No. 93839-3
COA No. 48127-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRUCE TOWNSEND,

Petitioner.

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

The Honorable Jerry Costello

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bruce Townsend asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Bruce Townsend*, No. 48127-8-II (October 11, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a constitutionally protected right to be tried by an unbiased jury. A trial court commits reversible error when it fails to dismiss a juror who shows actual bias. During *voir dire*, Mr. Townsend established that Juror 1 was actually biased and moved to challenge Juror 1 for cause, which the trial court denied. Is a significant question of law under the United States and Washington Constitutions involved where Juror 1 was a member of the jury that convicted Mr. Townsend which denied his right to an unbiased jury?

2. A witness may not comment or opine about the credibility of another witness. Such improper vouching violates the defendant's right

to a fair trial and right to a jury trial. Here, the investigating detective stated his opinion regarding the truthfulness of S.G., thus bolstering the credibility of the witness. Is a significant question of law under the United States and Washington Constitutions involved where the deputy's unsolicited opinion constituted improper vouching, thus violating Mr. Townsend's right to a fair trial and right to a jury trial?

D. STATEMENT OF THE CASE

1. Juror 1's actual bias.

Bruce Townsend was charged with third degree child rape and giving marijuana to his girlfriend's teenage daughter, S.G. CP 4-5. Prior to jury *voir dire*, the trial court issued a juror questionnaire to be completed by the potential jurors and used by the attorneys during jury selection. Based upon the answers in the juror questionnaires, the court and the attorneys selected several prospective jurors for individual *voir dire* questioning prior to general *voir dire*.

One of the prospective jurors who participated in the individual questioning was Juror 1. Juror 1 stated that she had two cousins and a friend who were sexually assaulted when they were children. 7/8/2015RP 65. When asked in the questionnaire whether she could be fair and impartial, Juror 1wrote: "I'm not sure. They were lifelong --

there were lifelong effects from their assaults, but I wasn't involved directly much with their lives and the events. They are all adults now." 7/8/2015RP 76. Juror 1 was also asked whether there was any reason she could not be a fair juror in a criminal case, to which she answered: "Not sure. Might depend on the case." 7/8/2015RP 76.

Juror 1 said she did not know the details involving her cousins, but related that her friend had stated she had been sexually abused by her father and a family member. 7/8/2015RP 65-67. Juror 1 repeatedly expressed her doubts about whether she could be fair and impartial:

> [Defense Counsel]: [A]m I correct in saying you feel hesitancy in whether or not you can be a fair and an impartial juror meaning basing your decision absolutely only on the evidence that you hear in the case, not based on any residual feelings or thoughts that you may have regarding people that you know who have also been molested. Is that a fair statement? Am I correctly stating or articulating how you are feeling at this time?
>
> PROSPECTIVE JUROR NO. 1: Yeah, I would say so.
>
> [Defense Counsel]: Do you think that if this was a case involving a theft or another drug charge, you would have no doubts about whether or not you could be fair and impartial; is that right?
>
> PROSPECTIVE JUROR NO. 1: Yes.
>
> [Defense Counsel]: But right now as you sit here, because of the allegation in this case, you have doubts about whether you can be fair or impartial; is that a fair statement?

PROSPECTIVE JUROR NO. 1: Yes, possibly.

[Defense Counsel]: [P]lease correct me if I'm wrong, . . . -- is it fair to say you would rather be on a different case that did not involve any child sexual assault because you know that you could be absolutely fair and impartial on a case of that kind; is that a fair statement?

PROSPECTIVE JUROR NO. 1: Probably, yes.

[Defense Counsel]: My next question, it's very important, what I need to know -- we need to know is if you were selected as a juror and you were sitting and deliberating, do you have concerns that somewhere in the back of your mind you may be thinking about this cousin who's had a very difficult life because of the trauma that she suffered, that somehow that might influence or color your decision? Do you have concerns that may be -- that those thoughts would be in the back of your mind as you are deliberating?

PROSPECTIVE JUROR NO. 1: There's a possibility of that, yeah, it would be there.

7/8/2015RP 69-73.

Mr. Townsend moved to challenge Juror 1 for cause. 7/8/2015RP 76-77. Without addressing Juror 1's stated doubts about fairness and impartiality, the court merely denied the challenge: "In considering the answers in the written questionnaire and the answers here in open court, I am going to deny the motion." 7/8/2015RP 78. Juror 1 ultimately sat on the jury.

