SUPREME COURT NO. 101999-8

NO. 83057-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ALEXANDER-SCHMIDT,

Petitioner.

---

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

The Honorable Catherine Shaffer, Judge

---

# PETITION FOR REVIEW

---

DANA M. NELSON
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

WASHINGTON CASES

## TABLE OF AUTHORITIES (CONT'D)

Page

## TABLE OF AUTHORITIES (CONT'D)

Page



RULES, STATUTES AND OTHER AUTHORITIES

## A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Timothy Alexander-Schmidt ("Alexander") seeks review of the Court of Appeals' unpublished decision in State v. Alexander-Schmidt, attached as an Appendix.

## B. ISSUES PRESENTED FOR REVIEW

Prospective juror 47 expressed an opinion against the presumption of innocence based on the filing of charges and her belief the defense must disprove the state's case. After informing the jury about the presumption of innocence, the court inquired what juror 47's verdict would be, in light of the presumption of innocence, if the state presented no evidence. Juror 47 eventually answered "not guilty."

Later during subsequent discussions, Juror 47 expressed a concern that due to her work as a paralegal, she knew that the defendant had to have done something wrong in the first place to have a no contact order entered against him (which he was charged with violating). The court simply assured the juror the state would have to prove the existence of the order.

Neither the parties nor the court asked whether Juror 47 could put her preconceived notions aside. Alexander's counsel did not exercise a peremptory challenge against No. 47 and accepted the panel.

1. Following this Court's decision State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022), should Alexander's convictions be reversed based on manifest constitutional error?

2. Relatedly, did Alexander's attorney provide ineffective assistance by allowing a biased juror to serve?

## C. STATEMENT OF THE CASE

A jury convicted Alexander of felony violation of a court order (FVNCO), based on two priors, and fourth degree assault allegedly committed against Sonja Michelle Leonard on August 7, 2020. CP 1-8, 62-63, 96. Leonard did not testify. RP 198.

On appeal, Alexander-Schmidt argued his state and federal constitutional rights to a fair and impartial jury were violated when the court allowed juror 47 to serve, despite her demonstration of actual bias. Amended Brief of Appellant

(ABOA) at 1, 5-22. Alexander argued the court's failure to remove the biased juror constituted manifest constitutional error. ABOA at 8-10.

During voir dire, juror 47 indicated she is a paralegal with 30 years of experience. RP 548-49.

During one of her rounds, defense counsel (Sarra Marie) inquired what the panel thought about the beyond-a-reasonable-doubt standard and Juror 47 responded:

> MS. MARIE: I'm seeing -- I'm seeing no responses. How about Juror 47. I'll come back to you, why no response to that or why doesn't that bother you [the state's burden of beyond a reasonable doubt]?
>
> THE JUROR: Well, just generally speaking I feel that -- and I don't know that this will answer your question but it's just a general thought -- the prosecutor wouldn't have brought -- brought this to this point, to trial, unless he thought he had enough evidence to prove his case. And on the other hand, you apparently feel that you have enough evidence to defend this case or it wouldn't have gotten to this point. So, like, that probably doesn't answer your question but just a general thought.

RP 605-06.

Defense counsel tried to follow up on what Juror 47 and another juror touched on, "which is this idea people sometimes come in that we wouldn't be here is something hadn't happened and if there wasn't enough to go forward with case either on both sides." RP 606.

Juror 53 interjected: "I mean, to even file charges there has to have been – something has to have happened[.]" RP 607.

At this point, the court attempted to dissuade Juror 53 from speculating as to why or how charges originate:

> THE COURT: . . .
>
> Or it might be that someone who's in a position to file a charge, okay, decided, I want to teach somebody I don't like a lesson and they filed a charge even though there wasn't enough evidence to prove it? Okay. That can happen, that people abuse their power and bring charges that aren't founded.
>
> Or it could be that it looked like something happened but when everybody looked at it more closely it became clear nothing happened, it was just a big misunderstanding, okay, and charges never should have been brought.

In other words there, are lots of reasons why charges get brought that don't have to do with any merit to them.

