Supreme Court No. 99302-5
(COA No. 80564-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TUIA,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER

Michael Tuia, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Tuia seeks review of the November 9, 2020 Court of Appeals decision, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Does removing a qualified seated juror for the minor expediency of being an hour late on the last day of trial require reversal of Mr. Tuia's conviction?

2. Does the decision not to address a question by the jury about how to handle inadmissible evidence require a new trial?

D. STATEMENT OF THE CASE

The government accused Michael Tuia of robbery in the first degree, alleging he threatened a Beankini Espresso barista with a firearm and took money from her. CP 8-9. The barista claimed a person in an older blue Buick asked for a

white chocolate mocha. RP 378. The customer spilled the drink and asked for napkins. RP 376. When she turned back to the Buick with the napkins, the driver was pointing what looked like a firearm at her. RP 378-79. He demanded she give him the money in her cash register. *Id*. He took the money and drove away. RP 381.

Patrick Boyd was waiting in line behind the Buick. RP 381. He saw unusual activity, including the barista giving the customer a large amount of cash. RP 317. Exchanging glances with the barista, Mr. Boyd followed the Buick. RP 320.

Mr. Boyd called 911 as he pulled away from the stand. RP 324. Mr. Boyd provided the 911 operator with a narrative of what he saw from exiting the barista stand until the police took over the pursuit of the Buick. RP 337-48.

At the beginning of the recording, Mr. Boyd stated, "I just saw a guy robbing an espresso stand." RP 337. After Mr. Boyd testified, Mr. Tuia asked for a limiting instruction, arguing this was improper opinion evidence, among other objections. RP 356. The court identified the recording as

"problematic" and likely a violation of ER 403. RP 582, 355. The court agreed to give a limiting instruction. RP 356.

Mr. Boyd remained behind the Buick until the police took up the chase. RP 344. Mr. Tuia continued to drive above the speed limit until an officer hit the rear of Mr. Tuia's car with his vehicle, causing it to spin out and stop. RP 448-49. For this conduct, the government charged Mr. Tuia with attempting to elude a police officer. CP 8-9.

When the police arrested Mr. Tuia, they found money in the car but no firearm. RP 450, 368. A gun was never found. RP 453.

Before the trial started, Mr. Tuia asked that no opinion testimony be allowed, except by qualified experts. RP 101. The prosecution stated it did not intend to elicit opinion testimony regarding Mr. Tuia's guilt. *Id*. The court granted Mr. Tuia's motion. RP 102.

The court also discussed how an alternate juror would be picked. RP 73-74. The court agreed with Mr. Tuia that the last person picked would be the alternate juror. RP 125-16.

The parties talked about the time it would take to try Mr. Tuia's case. RP 70. It was agreed that the trial would need to end by September 19, 2019. *Id*.

By September 16, 2019, all of the evidence had been presented to the jury. RP 496. The court instructed the jury. RP 517. The prosecution gave its closing argument. RP 532. The court then adjourned for the day. RP 542.

The next morning, juror number one was late. RP 546. The court was able to talk with him, and he told the court he had overslept. *Id*. He could arrive for court in an hour. RP 547. There was no indication juror number one had otherwise been late, inattentive, or desired to discontinue his service.

The court was a day and a half ahead of schedule when it decided to discharge the juror. The court disqualified juror number one from service because it did not want to delay the trial by an hour. RP 549. Over objection, the court replaced juror number one with the alternative juror. *Id*.

While the jury was deliberating, they asked the court whether they should consider the improperly admitted testimony. CP 38.

The jurors asked:

> We are assuming that the voices on the videos are part of the evidence. For example, one of the 911 operators refers to the call as a "robbery," in other portions of [the] video, traffic speeds are called out. Is this assumption correct or not?

CP 38.

Mr. Tuia asked the court to tell the jury that it should not. RP 580. Instead, the court told the jury to refer to its instructions. RP 583, CP 39.

After deliberations, Mr. Tuia was found guilty. CP 36-37. Before sentencing, he asked for a new trial because of the instructional error and the improper removal of a juror. CP 65. The court denied his motion. RP 596.

E. ARGUMENT

1. Review should be granted to determine whether a trial judge has the authority to dismiss a seated juror for the minor expediency of being one hour late for court.

