

c. *Guajardo may raise this issue for the first time on appeal as a manifest constitutional error.*

Finally, Guajardo may raise this issue for the first time on appeal as a manifest constitutional error. RAP 2.5(a). An error may be considered, despite being raised for the first time on appeal, when the error is truly constitutional and had practical and identifiable consequences for the defendant at trial. State v. A.M., ___ Wn.2d ___, 448 P.3d 35, 38-39 (2019). As shown, in addition to violating state statues ensuring random jury selection, the error in this case violated equal protection. Thus, it is a constitutional issue that may be raised for the first time on appeal. See State

v. Beliz, 104 Wn. App. 206, 214, 15 P.3d 683 (2001) (permitting claim of gender bias in jury selection, an equal protection claim, to be raised for the first time on appeal under RAP 2.5(a)).

The error had practical and identifiable consequences at trial. The State cannot show that the improperly stricken jurors had no chance to sit on the jury. Cf. State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011) (where State had burden to prove right to presence violation was harmless beyond a reasonable doubt, State could not meet burden to show three of the jurors who were excused in Irby's absence had no chance to sit on jury). For example, the characteristics of Juror 42's single drug conviction (more than 18 years old at the time of trial) suggest his rights would have been restored by unilateral court action by the time of trial in this case: Juror 42 would have received a relatively short sentence and been subject to post-release supervision. See Laws of 2000, ch. 119, § 3 and Laws of 1994, ch. 271, § 901 (amendments to RCW 9.94A.220, prior codification of RCW 9.94A.637, demonstrating that Juror 42 would have likely been eligible to have his rights restored by unilateral superior court action); see also former RCW 9.94A.383 (1988) (providing for community supervision where punishment was confinement of one year or less).[6] A proper inquiry—

[6] With an offender score of zero to two, the standard-range term of incarceration for possession of a controlled substance was one year or less. See, e.g., former

whether, for example, Juror 42 had satisfied all requirements of his judgment and sentence—would have made this clear.

The error in this case is reviewable under RAP 2.5(a). And the trial court's dismissal of the prospective jurors violated state statutory procedures and equal protection. In summary, this Court should grant review under RAP 13.4(b)(3) and (4) and reverse Guajardo's convictions.

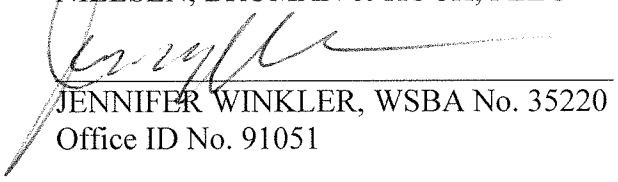
F. CONCLUSION

For the reasons stated, review is appropriate under RAP 13.4(b)(3) and (4). This Court should accept review and reverse the Court of Appeals.

DATED this 26th day of November, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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RCW 9.94A.310 (1998) (sentencing grid); former RCW 9.94A.320 (1998) (seriousness level).

APPENDIX A

FILED
10/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SEBASTIAN MARCUS GUAJARDO, Appellant.	)	No. 77856-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2019

ANDRUS, J. — Sebastian Guajardo appeals his convictions and sentence for second degree murder and unlawful possession of a firearm. First, he challenges the trial court's disqualification of two prospective jurors. Second, he asserts that he was prejudiced when a juror, who was ultimately empaneled, allegedly showed bias during jury selection. Third, he contends that his life sentence imposed under the Persistent Offender Accountability Act (POAA) violates the state and federal constitutional prohibitions on cruel and unusual punishment because he committed his first two strike offenses while a young man. Finally, he challenges the $100 DNA collection fee.

We affirm Guajardo's convictions and sentence but remand for a ministerial order striking the $100 DNA collection fee under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

FACTS

The State charged Guajardo with second degree murder and first degree unlawful possession of a firearm. The State alleged that Guajardo shot and killed Jesse Arabos Dacanay whom Guajardo suspected had stolen a friend's car. It also alleged that Guajardo had a 2000 conviction for assault in the first degree for stabbing a girlfriend in the abdomen with a knife, and a 2001 conviction for assault in the first degree with a firearm enhancement for shooting at three people, hitting two of them in the process. The State indicated that these convictions were strike offenses, and a conviction for murder would constitute a third strike, requiring that Guajardo be sentenced to life without the possibility of parole.