2. The lead detective's opinion of guilt.

The allegations against Mr. Townsend were based solely on S.G.'s claims. During the direct testimony of Pierce County Sheriff's Detective Darren Moss, the prosecutor asked about leads the detective failed to follow up on and why:

> Q: Did you ever interview or contact the cousin or the cousin's boyfriend?
>
> A: No.
>
> Q: Why did you not do that?
>
> A: Probably because I didn't have a name.
>
> Q: What is the point of contacting disclosure witnesses in these types of cases?
>
> A: To seek additional information, to look for consistency in the story.
>
> Q: Would it have been helpful for you to have contacted the cousin and the cousin's boyfriend?
>
> A: I can only guess.
>
> Q: Is that kind of information always dispositive?
>
> A: I'm sorry?
>
> Q: Is it always dispositive?
>
> [Defense Counsel]: Objection to the form of the question. Dispositive of what?

> THE COURT: I am going to sustain the objection. Please rephrase it.
>
> [Prosecuting Attorney]: Sure. *How -- what role do those interviews play in your investigation in these types of cases?*
>
> A *In most cases it supports the story of the victim.*

7/20/2015RP 767-68 (emphasis added). The trial court overruled Mr. Townsend's objection to this answer. *Id.*

At the conclusion of the jury trial, Mr. Townsend was found guilty as charged. CP 52-53.

The Court of Appeals ruled the juror did not show actual bias and Mr. Townsend waived his right to challenge the improper opinion of the deputy. Decision at 4-9.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The failure to dismiss Juror 1 for cause denied Mr. Townsend's right to an unbiased jury.**

A fundamental element of a fair trial is the right to an unbiased jury. *City of Cheney v. Grunewald*, 55 Wn.App. 807, 810, 780 P.2d 1332 (1989). "Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury." *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987).

In Washington, jury challenges may be peremptory or for cause. RCW 4.44.130; *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn.App. 747, 751, 812 P.2d 133 (1991). A prospective juror must be excused for cause if the trial court determines that the juror is actually or impliedly biased. RCW 4.44.170; *State v. Gosser*, 33 Wn.App. 428, 433, 656 P.2d 514 (1982). Actual bias must be established by proof. RCW 4.44.180, .190; *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

"Actual bias" is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "Under this definition, the issue of actual bias goes to whether a particular juror's state of mind is such that he or she can try a case impartially and without prejudice to a party." *State v. Jackson*, 75 Wn.App. 537, 542-43, 879 P.2d 307 (1994), *review denied*, 126 Wn.2d 1003 (1995).

The key inquiry for the trial court in deciding whether to excuse a juror for cause is "whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." *Hough v.*

Stockbridge, 152 Wn.App. 328, 341, 216 P.3d 1077 (2009). If a potential juror demonstrates actual bias, the trial court must excuse that juror for cause. *Ottis*, 61 Wn.App. at 754.

Reversal is the remedy for an erroneous for cause-challenge denial. *See e.g., State v. Stackhouse*, 90 Wn.App. 344, 352, 361, 957 P.2d 218 (1998) (case remanded for cause-challenge errors).

Juror 1 honestly revealed her bias and its basis: people she cared about who had been victimized by sexual abuse. When a juror is challenged for cause based upon actual bias, "the question is whether a juror with preconceived ideas can set them aside."*Noltie*, 116 Wn.2d at 839. Juror 1 said she could not be unbiased or fair against Mr. Townsend because the offenses for which he was charged were of the same type as what had traumatized Juror 1's cousin and her close friend.

The Court of Appeals chose to characterize Juror 1's statements as mere "equivocations." Decision at 6. In so doing, the Court distinguished the decision of Division One in *State v. Fire*, 100 Wn.App. 722, 998 P.2d 362 (2000), *rev'd on other grounds*, 145 Wn.2d 152 (2001), which is much closer to the facts of this case then the Court was willing to admit.

In *Fire*, the defendant was charged with child molestation. The judge asked potential jurors if they had any reason for not wanting to sit on the jury. A juror raised his hand and responded:

> The subject matter in this case. You know, if it was, you know, somebody stealing a car or even someone getting murdered, that's, you know, fine with me. But a case in this nature, you know, I consider him a baby raper, and it should just be severely punished.
>
> I'm very opinionated when it comes to this kind of crime. I hold innocent—or children from conception [are] very dear, and they should be protected.