> Our constitutions separate power into many hands. Among those hands are the hands of the jury. Const. art. I, § 22; U.S. Const. amend. VI. Juries are just as vital a check on government power as the separation of powers between the legislative, executive, and judicial branches. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009).

State v. Pierce, 195 Wn.2d 230, 231, 455 P.3d 647 (2020).

With no indication juror number one was unqualified from continuing to serve, the trial court removed him because he would be an hour late to the last day of trial. RP 549. This error prejudiced Mr. Tuia. This Court should take review of whether the decision to remove juror number one for a minor expediency violates Mr. Tuia's right to a fair trial and requires reversal. Review is warranted because the Court of Appeals decision conflicts with this Court's decisions, involves an issue of state and federal constitutional law, and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

The Court of Appeals holds that an hour's delay is a sufficient basis to remove an otherwise qualified juror. App 6. This holding is contrary to established constitutional law, which holds that the right to a fair trial includes the right to participate in selecting a jury and having the trial heard before those jurors. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884, 246 P.3d 796 (2011); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Jurors have the right to serve when fairly selected and should not be excluded for improper reasons. *Powers v. Ohio*, 499 U.S. 400, 409-10, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Removing juror number one for being an hour late was improper and required reversal.

The Court of Appeals cites RCW 2.36.110 to hold that there are many scenarios for when a juror may be dismissed. App 4. This statute authorizes dismissal only when a juror "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." RCW 2.36.110. Likewise, court rule limits when a juror may be removed to when they are "unable to perform the duties" of a juror. CrR 6.5 (emphasis added). These reasons cannot be construed to allow a court to remove a juror because of a one-time occurrence of delay of one hour.

The Court of Appeals first states that there was no error because Mr. Tuia participated in jury selection. But this process is made meaningless if a juror is excluded for improper grounds. *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017); *see also Pierce*, 195 Wn.2d at 231. To allow a court to remove a juror who has not demonstrated manifest unfitness is to deprive persons accused of crimes of their right to participate in jury selection.

Nor is it enough, as the Court of Appeals holds, that Mr. Tuia participated in selecting the alternative juror, thus creating no error when the selected juror was removed. App 5. This Court holds otherwise. When a juror is improperly dismissed,

> [i]t is no answer to say that the 12 jurors who ultimately comprised [the] jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result.

Irby, 170 Wn.2d at 886-87. The Court of Appeals' reliance on replacing a juror with an alternate conflicts with this Court's holdings and was made in error.

Likewise, the Court of Appeals holds that it should not be concerned with a Black juror's dismissal when three other Black jurors were seated. App 5. Again, when a court removes a juror who can perform their duties, the right to a fair trial is denied. Many actions may be interpreted innocently, which is why rules that remove the need to determine bias better guarantee free and fair courts. *See, e.g., State v. Jefferson*, 192 Wn.2d 225, 230, 429 P.3d 467 (2018) (adopting GR 37 objective observer test). By strictly construing to CrR 6.5 and RCW 2.36.110 to require manifest unfitness, this Court creates a greater likelihood of racial fairness. Allowing jurors to be removed for less than manifest unfitness, like here, allows for fairness to be replaced by bias.

The Court next holds that because the removal of juror number one was not a constitutional violation, the equal protection violation cannot be brought by Mr. Tuia. App 5. To be clear, the removal of juror number one deprived Mr. Tuia of his right to a fair trial in violation of the state and federal constitutions. U.S. Const. amends. VI, XIV; Const. art. I, § 22. "One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." *Powers*, 499 U.S. at 409-10. Courts must be required to uphold the high standard of only removing jurors who have manifested unfitness. It is violative of equal protection to remove a juror for less. *Id*. This Court should grant review to affirm this rule.

The Court of Appeals also rejects this Court's holding in *State v. Van Elsloo*, where this Court reversed the Court of Appeals and held that the erroneous dismissal of a deliberating juror requires reversal and remand, regardless of prejudice, because the dismissal implicates the rights to an

impartial jury and a unanimous verdict. 191 Wn.2d 798, 817, 425 P.3d 807 (2018). Unlike the Court of Appeals here, this Court made clear in *Van Elsloo* that once the jurors have begun to hear testimony and consider evidence, they may no longer be considered fungible. *Id*. at 821.