During jury selection, the State notified the trial court that two prospective jurors, Juror 33 and Juror 42, had indicated that they had prior felony convictions. The State did not know the context of the convictions or if the jurors' civil rights had been restored. Guajardo's counsel asked the trial court to confirm with each that they had a felony conviction and that their rights had been restored. The trial court agreed to this procedure.

When questioned, Juror 33 confirmed that he had previously pleaded guilty to "third degree burglary at 17 years old, [had] several drug possessions, [had participated in] drug court, [and had] multiple DUIs." He indicated that "[a] couple of the drug offenses and the burglary" were felony offenses. The trial court asked Juror 33 if he had "gone back to court or had a court expunge or address those [felonies] since conviction?" Juror 33 answered "no." The trial court dismissed Juror 33:

> I think per juror qualifications under state law here, you can't be a convicted felon, unless you've actually gone through a court process of having those taken off your record. So as to your ability to serve on this jury, you would not be able to serve, so I'm going to excuse you from service on this case – from service in general here today.

Guajardo did not object to the dismissal of Juror 33.

The trial court also questioned Juror 42, who indicated that he had a conviction for felony drug possession from 1998 or 1999. The trial court again inquired if Juror 42 had "taken any steps to have that [felony] expunged or to have [his] civil rights restored?" Like Juror 33, Juror 42 answered "no." The trial court similarly dismissed Juror 42:

> I'm sorry, there's confusion, but per Washington State law, there's a list of what jury qualifications are, and one of the disqualifying factors is if one has been convicted of a felony and hasn't had their civil rights restored.
>
> So what that means is that you right now as you sit are not qualified to serve as a juror on our case.
>
> And entirely your call, but you can take steps if you like at some point to have your civil rights restored.

Guajardo did not object to the dismissal of Juror 42.

The jury convicted Guajardo as charged and returned a special verdict, finding that Guajardo was armed with a firearm at the time he committed the murder.

At Guajardo's sentencing hearing, the State argued that Guajardo was a persistent offender under RCW 9.94A.030(38)[1] and that the sentencing court was

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[1] RCW 9.94A.030 defines "persistent offender" as someone who has been convicted in Washington of any felony considered a "most serious offense" and has, before the commission of that offense, been convicted on at least two separate occasions of felonies considered to be "most serious offenses." This is commonly known as "three strikes." State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514 (1996).

obligated to impose a sentence of life imprisonment without the possibility of parole. To prove Guajardo's prior convictions, the State presented certified copies of Guajardo's 2000 and 2001 judgments and sentences, the underlying crimes of both qualifying as "most serious offenses" under RCW 9.94A.030(33). The State also presented copies of Guajardo's booking photos from each arrest to verify that each conviction was for the same individual. It then called Cynthia Zeller, a fingerprint expert and trainer with the King County Automated Fingerprint Identification System (AFIS), to testify that Guajardo's fingerprint cards from his 2000 and 2001 convictions matched the fingerprints Zeller took of Guajardo in conjunction with the murder trial and that Guajardo's AFIS identification numbers on each card also matched. Guajardo's counsel neither questioned Zeller nor objected to her testimony. Based on this evidence, the trial court found that Guajardo had two prior most serious offense convictions and that he was a persistent offender for purposes of sentencing under RCW 9.94A.570.

Guajardo acknowledged that if the statutory criteria were met under the "three strikes" statute, the only sentence available was life without the possibility of parole and did not dispute the State's contention that he met the criteria for "three strikes." Instead, Guajardo's counsel asked the court to exercise its discretion in imposing his sentence. Guajardo's counsel submitted a summary of Guajardo's "social history," which detailed his turbulent childhood with absentee parents, physical and possible sexual abuse by his brothers, and homelessness by age 15 or 16.