Id. at 724. The prosecutor attempted to rehabilitate the potential juror by asking him whether he would follow the court's instructions despite his strong feelings, and the juror responded affirmatively with one-word responses. *Id.* at 728. The trial court refused to excuse the challenged juror for cause, focusing on the juror's affirmative responses without recognizing that his initial responses demonstrated actual bias. *Id.* The appellate court reversed, finding the juror's initial responses clearly indicated actual bias, requiring the trial court to remove the juror for cause. *Id.*

Here, Juror 1 consistently showed an actual bias, even when the prosecutor tried to rehabilitate her. Critically, Juror 1's preconceived notions against a defendant charged with rape, like Mr. Townsend, was

more than just an abstract bias against the nature of such allegations. Juror 1's bias was based on the personal connection she had with the victims of such crimes and knowledge of the damage their victimization caused. *See* 7/8/2015RP 76 ("There were lifelong effects from their assaults."). The juror should have been excused for cause as she could not set her preconceived ideas aside. *Noltie*, 116 Wn.2d at 839.

This Court should accept review to determine whether the juror expressed an actual bias the trial court erred in failing to grant the for cause challenge.

2. **The improper opinion of Deputy Moss concerning the truthfulness of S.G.'s allegations impermissibly invaded the province of the jury.**

a. *Improper vouching by a police officer violates a defendant's rights to a fair trial and a jury.*

The role of the jury is to be held "inviolate." U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the Constitution, the jury has "the ultimate power to weigh the evidence and determine the facts." *State v. Montgomery*, 163 Wn.2d 577, 589-

90, 183 P.3d 267 (2008), *quoting James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

In addition, an accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 3, 21, 22. Lay witness opinion testimony about the defendant's guilt invades that right. *State v. Johnson*, 152 Wn.App. 924, 934, 219 P.3d 958 (2009); *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *citing State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Carlin*, 40 Wn.App. at 701; *see also Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir., 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's

veracity may also violate the defendant's right to due process), *cert. denied*, 531 U.S. 1148 (2001).

In determining whether such statements are impermissible opinion testimony, courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), *quoting Heatley*, 70 Wn.App. at 579.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery*, 144 Wn.2d at 759; *State v. Farr-Lenzini*, 93 Wn.App. 453, 463, 970 P.2d 313 (1999). This is especially true for police officers because their testimony carries an "aura of reliability." *Demery*, 144 Wn.2d at 765.

b. *The opinion was improper and Mr. Townsend could raise it for the first time on appeal.*

In general, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). But a party can raise an error for the first

time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. *Kirkman*, 159 Wn.2d at 926-27. "If a court determines the claim raises a manifest constitutional error, it may still be subject to the harmless error analysis." *Id.* at 927.

The infringement on the province of the fact-finder suggests an error of constitutional magnitude. *Demery*, 144 Wn.2d at 759. "Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." *Kirkman*, 159 Wn.2d at 936. But, "an explicit or nearly explicit" opinion on a victim's credibility can constitute manifest error. *Id.* at 936 (noting, "[r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow").

"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. *Kirkman*, 159 Wn.2d at 936. Here, Deputy Moss opined that, based upon his law enforcement experience, additional interviews of people the

complainant spoke with after the alleged incident "supported the story of the victim." RP 768. This was an improper opinion that invaded the province of the jury. *Kirkman,* 159 Wn.2d at 928 (police officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability.").

A similar answer by a police officer in *Kirkman*, was deemed an improper opinion. In *Kirkman*, the officer was asked: "Do you remember [the victim's] demeanor or mood when he talked to you about these events that had occurred to him?" *Kirkman,* 159 Wn.2d at 936. The officer responded:

> He seemed very responsive to my questions, he seemed very articulate about the events that happened and their sequence. And I felt he was-seemed to be pretty honest.

Id. The Court ruled that, although unsolicited, this was an "explicit statement by the witness that the witness believed the accusing victim." *Id.*

Deputy Moss's answer to the prosecutor's question here was as egregious. What Deputy Moss testified to – his incomplete investigation – should have helped Mr. Townsend. But, by his claim that collateral contacts generally bolster the complainant's account, the

detective flipped a lack of evidence on its head and told the jury he knew and believed the victim, and that others did as well.