The Court of Appeals recognizes that juror number one "simply failed to appear." App 6. The only reason for removing the juror was because he was going to be late. *Id*. Even if the jurors' belief that he could get to court within an hour was wrong, it was not wrong by much. He lived in downtown Seattle, close to the courthouse. This is not a sufficient reason to remove a juror.

This Court and the legislature have clear rules for when a juror may be removed. Courts must err on the side of caution by protecting the defendant's constitutional right to ensure jurors are not dismissed for their views of the evidence. *State v. Depaz*, 165 Wn.2d 842, 854, 204 P.3d 217 (2009). RCW 2.36.110 requires the court to find the seated juror is unable to serve as a fair juror. *Id*. These rules must be

read in conjunction to require removing a juror only when they demonstrate a manifest unfitness. *Id*. Where the trial court does not identify a valid reason, this Court will not find that the trial court's error did not substantially sway the judgment, and a new trial will be ordered. *Van Elsloo*, 191 Wn.2d at 823.

This Court should grant review. Seated jurors should not be removed for minor expediencies. Removing a jury for a minor reason denigrates the importance of their rule, reducing their role as a vital check on the government's authority and the courts. *Pierce*, 195 Wn.2d at 231. Review should be granted to correct the Court of Appeals decision, which conflicts with this Court's decisions, involves a state and federal constitutional law question, and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

2. Review should be granted to address the inadequate response to the jury's question during deliberations of how to deal with inadmissible evidence.

The Court of Appeals held that the trial court's decision to instruct the jurors to refer to the instructions given at the end of the trial was a sufficient answer to the question of how they should deal with inadmissible evidence. App 6. This Court should review this issue, as the Court of Appeals decision conflicts with a decision of this Court, involves an issue of state and federal constitutional law, and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

It is "incumbent upon the trial court to issue a corrective instruction" when the deliberating jury indicates an erroneous understanding of the law that applies in a case. *State v. Campbell*, 163 Wn. App. 394, 402, 260 P.3d 235 (2011). When the jury asked the court during deliberations whether it could consider improperly admitted evidence, Mr. Tuia requested the court to tell the jury it could not. RP 580. Instead, the court told the jury to refer to its instructions. CP

38-39. The court's supplementary instruction failed to apprise the jury of its duty properly and deprived Mr. Tuia of a fair trial.

Opinion testimony that embraces an ultimate issue that is otherwise inadmissible should be excluded. *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213 (2014) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). When opinion evidence invades the independent determination of the facts by the jury, it violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); U.S. Const. amend. XIV, Const. art. I, § 22. When this occurs, a reversal of the conviction is required. *Quaale*, 182 Wn.2d at 194.

The Court of Appeals determined it could disregard this Court's decision in *Quaale* because portions of the 911 call were admissible under ER 711. App 7. No one ever argued that most of the 911 call was admissible. Moreover, this analysis looks past the purpose of the question, which was to seek guidance with how to use the opinion testimony of how

to deal with the characterization of this incident as a "robbery," which was precisely what the trial court sought to limit with its instruction during the trial. RP 355.

It was clear from the jurors' question the instruction was not sufficient to correct the error of the improperly admitted evidence. Providing the requested instruction during deliberations would have fixed this error. Instead, the court's response failed to clarify the law or correct the jury's misimpression of its ability to use the evidence it had been told to disregard. *Campbell*, 163 Wn. App. at 402. The court's response impliedly endorsed the jury's interpretation of the evidence and its use of that evidence for improper purposes.

This error was critical to Mr. Tuia's case, as his defense rested on the witnesses' perceptions. RP 554, 556-58. Mr. Boyd, the 911 caller, was a critical witness because he was detached from the crime and law enforcement, making his credibility unimpeachable. RP 556-58. Mr. Boyd did not see what happened but suspected a robbery had taken place. RP

319. His opinion that Mr. Tuia had committed the robbery went beyond what he saw and cemented Mr. Tuia's guilt.

In accordance with this Court's opinions, the Court of Appeals should have corrected this error, which deprived Mr. Tuia of his right to a fair trial. This Court should take review, as the Court of Appeals decision is in conflict with this Court's decision, involves a state and federal constitutional law question, and is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

F. CONCLUSION

Based on the preceding, Mr. Tuia respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 9th day of December 2020.