And then when a person pleads not guilty we throw all that out and we just look again and we say, Okay, let's presume they didn't do it, okay? And let's hold the State to this high burden of proof and see if they can overcome that presumption of innocence with proof beyond a reasonable doubt so we can make sure we're not making any mistakes here.

Are you with me, 53? I'm not saying that, you know –

THE JUROR: Yes. Yeah, no, I -- I totally understand –

THE COURT: Okay.

THE JUROR: -- that aspect of it. I guess my point is that -- I don't know. I guess there needs to be –

THE COURT: Presumably the State thinks that they can prove their case as the Juror -- Juror No. 47 –

THE JUROR: Yeah.

. . .

THE JUROR: Yes. There has to be evidence on both sides –

THE COURT: -- we will figure it out. No.

THE JUROR: -- or we wouldn't be – like --

THE COURT: No. No, no. There only has –

THE JUROR: No.

THE COURT: -- to be proof beyond a reasonable doubt or not.

THE JUROR: Sorry.

THE COURT: Okay?

THE JUROR: Yes.

THE COURT: Burden's on the State. But the defense may be looking at this case saying, They can never prove this, okay? So you just don't know –

THE JUROR: That makes sense.

THE COURT: -- until you're a juror and you've heard everything and you can assess it all.

Can you wait? Can you apply the presumption of innocence? What do you think, 53?

THE JUROR: I -- I think I can. I think -- I think that -- I think the one thing that I'm struggling with is getting between, like, facts and emotion.

RP 607-610.

Although the court made efforts to educate Juror 53 on the presumption of innocence, Juror 53 ultimately did not sit. RP 621. Neither the court nor defense counsel included juror 47 in this colloquy or asked if she could apply the presumption of innocence, as it did with Juror 53. RP 607-10.

Once questioning was broadened back to the entire panel, defense counsel continued:

> MS. MARIE: Okay. So anyone who at this point would say, Okay, at this point he's guilty, that's all I know?
>
> THE COURT: Okay. So here's the -- the scenario, just to make it more clear, okay? The State doesn't present any evidence at all, okay? You're instructed on the presumption of innocence and the State's burden and then the State doesn't present anything, okay? That's the scenario.
>
> MS. MARIE: Guilties? All right. Who -- if, again, exact same scenario, gone back having been given no evidence, who would vote not guilty at that point?
>
> THE COURT: Most of the jurors.
>
> MS. MARIE: So I'm seeing about half. And then I told you I'd give you three options, would the

rest of you all say I can't come to a decision at this point?

THE COURT: I see three jurors that wouldn't be able to come to a decision, 61 –

MS. MARIE: Okay.

THE COURT: -- 65, and 47. So I'm going to visit with the three of you again, okay? Juror 47, go ahead and unmute for a minute. So if the defendant is presumed to be innocent and the State presents no evidence, what does your verdict have to be?

THE JUROR: I'm sorry, can you repeat that?

THE COURT: Yeah. If the defendant is presumed to be innocent of the charge and the State gives you no evidence at all, what does your verdict have to be?

THE JUROR: Not guilty.

THE COURT: Okay. And how about you, 61, what do you think your verdict has to be?

RP 610-11.

Although Juror 47 ultimately agreed the answer was "not guilty," Alexander argued on appeal that this two-word affirmative response did not sufficiently rehabilitate her from her prior statement that the prosecutor must believe he could prove

the state's case in order to bring charges or that it was up to the defense to disprove the state's case. ABOA at 17-18 (citing State v. Fire, 100 Wn. App. 722, 729, 998 P.2d 362, 365 (2000) ("We find nothing in the potential juror's one-word affirmative responses to the series of rehabilitative questions that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror"), rev'd on other grounds, 145 Wash. 2d 152, 34 P.3d 1218 (2001) (error corrected when defense counsel exercised peremptory challenge to remove biased juror).

But as Alexander pointed out, Juror 47 made other comments indicative of partiality or knowledge about the case. These comments were made when the court thereafter spoke to several jurors individually, including Juror 47. RP 616. After explaining how busy her law firm was, Juror 47 explained:

> THE JUROR: I do -- I do have one other concern that –
>
> THE COURT: Sure.