Mr. Townsend was charged with child rape and furnishing marijuana to a minor, which he generally denied. There was no corroborating physical evidence. As a consequence, Deputy Moss's opinion testimony that S.G. was a victim was improper.

As a consequence, contrary to the conclusion of the Court of Appeals, Mr. Townsend could raise the issue for the first time on appeal absent an objection. *Id.* at 938. Further, the testimony of the deputy improperly invaded the province of the jury.

This Court should accept review in order to rule that Mr. Townsend could raise the issue for the first time on appeal and that the deputy offered an improper opinion regarding Mr. Townsend's veracity.

F. CONCLUSION

For the reasons stated, Mr. Townsend asks this Court to accept review and reverse his convictions.

DATED this 9th day of November 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRUCE EARL TOWNSEND, Appellant.	No. 48127-8-II UNPUBLISHED OPINION

WORSWICK, J. — Bruce Earl Townsend appeals his convictions for one count of third degree rape of a child and one count of unlawful delivery of a controlled substance — marijuana—to a person under the age of 18. Townsend argues that his right to a fair trial was violated because the trial court denied his challenge of juror 1 for cause and admitted improper opinion testimony regarding the credibility of the minor victim. Because the trial court did not err when it denied Townsend's challenge of juror 1, and because Townsend failed to preserve the improper opinion issue for appeal, we affirm.

FACTS

In 2013, 15-year-old S.G.[1] spent Fourth of July weekend with her mother, sister, and her mother's boyfriend, Townsend. On the evening of July 3, S.G. and Townsend decided to watch a movie in a tent set up on the front yard of her mother's home. Before starting the movie,

[1] We use initials to identify the minor victim under this court's General Order 2011–1, which states in part, "in all opinions, orders and rulings in sex crime cases, this Court shall use initials or pseudonyms in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case." http://www.courts.wa.gov/appellate_trial_courts.

Townsend and S.G. smoked marijuana that Townsend provided. While the movie was playing, S.G. and Townsend fell asleep. S.G. later awoke to Townsend digitally raping her. The State charged Townsend with one count of third degree rape of a child[2] and one count of unlawful delivery of a controlled substance to a person under the age of 18.[3]

During jury voir dire, the parties inquired about juror 1's answers to a jury questionnaire, which stated that she had two cousins and a friend who were sexually assaulted as children. The following exchange took place:

> [STATE]: And specific to those people that you know were abused, you said that when asked if you could be fair and impartial you said I'm not sure. Have you thought about it more?
> [PROSPECTIVE JUROR 1]: Yeah, a little bit, I guess. Like I said, I was trying to make sure I was honest in saying I wasn't sure. I said I don't know the specific details of that. I think, not knowing that it would be easier to separate it, because I don't know what their details specifically were. I just know how it affected them later in life, so I think I might be able to—be impartially able to look at it, but again, I don't know 100 percent if I could be.
> [STATE]: If you got seated on this jury you—at the end you would be asked to decide it based on the facts that were presented through testimony, through exhibits. You think you would be able to separate these things that have—that you have some vague knowledge of with your cousins and make your decision just based on the evidence and not based on any of that?
> [PROSPECTIVE JUROR 1]: I think so. I served once before and we were able to not—not something with this but in a different case, and we were able to—I was able to make sure that I focused just on what evidence was actually presented . . . I realized the evidence just wasn't there to prove that and so we were able to kind of make sure we separated what there was proof of and what there wasn't.

2 Verbatim Report of Proceedings (VRP) at 67-68.

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[2] RCW 9A.44.079(1).

[3] RCW 69.50.401(1), (2)(a), .406(1).