Respectfully submitted,

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APPENDIX

Table of Contents

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL TUIA, Appellant, v. STATE OF WASHINGTON, Respondent.	)	No. 80564-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Michael Tuia appeals his conviction for robbery in the first degree and attempting to elude a pursuing police vehicle. He argues that the trial court's dismissal of a juror, as well as its response to a jury question, deprived him of a fair trial. Because the trial court did not abuse its discretion in either respect, we affirm.

I.

On the morning of April 22, 2018, Candice Gruender was working as a barista at Beankini Espresso in Auburn, Washington. Tuia pulled into the drive through and ordered a coffee from Gruender. Once handed his beverage, Tuia spilled it and asked for a replacement lid. When Gruender turned back to hand Tuia his lid, he pointed a gun at her and demanded all of the cash in the till.

Patrick Boyd was in the vehicle behind Tuia during this exchange. After seeing Gruender hand Tuia rolls of cash, he called 911 and followed Tuia. Boyd followed Tuia while giving directions to the 911 operator. Boyd followed Tuia until the police arrived. The police ultimately disabled Tuia's vehicle and arrested him.

The State charged Tuia with robbery in the first degree and attempting to elude a pursuing police vehicle.

On the final morning of Tuia's trial, juror 1 failed to appear. When the bailiff called him, juror 1 said he was still in bed in downtown Seattle, but could get to the Kent courthouse in an hour. Because traffic that morning was bad, and juror 1 had not left his house, the trial court did not have confidence in this estimate. It noted that the 12 jurors, staff, interpreters, attorneys, and others, were all waiting on this one juror. Defense counsel requested that the trial court wait for juror 1. While defense counsel agreed that they had a fairly diverse jury, juror 1 was black and the alternate was not a person of color.

The trial court excused juror 1 and continued the trial with the alternate juror.

During Tuia's trial, the State moved to introduce Boyd's 911 call under the present sense impression and excited utterance hearsay exceptions. Tuia objected to a lack of foundation, which the court overruled. The court admitted the call, during which the 911 operator asked Boyd what he was reporting. Boyd stated: "yeah, I just saw a guy robbing an espresso stand."

During a recess after the jury heard the 911 call, Tuia again objected, asserting that the call was hearsay and self-serving. The trial court agreed that a limiting instruction might be appropriate under ER 403 because of the potentially prejudicial

impact of Boyd explaining he had seen a robbery. Tuia proposed the following limiting instruction, requesting that the jury disregard the portion of the call where Boyd explained he had seen a robbery:

> The jury is instructed to disregard that portion of the 911 call that was made by the witness Patrick Boyd wherein he describes what he knew was going on at the espresso stand when he pulled up behind the old blue Buick and followed that vehicle out of the espresso stand.

The State objected to the instruction, but the trial court allowed it, explaining that it would have likely granted a motion to strike the word "robbery" had one been timely-raised.

During deliberations, the jury submitted a question to the court asking about the evidentiary status of the voices on videos provided to them:

> We are assuming that the voices on the videos are part of the evidence. For example, one of the 911 operators refers to the call as a "robbery," in other portions of [the] video, traffic speeds are called out. Is this assumption correct or not?

Tuia wanted the court to answer "no." Tuia stated that "a reference to a robbery by a 911 operator should not in any way, shape or form become part of this case or the evidence in this case." The trial court instead answered: "please refer to your jury instructions."

The jury convicted Tuia as charged. After an unsuccessful motion for a new trial under CrR 7.5, Tuia appeals.

II.

Tuia argues first that the dismissal of juror 1 deprived him of a fair trial. We disagree.

We review a trial court's decision to excuse a juror for an abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (excusing a juror for inattentiveness); State v. Jorden, 103 Wn. App. 221, 224-30, 11 P. 3d 866 (2000) (excusing a juror for inattentiveness despite a defense objection); State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993) (upholding a court's discretion in determining when a juror is unable to attend trial). We determine a trial court has abused its discretion only when we are satisfied that "no reasonable person would take the view adopted by the trial court." State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

RCW 2.36.110 governs when a judge may excuse a juror:

> 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.

The statute explicitly states that it is the judge's opinion which determines the juror's fitness.