THE JUROR: -- I may have -- should have brought up in the -- in the main session, but my concern is if one of the charges is that the defendant violated the terms of a previous, you know, that's kind of in the back of my head, there –

THE COURT: I -- I –

THE JUROR: -- might –

THE COURT: -- we're not going to get any kind of criminal charge where you're going to be okay with the alleged behavior.

THE JUROR: Right. Right.

THE COURT: It's just never going to happen, okay?

THE JUROR: Right.

THE COURT: Now, I understand as a paralegal it might particularly offend you to think about somebody being charged with violation of a court order, but it's just a charge. We'll have to see if the State –

THE JUROR: Right.

THE COURT: -- can prove this one up, okay?

THE JUROR: But I guess what I'm saying is that there must have been something prior that happened for that order to be in place.

THE COURT: Allegedly there was an order in place, we don't know. The State's going to have to prove that.

THE JUROR: Okay. Prove that. Got it.

THE COURT: Okay. Allegedly it was violated; the State's going to have to prove that. Allegedly, you know, this and that.

THE JUROR: Yeah.

THE COURT: It's all on the State to prove it.

THE JUROR: Yeah, got it. Got it. Got it.

THE COURT: All right. We're going to let you go.

THE JUROR: Okay.

RP 619-20.

Alexander argued on appeal that during this exchange, Juror 47 revealed specialized knowledge about the case that Alexander must have done something to have the order entered against him in the first place. She was never asked if she could set aside this knowledge. In short, Juror 47 demonstrated actual bias and was not rehabilitated. ABOA, at 20-21 (citing State v.

Gonzalez, 214 F.3d 1109 (9th Cir. 2000) (juror not rehabilitated where she never stated affirmatively she put aside her personal experiences or that she could be fair or impartial).

Following peremptory challenges, Juror 47 was seated as juror 13. RP 217, 631, 642-43. Jurors 3 and 5 were chosen as the alternates before deliberations. RP 1032. Accordingly, juror 47 deliberated on Alexander's jury.

Division One affirmed. Appendix. The court held it was precluded from considering Alexander's claim juror 47 exhibited bias on grounds he had at least one unused peremptory challenge available when he accepted the panel with juror 47 seated. Appendix A at 2 (citing State v. Talbott, 200 Wn.2d 731, 747-48, 521 P.3d 948 (2022) ("If a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause."). The court did not address Alexander's argument his challenge to juror 47 constituted manifest

constitutional error that could be raised for the first time on appeal. Appendix.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(3).**

Review is appropriate under RAP 13.4(b)(3) because the case presents an important constitutional issue.

2. **The seating of a biased juror constituted manifest constitutional error.**

This Court should grant review and hold that reversal is required based on manifest constitutional error, which this Court did not address in Talbott.

a. *Talbott* did not address a claim of manifest constitutional error, which Alexander Established.

Talbott explicitly does not address or dispense with a claim of manifest constitutional error. Alexander can establish manifest constitutional error in this case.

This Court will consider an unpreserved error on appeal if it constitutes manifest constitutional error. RAP 2.5(a)(3); see

State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869, review denied, 195 Wn.2d 1025 (2020). A party demonstrates manifest constitutional error by showing that the issue before this Court affects that party's constitutional rights and that they suffered actual prejudice. Id.

As a preliminary matter, Alexander argued manifest constitutional error in his brief. ABOA at 8-10. For unknown reasons, the appellate court failed to address it. Appendix A.

As argued by Alexander, a trial judge has an independent obligation to protect an accused person from a biased juror even in the face of inaction by the defense. ABOA, at 9 (citing State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015)). In Irby, Division One adopted the federal circuit court standard that the defense does not waive the accused's constitutional right to an impartial jury by failing to bring a for-cause challenge. Id.

Applying the decision in Hughes v. United States, 258 F.3d 453 (6th Cir. 2001), the Irby court held the seating of a juror who expressed actual bias is manifest constitutional error,

reviewable for the first time on appeal. Irby, 187 Wn. App. at 192-96. The Irby court emphasized the trial court's "independent obligation" to protect the accused's right to an impartial jury, "regardless of inaction by counsel or the defendant." Id. at 193.