In imposing Guajardo's sentence, the court held that it did not have the discretion to depart from the POAA, but that even if it did, the mandatory life sentence under the POAA was appropriate in Guajardo's case, given that the murder was a "senseless killing." It sentenced Guajardo to life in prison without the possibility of parole.[2] The sentencing court also imposed a $500 victim penalty assessment and $100 DNA collection fee.

ANALYSIS

1. Jury Selection

a. Jurors 33 and 42

Guajardo argues that the trial court violated his right to random jury selection when it disqualified Jurors 33 and 42 under RCW 2.36.070(5). We disagree.

Both the Sixth Amendment of the United States Constitution and article 1, section 22 of our state constitution guarantee a defendant the right to a fair trial by an impartial jury. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). Under our state statutes, members of a jury panel must be randomly selected. State v. Roberts, 142 Wn.2d 471, 518, 14 P.3d 713 (2000). A defendant, however, has no right to be tried by a particular juror or jury. State v. Williamson, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000). A defendant must show prejudice to justify reversal if the jury selection process substantially complied with the applicable statute or rules. Id. at 253. We will presume prejudice only if there has been a

[2] The sentencing court also imposed a concurrent 54-month sentence for the unlawful possession of a firearm conviction, as well as a 120-month weapons enhancement added to the life sentence for the murder conviction.

material departure from those statutes or rules. Id. We review a trial court's decision to excuse members of the jury venire for abuse of discretion. Roberts, 142 Wn.2d at 519.

RCW 2.36.070 provides:

> A person shall be competent to serve as a juror in the state of Washington *unless that person*:
>
> (1) Is less than eighteen years of age;
> (2) Is not a citizen of the United States;
> (3) Is not a resident of the county in which he or she has been summoned to serve;
> (4) Is not able to communicate in the English language; or
> (5) *Has been convicted of a felony and has not had his or her civil rights restored* (emphasis added).

RCW 2.36.072(4) requires the trial court to excuse a potential juror if the juror declares that he or she does not meet the qualifications. State v. Marsh, 106 Wn. App. 801, 806-07, 24 P.3d 1127 (2001) (jurors properly excused based on their declarations that they were unable to communicate in English).

After reviewing their juror questionnaires and questioning Jurors 33 and 42, the trial court found—based on the information each provided to the court—that they were disqualified from jury service because they had been convicted of at least one felony and had not had their civil rights restored. Guajardo did not object to either the trial court's questioning of these two jurors or to its conclusion that they were disqualified from serving under RCW 2.36.070(5). Generally, objections relating to a juror's qualifications must be made in a timely manner to give the trial court the opportunity to correct the error. See City of Seattle v. Erickson, 188 Wn.2d 721, 728, 398 P.3d 1124 (2017) (in the context of a Batson[3] challenge,

[3] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712. 90 L. Ed. 2d 69 (1986).

objection should be raised no later than before any testimony is heard or evidence admitted).

Even if we assume Guajardo preserved this issue for appeal, he has not demonstrated that the trial court materially departed from the jury selection statutes or applicable court rules. And he has failed to demonstrate that the jurors empaneled as a result of the disqualification of Jurors 33 and 42 were not impartial.

Guajardo relies on State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991), and Brady v. Fibreboard Corp., 71 Wn. App. 280, 284, 857 P.2d 1094 (1993), to argue that the trial court's disqualification of the prospective jurors was a "material departure" from a jury selection statute. Guajardo's reliance on these cases is misplaced. In Tingdale, the Supreme Court concluded that the trial court materially departed from former RCW 2.36.090, which required the clerk to be blindfolded and to draw names of prospective jurors from a box in the presence of a judge or commissioner, and from CrR 6.4(c)(1), when it relied on the clerk to determine whether three prospective jurors should be removed from the venire based on their possible acquaintance with the petitioner. 117 Wn.2d at 597-601. In Brady, two judges, neither of whom were the trial judge, excused 14 prospective jurors for bias based on answers provided in mailed-in questionnaires without requiring the jurors to appear to be questioned by the parties or the judge who actually presided over the trial. 71 Wn. App at 282-84. Division Two of this court held that this process violated the statutory requirement that there be proof of actual bias and a determination of such bias by the trial judge. Id. at 284. In both

instances, the parties were denied the right to be heard on the question of actual bias.