Tuia makes a number of arguments in support of his claim. First, he asserts that CrR 6.5 limits the trial court's dismissal of a juror to situations where he or she is unable to perform their duties.[1] This assertion is inaccurate. CrR 6.5 dictates a scenario wherein a court is required to dismiss a juror, but the rule does not limit other scenarios where the court may use its discretion to dismiss a juror under RCW 2.36.110.

[1] CrR 6.5 provides, in relevant part: "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the jurors place on the jury."

Second, Tuia claims that dismissal of juror 1 denied him the right to participate in jury selection. Tuia fully participated in jury selection, including the alternate that took juror 1's place.

Third, Tuia relies on Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 69 (1986), to assert an equal protection claim. Despite the dismissal of juror 1, there were three black jurors, and persons of color made up the majority of the jury; there is no suggestion that the court violated Tuia's right to equal protection.

Fourth, Tuia relies on Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), to assert that juror 1 had a right to serve on his case. Tuia does not have standing to assert this claim. Powers, 499 U.S. at 408 (holding that a defendant does not have standing to rest a claim on a juror's right absent a constitutional violation).

Fifth, Tuia relies on State v. Sassen Van Elsloo, 191 Wn.2d 798, 425 P.2d 807 (2018), for the premise that improper dismissal of a juror requires reversal regardless of prejudice or whether jurors have begun deliberating. This reliance is misplaced. Sassen Van Elsloo instead states that if there is a reasonable possibility a court dismissed an impaneled juror because of his or her views on the merits of the case, reversal is required, but an erroneous dismissal on other grounds undergoes a harmless error analysis. Sassen Van Elsloo, 191 Wn.2d at 802. Here, the trial court dismissed juror 1 for his failure to appear on time, not for his view of the case.

Finally, Tuia relies on Hough v. Stockbridge, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009), for the premise that in order for a court to dismiss a juror, the record must show the juror is biased or prejudiced. This reliance is also misplaced. The Hough

court was asked to decide whether the trial court abused its discretion in refusing to dismiss a juror for actual bias after the juror suggested that the plaintiff should undergo a mental health evaluation. Hough, 152 Wn. App. at 340. This court affirmed the trial court's finding that the juror's comment did not demonstrate actual bias because the juror did not indicate an inability to be fair or impartial. Hough, 152 Wn. App. at 340. The court looked for evidence of bias or prejudice, not because it concluded such evidence was required in all cases, but because that was the claim Hough raised on appeal.

Here, the State did not allege and the trial court did not find that juror 1 held an actual bias. He simply failed to appear. The trial court had the bailiff call juror 1, who was still in bed in downtown Seattle. It determined that the juror's estimation of when he could arrive did not seem realistic. Further, every other participant in the trial was present. So as not to delay the trial, the court determined the alternate juror should stand in. This was not an abuse of discretion.

III.

Tuia next contends that the trial court's response to the jury's question regarding the 911 calls deprived him of a fair trial. We disagree.

We review a trial court's decision to give further instructions for an abuse of discretion. State v. Sublett, 176 Wn.2d 58, 82, 292 P.3d 715 (2012). Once a jury begins deliberations, it is within the discretion of the trial court to give further instructions. State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Here, the jury submitted a question asking if the voices on the videos were part of the evidence including use of the term robbery and traffic speeds. The court responded by referring

the jury to its instructions. The trial court's response instructing the jury to refer to the instructions was not an abuse of discretion.

Tuia relies on State v. Quaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014), for the proposition that opinion testimony embracing an issue that is otherwise inadmissible, should be excluded. Tuia's argument is misplaced, however, because here the court determined during its pretrial ruling that the 911 call was admissible under ER 701. The only portion of the call the trial court determined should not have been admitted was Boyd's use of the term "robbery." The trial court gave the limiting instruction requested by Tuia, instructing the jury to disregard the portion of the call where Boyd described what was going on.

The remainder of Boyd's call was within the purview of the jury to make a credibility determination. The trial court referred the jury to its instructions, instructions that contained both a note to disregard the portion of Boyd's 911 call describing what he saw, as well as instructions on weighing the evidence. For these reasons, the trial court did not abuse its discretion.

Affirmed.

Mann, C.J.

WE CONCUR:

Andrus, A.C.J.

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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