Hughes and Irby are consistent with the well-recognized rule that courts must indulge every reasonable presumption against waiver of a fundamental right. Defense counsel cannot waive the accused's related right to trial by jury "without the fully informed and publicly acknowledged consent of the client." Taylor v. Illinois, 484 U.S. 400, 418 & n.24, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Defense counsel cannot waive a client's constitutional right to an impartial jury by failing to challenge a biased juror *for cause*. Divisions One and Two have applied this rule several times since Irby. State v. Phillips, 6 Wn. App. 2d 651, 666, 431 P.3d 1056 (2018); Guevara Diaz, 11 Wn. App. 2d at 851-54; State v. Lawler, 194 Wn. App. 275, 282, 374 P.3d 278 (2016).

The same reasoning applies with even more force to defense counsel's failure to use a *peremptory* challenge following a timely for-cause challenge. See State v. Ramsey, noted at 21 Wn. App. 2d 1034, 2022 WL 842605, review denied, 199 Wn.2d 1028 (2022) (nonbinding unpublished decision stating that "a defendant who challenges a conviction based on a claim of juror bias established by the record raises an issue of manifest constitutional error that is not waived even where that defendant fails to exercise all his peremptory challenges").

Where counsel objects, but fails to exhaust peremptory challenges, the proper analysis becomes manifest constitutional error.

The Court of Appeals rejected Alexander's claims on appeal solely based on Talbott. Appendix A at 2. In Talbott, this Court held that "if a party 'accepted the jury as ultimately empaneled and did not exercise all of [their] peremptory challenges,' then they do not have the right to appeal 'based on the jury's composition.'" Talbott, 200 Wn. App. at 738 (citing

State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001)). This Court said language in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001), that appeared to give alternate direction, was mere dicta. Talbott, 521 P.3d at 955.

But Talbott explicitly did not address manifest constitutional error and declined to overrule or condemn related cases, including Ramsey. This Court stated:

> [T]here are some opinions that appear to follow Fire, but their underlying reasoning is different. In several cases, the Court of Appeals has reached the merits of an alleged jury-selection error, despite the defendant's failure to exhaust their peremptory challenges, because the defendant "raise[d] an issue of manifest constitutional error." [Ramsey, 2022 WL 842605]; see also [Guevara Diaz, 11 Wn. App. 2d at 853].
>
> These cases do not resolve the tension between Fire and Clark because neither [of those cases] was based on manifest constitutional error. In addition, Talbott conceded at oral argument that manifest constitutional error is not at issue here.

Talbott, 200 Wn.2d at 741-42 (citation omitted). This Court concluded, "We therefore express no opinion on the proper

application of the manifest constitutional error standard in this context." Id. This Court did not rule on manifest constitutional error. This Court should grant review and address Alexander's claim. As Alexander will demonstrate, he prevails on the merits.

b. Alexander prevails on the merits.

"Criminal defendants have a federal and state constitutional right to a fair and impartial jury." Irby, 187 Wn. App. at 192-93 (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)); accord U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22. "[S]eating a biased juror violates this right." Irby, 187 Wn. App. at 193.

Put another way, a trial court must excuse a juror if they demonstrate actual bias. "Actual bias" means their state of mind is such that they "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "If the court has only a 'statement of

partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)). The trial court need not excuse a prospective juror who expresses bias, provided that the juror can set that bias aside and decide the case based solely on the court's instructions and evidence presented at trial. Guevara Diaz, 11 Wn. App. 2d at 855-56. Thus, the central question is "'whether a juror with preconceived ideas can set them aside."' Id. at 856 (quoting State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). As the federal Supreme Court has stated, moreover, a juror is impartial "only if [they] can lay aside [their] opinion and render a verdict based on the evidence presented in court." Patton v. Yount, 467 U.S. 1026, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Notably, when it comes to assuring rehabilitation of prospective jurors who have expressed bias, silence and even answers during *group* voir dire "'cannot substitute for individual questioning."' Guevara Diaz, 11 Wn. App. 2d at 859 (quoting

Irby, 187 Wn. App. at 196). Indeed, doubts about bias must be resolved against allowing the juror to serve. State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); accord Guevara Diaz, 11 Wn. App. 2d at 855; United States v. Kechedzian, 902 F.3d 1023, 1027 (9th Cir. 2018).