Defense counsel followed:

> [DEFENSE COUNSEL]: On a case of this nature, which is an allegation of child rape, you, having known, or you knowing people in your life who said they too were molested as children, am I correct in saying you feel hesitancy in whether or not you can be a fair and an impartial juror . . . ?
> [PROSPECTIVE JUROR 1]: Yeah, I would say so.
> [DEFENSE COUNSEL]: Do you think that if this case was a case involving a theft or another drug charge, you would have no doubts about whether or not you could be fair and impartial; is that right?
> [PROSPECTIVE JUROR 1]: Yes.
> [DEFENSE COUNSEL]: But right now as you sit here, because of the allegation in this case, you have doubts about whether you can be fair or impartial; is that a fair statement?
> [PROSPECTIVE JUROR 1]: Yes, possibly.
> . . . .
> [DEFENSE COUNSEL]: . . . [D]o you have concerns that somewhere in the back of your mind you may be thinking about this cousin who's had a very difficult life because of the trauma that she suffered, that somehow that might influence or color your decision? Do you have concerns that may be—that those thoughts would be in the back of your mind as you are deliberating?
> [PROSPECTIVE JUROR 1]: There's a possibility that, yeah, it would be there.

2 VRP at 69-70, 73.

On rebuttal, the State asked:

> [STATE]: . . . Would you make a decision just based on the evidence or do you think that those things would effect [sic] your decision?
> [PROSPECTIVE JUROR 1]: I would do my best to try to stick to just the evidence that's presented. Like I said, there's always thoughts that might trigger back to that if I think about it, but I would try and do my best just to stick with just the evidence that's presented and stick with the case from there.

2 VRP at 74-75.

Townsend challenged juror 1 for cause arguing, "If you can be a fair juror and you know you can be a fair juror on a different type of case but you have doubts about whether you can be on a case of this kind, then I think that's sufficient basis for cause." 2 VRP at 77. The trial court denied Townsend's motion, and juror 1 sat on the jury.

At trial, witnesses testified to the above facts. The State also called Detective Darren Moss as a witness. The State asked Detective Moss about his not contacting possible witnesses to whom S.G. disclosed the abuse:

> [STATE]: What is the point of contacting disclosure witnesses in these types of cases?
> [DETECTIVE MOSS]: To seek additional information, to look for consistency in the story.
> . . . .
> [STATE]: How—what role do these interviews play in your investigation in these types of cases?
> [DETECTIVE MOSS]: In most cases it supports the story of the victim.

6 VRP at 767-68. Townsend objected to Detective Moss's statement, arguing that what happened in most cases was not relevant to the case at hand. The trial court overruled Townsend's objection.

The jury found Townsend guilty of both counts on July 22, 2015. Townsend appeals.

ANALYSIS

I. CHALLENGE FOR CAUSE

Townsend first argues the trial court violated his right to a fair trial by denying his challenge to strike juror 1 for cause. We disagree.

The Sixth and Fourteenth Amendments guarantee a defendant the right to a fair trial before an impartial jury. CONST. art I, § 22; *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). Including a biased juror on the jury violates this right. *Yates*, 177 Wn.2d at 30. The trial court is in the best situation to determine whether a juror can serve impartially because it has the ability to observe the juror's demeanor and evaluate the juror's answers. *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008), *aff'd*, 169 Wn.2d 47, 234 P.3d 169

(2010). Thus, we review a trial court's denial of a challenge for cause for manifest abuse of discretion. 142 Wn. App. at 540.

A party may challenge a juror for cause if the juror shows actual bias. RCW 4.44.170(2). A juror shows actual bias when she cannot put her opinions and beliefs aside for the purpose of impartiality in deciding the merits of the case. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). To successfully challenge a trial court's decision regarding a challenge for cause on appeal, a defendant must prove actual bias by showing "'more than a mere possibility that the juror was prejudiced.'" 116 Wn.2d at 840 (quoting 14 L. Orland & K. Tegland, *Washington Practice: Trial Practice* § 202, at 331 (4th ed. 1986)). A juror's "equivocal answers alone do not require a juror to be removed when challenged for cause." 116 Wn.2d at 839. Instead, the appropriate question is "whether a juror with preconceived ideas can set them aside" and decide the case impartially based on the law and the evidence at trial. RCW 4.44.170(2); 116 Wn.2d at 839.

Townsend relies on *State v. Fire*, 100 Wn. App. 722, 988 P.2d 362 (2000), *rev'd on other grounds*, 145 Wn.2d 152, 34 P.3d 1218 (2001), to support his claim, but *Fire* is easily distinguishable. There, a juror stated, "I consider [the defendant] a baby raper, and [child rape] should just be severely punished. . . . I'm very opinionated when it comes to this kind of a crime." 100 Wn. App. at 724. Division One of this court held that the juror's statements indicated actual bias. 100 Wn. App. at 728. Further, Division One held that the prosecutor's attempt to rehabilitate the juror by asking leading questions and receiving one-word affirmative responses was insufficient. 100 Wn. App. at 728.