These cases are distinguishable because the trial court here did not rely on others to determine that the jurors were disqualified and did not excuse either juror until after they were individually questioned about their convictions in open court in the presence of the parties, both of whom had the opportunity to be heard on the manner in which the trial court questioned the jurors and the ultimate qualifications of each juror to serve.

State v. Phillips is more analogous. In Phillips, our Supreme Court upheld the trial court's disqualification of a juror who stated he was unsure if he was a United States citizen. 65 Wash. 324, 326, 118 P. 43 (1911). Phillips challenged the juror's disqualification, but the Court held that "[t]he citizenship of the juror was sufficiently doubtful to justify the trial judge in sustaining the challenge." Id. Here, the trial court similarly had reason to doubt that Jurors 33 and 42 had had their civil rights restored. Both indicated on the record that their respective felonies had not been expunged and to their knowledge, their civil rights had not been restored. Based on this record, it is unclear what else the trial court could have done to eliminate the doubt as to their qualifications.

Guajardo argues that the trial court erroneously stated that offenders who had not asked to have their civil rights restored were not qualified to sit as jurors. This statement, he contends, is an incorrect statement of the law and constitutes a "material departure" from "our state's law governing jury selection." He does not, however, identify any jury selection statute from which the trial court departed.

Under RCW 9.94A.637(5), a person convicted of a felony is deemed to have their civil rights restored when they receive a certificate of discharge from the Department of Corrections (DOC) under RCW 9.94A.637(1)(a) or a certificate of discharge from the sentencing court under RCW 9.94A.637(1)(b) or (c). If an offender completes all requirements of a sentence while in custody or under DOC supervision, the Department must issue a certificate of discharge, and the offender need not take any action. If, however, the offender fails to complete the sentence requirements or is not under DOC supervision at the time of completion, the offender is responsible for providing the sentencing court with verification that he has completed the sentence requirements. RCW 9.94A.637(1)(c). There are circumstances in which an offender does bear responsibility for seeking a restoration of his civil rights, but Guajardo correctly notes that it is not required in all circumstances.

But to the extent the trial court incorrectly implied that an offender's civil rights cannot be restored absent action on their part, RCW 9.94A.637 is nevertheless clear that an offender should receive notice that his rights have been restored, either from the DOC or from the sentencing court. If a prospective juror states that he is not aware of having his civil rights restored, as was the case with Jurors 33 and 42, then it was reasonable for the trial court to conclude that restoration had not in fact occurred. In this case, like in Phillips, the trial court properly relied on the prospective jurors' answers to its inquiries about their prior felonies and had sufficient doubt as to their qualifications to justify disqualification.

Moreover, a defendant "has no right to be tried by a particular juror or by a particular jury." Williamson, 100 Wn. App. at 253-54 (internal quotation marks omitted) (quoting State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995)). Guajardo has failed to establish that the jury that was ultimately empaneled was not randomly selected, fair, or impartial. We presume the jurors chosen to replace the ones rejected were impartial jurors. Phillips, 65 Wash. at 327. There is nothing in the record to suggest otherwise. Because Guajardo was not entitled to be tried by Juror 33 or Juror 42 and because he was ultimately tried by a jury deemed to be impartial, he cannot establish a violation of his constitutional right to an impartial jury.

Finally, Guajardo asserts that the trial court's disqualification of Jurors 33 and 42 violated the jurors' equal protection rights.[4] We reject this argument as well.