In addition, the presence of a biased juror cannot be harmless. Rather, the error requires a new trial without a showing of actual prejudice. Irby, 187 Wn. App. at 193; United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (quoting Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998)).

Prospective juror 47 expressed bias and never unequivocally stated she could set preconceived notions aside and be fair. ABOA at 18-20. Juror 47 revealed specialized knowledge about the case (presumably from her work in the legal industry), i.e. that Alexander must have done something to have the order entered against him in the first place. Juror 47 expressed concern it might affect her impartiality. The court did nothing to assuage juror 47 of this fear or ask if she could set it

aside. In fact, the court seemingly approved of it when the court recognized juror 47 – as a paralegal – might be particularly offended by the nature of the charge. In short, juror 47 demonstrated actual bias and was not rehabilitated. See e.g. State v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000) (juror not rehabilitated where she never stated affirmatively she could put aside her personal experiences or that she could be fair or impartial).

Here, the court never inquired whether juror 47 could put aside her knowledge that something must have happened in order for the no contact order to exist in the first place, or that the prosecutor would not have brought charges if he did not believe heh could prove them.

The court merely informed juror 47 that the state would have to prove the violations. The court never elicited an asurange from juror 47 she could set her preconceived notions aside when evaluating the evidence. The failure put Alexander on an uneven playing field with the prosecution and violated his right to the presumption of innocence and a fair and impartial jury. There is

no ambiguity. Juror 47 demonstrated actual bias requiring reversal. Irby, 187 Wn. App. at192-93.

3. **Defense counsel's acquiescence to the seating of a biased juror also deprived Alexander of the effective assistance of counsel.**

In Talbott, this Court recognized "there are good reasons to require parties to use their available peremptory challenges to cure jury-selection errors," including "promot[ing] a defendant's right to receive a fair trial in the first instance." 200 Wn. App. at 746. "This helps to ensure that peremptory challenges are used to 'promote, rather than inhibit, the exercise of fundamental constitutional rights.'" Id. (quoting State v. Lupastean, 200 Wn.2d 26, 52, 513 P.3d 781 (2022)). Alternatively, then, Alexander's counsel was constitutionally ineffective for failing to use a peremptory challenge to remove prospective juror 47 and "affirmatively accept[ing] the jury panel as presented," thereby allowing prospective juror 47 to deliberate on Alexander's guilt. Id. at 957.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Under Strickland, [to prevail on such a claim] the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Estes, 188 Wn.2d at 458 (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the evidence

standard; "it is a probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458.

It could never be considered reasonable for defense counsel to waive a client's right to trial by a fair and impartial jury. As the Hughes court put it, "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." 258 F.3d at 463 (citing United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' [Taylor v. Illinois, 484 U.S. at 418 & n.24], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury . . . . We find no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Hughes, 258 F.3d at 463.

The Hughes decision makes plain that, regardless of what decisional law indicated at the time of Alexander's trial, there can be no legitimate strategy in failing to protect a client's right to a fair trial *in the first instance* by allowing a biased juror to remain. In short, counsel cannot strategically waive a client's right to an impartial jury. Defense counsel's performance was objectively deficient in allowing prospective juror 47 to serve without exercising a peremptory challenge. The first prong of Strickland is satisfied.

The prejudice prong is also satisfied, considering the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. Irby, 187 Wn. App. at 193; Hughes, 258 F.3d at 463. "[G]iven that a biased juror was impaneled in this case, prejudice under Strickland is presumed, and a new trial is required." Hughes, 258 F.3d at 463. Thus, Strickland's second prong is also satisfied.

For these reasons, even following Talbott, this Court should grant review reverse Alexander's conviction.

## D. CONCLUSION

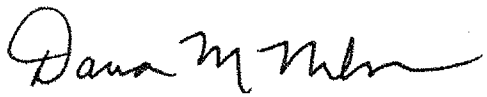
This Court should accept review under RAP 13.4(b)(3) and reverse Alexander-Schmidt's conviction.

**I certify this document was prepared in 14-point font and contains 4,856 words excluding those portions exempt under RAP 18.17.**

DATED this 5th day of May, 2023.

Respectfully submitted,

NIELSEN KOCH GRANNIS, PLLC



DANA M. NELSON
WSBA No. 28239
Office ID No. 91051
Attorneys for Petitioner

# APPENDIX

FILED
4/10/2023
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| THE STATE OF WASHINGTON,<br>Respondent,<br>v.<br>TIMOTHY R. ALEXANDER-SCHMIDT,<br>Appellant. | No. 83057-1-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

BIRK, J. — Timothy Alexander-Schmidt was convicted of felony violation of a no-contact order (VNCO). He appeals, arguing (1) the superior court should have sua sponte removed a juror because the juror demonstrated bias during jury selection, (2) guilty pleas for two predicate convictions of misdemeanor violation of a no contact order were not voluntary and therefore unconstitutional, and (3) two additional claims in a statement of additional grounds. We affirm.

I

Alexander-Schmidt asserts that during jury selection juror 47 demonstrated bias which required the superior court to sua sponte excuse the juror. Alexander-Schmidt did not challenge the juror for cause. Alexander-Schmidt exercised five peremptory challenges, for jurors 16, 27, 29, 41, and 43. The superior court reviewed the composition of the jury, stating "13 will be 47." Alexander-Schmidt accepted the panel with juror 47 seated. Alexander-Schmidt had not exhausted

his peremptory challenges, using five of the six challenges he had available. This is dispositive.

In State v. Talbott, 200 Wn.2d 731, 747-48, 521 P.3d 948 (2022), the court held, "[I]f a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause." In Talbott, the defendant moved to excuse a juror for cause, and the trial court denied the motion. Id. at 735. When the juror moved into the jury box, Talbott did not use a peremptory challenge to remove the juror, despite having at least one unused peremptory challenge available, and accepted the panel. Id. at 736. The facts here are slightly different from Talbott in that Alexander-Schmidt did not challenge juror 47 for cause. However, Talbott applies to these facts because Alexander-Schmidt had at least one unused peremptory challenge available when he accepted the panel with juror 47 seated. We are therefore precluded from reaching his claim that juror 47 exhibited bias calling for the juror's dismissal.

II

VNCO is a misdemeanor crime that is elevated to a felony under certain circumstances, including when the defendant has two or more prior convictions for the same crime.[1] Former RCW 26.50.110(4)-(5) (2019). Evidence was admitted

[1] This opinion refers to former RCW 26.50.025 (2019), *repealed by* LAWS OF 2021, ch. 215, § 170(97). Chapter 7.105 RCW now governs civil protection orders. RCW 7.105.550(2) provides,

> "Nothing in chapter 215, Laws of 2021 affects the validity of protection orders issued prior to July 1, 2022, under . . . former chapter[] 26.50 RCW. Protection orders entered prior to July 1, 2022, under . . . former chapter[] 26.50 RCW are subject to the

showing Alexander-Schmidt was convicted of two separate misdemeanor VNCO charges in 2015. The complaint in exhibit 20 showed that Alexander-Schmidt pleaded guilty to VNCO in the Evergreen Division of Snohomish County District Court under cause no. 5316A-14D. The statement of defendant on plea of guilty included "having prohibited contact with [redacted]." Exhibit 21 showed that Alexander-Schmidt pleaded guilty in the Evergreen Division of Snohomish County District Court under cause no. 4596A-14D to violating the same no contact order. The elements of the offense are listed in the same manner as in Exhibit 20.

For the first time on appeal, Alexander-Schmidt challenges the constitutional validity of his two predicate convictions for misdemeanor VNCO. Alexander-Schmidt argues his guilty pleas were not knowing, voluntary, and intelligent because the complaints and statements of the defendant for both convictions do not contain the "willfulness" element of violation of a no contact order.