The constitutional right to equal protection of the law requires that similarly situated persons receive like treatment under the law. State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). But states may constitutionally prescribe qualifications for their jurors and a court may permissibly discharge jurors who do not meet these statutory qualifications. Marsh, 106 Wn. App. at 807-08. Guajardo does not challenge the validity of the felony disqualification provision in RCW 2.36.070; instead, he contends that the trial court's interpretation of that

[4] Guajardo asserts that he has third party standing to raise the constitutional rights of prospective jurors under State v. Burch, 65 Wn. App. 828, 837, 830 P.2d 357 (1992). The State does not respond to Guajardo's standing argument so we decline to reach this issue. We note, however, that it is arguable whether Guajardo can meet the three part test for third-party standing of Powers v. Ohio, 499 U.S. 400, 415, 111 S. Ct. 1364, 1373, 113 L. Ed. 2d 411 (1991), when the challenge does not relate to the State's alleged discriminatory use of peremptory challenges.

provision resulted in prospective jurors being disqualified from jury service solely because they had not proactively sought reinstatement of their civil rights. A denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons. Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 811, 756 P.2d 736 (1988). But the unequal enforcement of a statute will violate equal protection rights only if deliberately or purposefully based on an unjustifiable standard such as race, religion or other arbitrary grounds. Id. The disparate treatment must be the result of intentional or purposeful discrimination. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Guajardo concedes that the rational basis test applies to the trial court's decision to exclude Jurors 33 and 42 because the jurors are not members of a suspect class and the exclusion did not threaten a fundamental right. We review allegations of constitutional violations de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Guajardo argues that the two disqualified jurors belong to a class of prospective jurors with felony convictions. He contends that there was no rational basis for the trial court to have treated jurors who have not proactively sought restoration of their civil rights differently than felons who have done so. Guajardo's argument is flawed, however, because it is based on a false premise—that the trial court rejected these jurors for the sole reason that they had not initiated the restoration process. The record does not support this characterization of the trial court's decision. The trial court informed each juror that they were disqualified because they had been convicted of a felony and either had not "actually gone

through a court process of having [the conviction] taken off [their] record," or had not "had [their] civil rights restored." The trial court was clearly focused on whether the process had resulted in restoration, not whether the process was initiated by the prospective juror. There is no evidence in this record that the trial court deliberately excluded a particular class of prospective jurors just because they had failed to request the restoration of their rights. Because there is no evidence to support an assertion of dissimilar treatment of similarly situated jurors, we reject Guajardo's equal protection challenge.

b. Juror 49

In his Statement of Additional Grounds, Guajardo contends that the trial court erred in failing to disqualify Juror 49 during jury selection. He claims that Juror 49 expressed bias when the juror stated that the defense was required to present its case to refute the State's arguments and that the jury should be presented with both sides before making its ultimate decision. Guajardo claims that through this statement, Juror 49 expressed an opinion as to his guilt.

Guajardo did not challenge Juror 49 for cause. Under RAP 2.5(a)(3), a party may raise for the first time on appeal a manifest error affecting a constitutional right, such as the right to be tried by a fair and impartial jury. Latham, 100 Wn.2d at 62-63. Seating a biased juror would violate that right.

RCW 2.36.110 states that a judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, [or] prejudice . . . ." A trial judge has an independent obligation to protect a defendant from biased jurors regardless of inaction by

counsel or the defendant. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). And the presence of a biased juror cannot be deemed harmless error. Id. If the record demonstrates actual basis of a juror, seating him would be by definition manifest error. Id.

But Guajardo's argument that Juror 49 manifested actual bias is unsupported by the record. Actual bias is "the existence of a state of mind on the part of the juror . . . 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). In this case, Guajardo asked the venire whether anyone thought he needed to present evidence or put Guajardo on the witness stand. Juror 49 expressed the opinion that "at some point you will have to refute the statements that are made by the other side." Juror 49 stated:

> Well, if they're providing a preponderance of evidence that suggests that the client is guilty and there's no defense presented, what am I left to think, right? I would like to see both sides of the story. Do I need to see him testify? Well, I don't care, as long as there's evidence, right?
>
> . . .
>
> I mean, it wouldn't be absolutely necessary for the Defendant to testify.

Eight jurors agreed with Juror 49's statements. Guajardo's counsel then informed the prospective jurors that "the Defendant is not required to present any evidence, to testify, or to do anything. The burden of proof is on the State of Washington, and the judge will instruct you about the law." Counsel then asked the jurors as a group:

> [I]f the State doesn't meet its burden of proof beyond a reasonable doubt at the end of the case and the Defendant has presented no evidence except cross-examination of witnesses, and the Defendant has not testified, the Court will instruct you that if you're not satisfied after you look at all the evidence that the State had met its burden of proof, then you must find the Defendant not guilty. How many would disagree with that? We'd like to know.

There is no indication from the record that Juror 49 disagreed with this proposition.

The jury was instructed that the State had the burden of proving Guajardo's guilt beyond a reasonable doubt and that Guajardo had no burden of proving that a reasonable doubt exists. It was also instructed that Guajardo was not required to testify and that it could not use the fact that he did not testify to infer guilt or to prejudice him in any way. We presume jurors follow these instructions. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). We find no evidence of actual bias here and thus reject Guajardo's contention that the trial court erred in failing to disqualify Juror 49.

2. Challenge to Life Sentence

Guajardo next challenges his life sentence under the POAA, claiming that his sentence violates the prohibitions on cruel and unusual punishment under the state and federal constitutions because the first two of his three strikes occurred when he still had characteristics of youth under State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), despite being a legal adult at the time.

Former RCW 9.94A.030 defined a persistent offender as an offender who:

> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and (ii) Has, before the commission of the offense . . . been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.9A.525;

> provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

Under former RCW 9.94A.030 (2016), any class A felony was considered a "most serious offense." Second degree murder is a class A felony. RCW 9A.32.050. Under RCW 9.94A.570:

> Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender *shall be sentenced to a term of total confinement for life without the possibility of release* or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death.

(Emphasis added.) Guajardo asserts that the sentencing court had the discretion to impose a non-POAA sentence and impose a standard range sentence under the Sentencing Reform Act (SRA) and that it should have done so based on Guajardo's young age at the time of his first two strike offenses. But this argument fails in the face of the clear text of the statute, which says that a persistent offender "*shall* be sentenced to a term of total confinement for life." RCW 9.94A.570 (emphasis added).

Our Supreme Court recently rejected Guajardo's argument in State v. Moretti, No. 95263-9 (Wash. Aug. 15, 2019).[5] In Moretti, trial courts sentenced three defendants, Moretti, Nguyen, and Orr, to life without the possibility of parole under the POAA after the State established that each had committed their first two offenses while in their early 20s and committed the third offense in their 30s

[5] http://www.courts.wa.gov/opinions/pdf/952639.pdf.

(Moretti) or 40s (Nguyen and Orr). Id., slip op. at 2-7. Each division of the court of appeals affirmed POAA sentences.[6]

The defendants argued, as Guajardo does here, that article I, section 14 of the Washington Constitution bars sentences of life in prison without the possibility of parole for fully developed adult offenders who committed one or more of their prior strike offenses as young adults over age 18. The Court rejected this argument. First, it found no national consensus against applying recidivist statutes to adults who committed prior strike offenses as young adults. Id., slip op. at 11. Second, it found no showing of any reduced culpability. Id., slip op. at 14. The Court reasoned that the defendants "have not produced any evidence that their youth contributed to the commission of the instant offenses, or even that youth contributed to their prior offenses." Id. slip op. at 15. Instead, it concluded that "[t]hese petitioners are fully developed adults who were repeatedly given opportunities to prove they could change." Id. slip op. at 16. The Court disagreed with the assumption that the POAA sentences punished the defendants for crimes they committed as young adults. Id., slip op. at 17. "These POAA sentences are not punishment for the crimes the petitioners committed as young adults because recidivist statutes do not impose 'cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies

[6] See State v. Moretti, No. 47868-4-II (Wash. Ct. App. Oct. 21, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2047868-4-II%20Unpublished%20Opinion.pdf; State v. Nguyen, No. 74962-5-I (Wash. Ct. App. Jan. 16, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/749625.pdf; State v. Orr, No. 34729-0-III (Wash. Ct. App. April 26, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/347290_unp.pdf.

a heavier penalty for the crime.'" Id., slip op. at 17 (quoting State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)).