Alexander-Schmidt cannot raise this claim for the first time on appeal. State v. Smith, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985). The court stated in Smith:

> Allowing a defendant to raise the voluntariness issue at any time would tempt a defendant to delay his challenge to await the result of the . . . proceeding. If he lost, he could raise the issue initially on appeal and gain remand if the State had failed to incorporate voluntariness into its original case. The practical result would be that the State always would have to establish voluntariness, regardless of whether the defendant raised the issue.

---

provisions of chapter 215, Laws of 2021 and are fully enforceable under the applicable provisions of RCW 7.105.450 through 7.105.470."

Id. at 506-07. Alexander-Schmidt could have raised the asserted constitutional issue during the plea hearings, on direct appeal, at trial for the present case, or in a motion for a new trial. Id. at 507. "Considering the conceptual basis of the issue and the numerous opportunities for contesting the guilty plea's validity, the challenge cannot be raised initially on appeal." Id. Smith arose in the context of a defendant's seeking to dispute the voluntariness of prior pleas while being sentenced under the former habitual offender statute. Id. at 500.

In State v. Robinson, 8 Wn. App. 2d 629, 631, 439 P.3d 710 (2019), another felony VNCO case, the court held the State failed to prove two prior convictions when both prior convictions were based on one factual occurrence. In that case, the court held the second of the prior convictions violated double jeopardy, rendering the State's evidence insufficient, id. at 639, and further held the prior guilty plea did not foreclose a later attack "go[ing] to 'the very power of the State to bring the defendant into court,'" id. at 639 (quoting State v. Knight, 162 Wn.2d 806, 811-12, 174 P.3d 1167 (2008)). But Robinson began from the premise that in challenging a predicate conviction, " 'the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. *Only after* the defendant has made this initial showing does the State's burden arise.' " Id. at 635 (emphasis added) (quoting State v. Summers, 120 Wn.2d 801, 812, 846 P.2d 490 (1993)).

In State v. Webb, the defendant challenged the constitutionality of two prior convictions in the context of sentencing under the persistent offender statute. 183

Wn. App. 242, 245, 333 P.3d 470 (2014). The defendant argued at trial that one of his prior convictions was facially constitutionally invalid because the plea listed a statute that had been repealed. Id. at 246, 251. This court held the conviction was facially constitutionally invalid because the State charged and the court sentenced the defendant for a crime that did not exist when the alleged events occurred. Id. at 251. The repealed statute also undermined the constitutional voluntariness of the defendant's plea, because the defendant did not have notice of the charges against him. Id. Because Webb and Robinson involved challenges to prior convictions first raised in the trial court, they do not support Alexander-Schmidt challenging voluntariness of predicate convictions for the first time on appeal.

Because Alexander-Schmidt is not entitled to challenge the voluntariness of the predicate convictions for the first time on appeal, we do not reach the merits of this argument.

III

In a statement of additional grounds Alexander-Schmidt argues (1) "if I did not testif[y]" then the State could not rely on past convictions, and (2) "twice during trial" the prosecutor and the defense attorney were "taken to the Judge's chambers" because of the prosecutor bringing up matter which had been excluded, but the statement of additional grounds does not describe the nature of any matter that was allegedly mentioned but should not have been. Alexander-Schmidt provides no basis for concluding that any error of law occurred with regard to the

admission of his prior convictions, any matter allegedly occurring in the judge's chambers, or the mention of any matter that had been excluded.

Affirmed.

Birk, J.

WE CONCUR:

Brunner, J

Hazelrigg, ACJ

**NIELSEN KOCH & GRANNIS P.L.L.C.**

**May 05, 2023 - 12:49 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 83057-1 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Timothy Alexander-Schmidt, Appellant |

**The following documents have been uploaded:**

- 830571_Petition_for_Review_20230505124841D1668314_4689.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was PFR 83057-1-I.pdf*

**A copy of the uploaded files will be sent to:**

- paoappellateunitmail@kingcounty.gov
- stephanie.guthrie@kingcounty.gov

**Comments:**

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
**Filing on Behalf of:** Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email: )

Address:
2200 Sixth Ave. STE 1250
Seattle, WA, 98121
Phone: (206) 623-2373

**Note: The Filing Id is 20230505124841D1668314**