Finally, it determined that the goal of punishing recidivists justified the life sentence. "Because Moretti, Nguyen, and Orr each committed their third most serious offense as adults in their 30s and 40s, they have shown that they are part of this rare group of offenders who are 'simply unable to bring [their] conduct within the social norms prescribed by the criminal law.'" Id., slip op. at 22 (quoting Rummel v. Estelle, 445 U.S. 263, 284, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)).

Guajardo was 19 when he committed his first strike offense, second degree assault, and 20 when he committed the second strike offense, first degree assault.[7] But he was 35 when convicted of murder in 2016. Although Guajardo presented an unsworn report from a private investigator describing a turbulent childhood, it does not explain how, 15 years after committing his second violent felony, his youth impacted his decision to commit murder at age 35. Moreover, at the time of the third felony, Guajardo had just served 15 years in prison for his 2001 assault conviction and was still on community custody for that offense. As the Moretti court noted, the POAA "gives offenders a chance to show that they can be reformed." Id., slip op. at 17. Guajardo presented no such evidence here. Based on Moretti, we reject Guajardo's argument that his life sentence violates the prohibitions on cruel and unusual punishment.

Even if the trial court had the discretion to depart from the POAA and impose a sentence within the SRA standard sentencing range, the trial court stated that

[7] According to the judgment and sentence, Guajardo was born on February 10, 1981.

Guajardo's life sentence without parole "seems appropriate here," reiterating that "the sentence in this particular case is appropriate, in light of the history." Thus, even if the trial court had the discretion to impose an SRA sentence, we are unconvinced the trial court would have done so.

3. $100 DNA Collection Fee

Finally, Guajardo challenges the imposition of the $100 DNA fee. The State agrees that Guajardo's $100 DNA fee should be stricken under Ramirez.

Therefore, we affirm Guajardo's convictions and sentence but remand for a ministerial order striking the $100 DNA fee.

Andrus, J.

WE CONCUR:

Mann, ACJ

Appelwick, J.

APPENDIX B

State v. Guajardo; 16-1-04911-3 KNT
JUROR QUESTIONNAIRE

Juror Number 33

This questionnaire is designed to obtain information from you concerning your ability to be fair and impartial if you are selected as a juror in this case. If you cannot answer a questions, or do not understand a question, please indicate that problem in the response section. In answering this questionnaire, your oath as a prospective juror applies. You must answer the questions truthfully.

1. Have you, a relative or a close friend ever been a witness to or a victim of any form of violence, including murder?
YES___ NO X

If the answer is yes, please provide a brief explanation:

If the answer is yes, was the matter referred to any governmental or social agency for prosecution or investigation? Yes _____ No _____

2. Have you, a family member, or close friend ever been reported for, arrested for, accused of, or convicted of a crime?
YES X NO___

If the answer is yes, please provide a brief explanation:
Myself, 3rd degree burglary at 17 yrs. old. Severeal drug possesions, drug court, multiple DUI's plead guilty to all.

3. The defendant has been charged in connection with an incident where a body was found in the Angle Lake Apartments in SeaTac, Washington, with gunshot wounds that occurred around July 4, 2016. Are you aware of any news media accounts pertaining to this case?
YES X NO___

If your answer is yes, please indicate where/how you have heard about the case (mark all that apply):

TV___Radio___Newspaper X Internet___Social media (i.e. Facebook)___ Other___

Please briefly state what you have heard about the case:
I read the newspaper every day and all I remember is that yes, there was a murder at the Angle Lake Apts. I do not remember any circumstances.

4. Has anyone in your household ever owned a firearm?
YES___ NO X

5. What are your feelings about gun ownership or possession?
It is ok as long as the gun owner is law abiding and follows prudent safety rules,
My Son owns firearms, It is fine.
Criminals Should not have firearms.

6. Do you believe that implicit bias exists? Absolutely for Sure.

7. Can you describe a circumstance in your own life where a bias, implicit or otherwise, may have affected your decision making?
A new, young coworker needed instruction and I thought he was pretty dumb because of his age, I was wrong.

8. Do you have any thoughts about or experiences with implicit bias that you would like to share?
I think ~~Society~~ Society as a whole is becoming more aware of this so things are getting better. People don't want to pre judge.

9. What are your thoughts about race and the role it plays, if any, in the criminal justice system?
I think money plays a more important role and many minorities have less money so are treated more harshly.

10. Is there any reason why you believe you could not be fair and impartial in a case involving an allegation of murder?
YES____ NO X

If yes, please explain:

If you answered "yes" to any of the questions asked above, you may be asked additional questions about your answers. It is preferable that such questions be asked in open court so that all the jurors can hear and participate in the discussion. However, if you are uncomfortable with the prospect of answering questions in front of other jurors, we can conduct a separate inquiry outside of the presence of your fellow jurors.

Would you rather discuss your answer in greater detail outside of the presence of your fellow jurors? YES____ NO X

I declare under penalty of perjury under the laws of the State of Washington that the answers to the foregoing questions are the truth to the best of my knowledge.

DATED this 26 day of September, 2017

KW
Juror Initials

33
Juror Number

APPENDIX C

State v. Guajardo; 16-1-04911-3 KNT
JUROR QUESTIONNAIRE

Juror Number 42

This questionnaire is designed to obtain information from you concerning your ability to be fair and impartial if you are selected as a juror in this case. If you cannot answer a questions, or do not understand a question, please indicate that problem in the response section. In answering this questionnaire, your oath as a prospective juror applies. You must answer the questions truthfully.

1. Have you, a relative or a close friend ever been a witness to or a victim of any form of violence, including murder?
YES___ NO ✓

If the answer is yes, please provide a brief explanation:

If the answer is yes, was the matter referred to any governmental or social agency for prosecution or investigation? Yes _____ No _____

2. Have you, a family member, or close friend ever been reported for, arrested for, accused of, or convicted of a crime?
YES ✓ NO___

If the answer is yes, please provide a brief explanation:
Felony drug possession 1998-99

3. The defendant has been charged in connection with an incident where a body was found in the Angle Lake Apartments in SeaTac, Washington, with gunshot wounds that occurred around July 4, 2016. Are you aware of any news media accounts pertaining to this case?
YES ✓ NO ✓

If your answer is yes, please indicate where/how you have heard about the case (mark all that apply):

TV ✓ Radio___ Newspaper___ Internet___ Social media (i.e. Facebook)___ Other___

Please briefly state what you have heard about the case:

4. Has anyone in your household ever owned a firearm?
YES___ NO ✓

5. What are your feelings about gun ownership or possession?
If the person feels unsafe without one, they should get one

6. Do you believe that implicit bias exists?

yes

7. Can you describe a circumstance in your own life where a bias, implicit or otherwise, may have affected your decision making?

NO

8. Do you have any thoughts about or experiences with implicit bias that you would like to share?

NO

9. What are your thoughts about race and the role it plays, if any, in the criminal justice system?

Blacks are givin more time behind bars for the same crime as a white man

10. Is there any reason why you believe you could not be fair and impartial in a case involving an allegation of murder?

YES____ NO✓

If yes, please explain:

If you answered "yes" to any of the questions asked above, you may be asked additional questions about your answers. It is preferable that such questions be asked in open court so that all the jurors can hear and participate in the discussion. However, if you are uncomfortable with the prospect of answering questions in front of other jurors, we can conduct a separate inquiry outside of the presence of your fellow jurors.

Would you rather discuss your answer in greater detail outside of the presence of your fellow jurors? YES____ NO✓

I declare under penalty of perjury under the laws of the State of Washington that the answers to the foregoing questions are the truth to the best of my knowledge.

DATED this 26 day of _____, 2017

DM
Juror Initials

42
Juror Number

NIELSEN, BROMAN & KOCH P.L.L.C.

November 26, 2019 - 12:35 PM

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