Unlike in *Fire*, juror 1's voir dire statements did not indicate actual bias. Instead, juror 1 expressed equivocations regarding whether she was certain she could be fair and impartial, and equivocations alone do not require that a juror be removed for cause. While juror 1 stated it was possible that her decision might be influenced by her two cousins and her friend, actual bias requires more than the mere possibility of prejudice. Juror 1 said she would do her best to decide the case based on the law and the evidence presented, rather than her vague knowledge of the assault of her cousins and her friend.

Also unlike the juror in *Fire*, juror 1 responded affirmatively to open-ended questions about her ability to be fair and impartial and decide the case on the evidence. The trial court did not base its decision on one-word responses to rehabilitative questions. Juror 1's responses during voir dire demonstrated her ability to set aside her preconceived ideas about sexual assault and her commitment to do the best that she could to consider only the evidence presented.

The trial court determined that juror 1's answers on voir dire did not manifest actual bias. Because juror 1 did not show actual bias, the trial court was within its discretion in denying the challenge for cause. Therefore, the trial court did not manifestly abuse its discretion by denying Townsend's challenge of juror 1 for cause.

II. Opinion Testimony

Townsend next argues his rights to fair trial and trial by jury were violated because Detective Moss gave improper opinion testimony regarding S.G.'s credibility. The State contends Townsend waived this issue because it was raised for the first time on appeal and is not a manifest constitutional error. We agree with the State.

A defendant may assign evidentiary error on appeal only on the specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Generally, we will not consider an issue raised for the first time on appeal. RAP 2.5(a); *Kirkman*, 159 Wn.2d at 926. A defendant may, however, raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. To demonstrate manifest error, the defendant must show actual prejudice by identifying a constitutional error and showing that the alleged error actually affected his rights at trial. *Kirkman*, 159 Wn.2d at 926-27. If we determine the claim raises a manifest constitutional error, it may be subject to a harmless error analysis. 159 Wn.2d at 927.

To determine if the defendant claims a manifest constitutional error, we preview the merits of the defendant's claim to see if it would succeed. *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). It is generally improper for a witness to offer testimony concerning the credibility of another witness. *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001). Such testimony is unfairly prejudicial to a defendant and may be reversible error because it invades the exclusive province of the jury. 144 Wn.2d at 764. A law enforcement officer's testimony regarding the credibility of another witness may be especially prejudicial because "an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928. A showing that improper witness testimony constitutes manifest error requires an explicit or almost explicit statement by a witness that he believed the accusing victim. 159 Wn.2d at 936.

Here, Detective Moss testified that he routinely interviews disclosure witnesses as part of an investigation in order to determine the consistency of a victim's story. Detective Moss also

stated that these interviews typically corroborate a victim's story. Townsend objected to Detective Moss's testimony on grounds of relevance.

Townsend relies on *Kirkman* to argue that a similar statement was held to be an improper, explicit statement of the witness's credibility. 159 Wn.2d at 918. Townsend is mistaken; *Kirkman* is analogous to this case.[4] In *Kirkman*, a detective testified about the competency protocol he administered to a victim, which showed the victim was able to distinguish between the truth and a lie. 159 Wn.2d at 930. The Washington Supreme Court determined the testimony was simply an account of the interview protocol the detective used, and the detective *did not* make a statement regarding whether he believed the victim was telling the truth. 159 Wn.2d at 931. Ultimately, the court held that it is not a manifest constitutional error to admit opinion testimony that indirectly relates to a victim's credibility. 159 Wn.2d at 922.

Here, Detective Moss similarly testified about the procedure of his investigation. Detective Moss simply stated that he contacts disclosure witnesses so that he can determine whether a victim's story is consistent. In addition, Detective Moss testified that interviews with disclosure witnesses support the story of the victim in most cases. Detective Moss did not make an explicit or almost explicit statement regarding whether he believed S.G. was telling the truth. Further, Detective Moss's testimony that the interviews support the story of the victim in most cases was a general statement and was

[4] Townsend actually quotes *State v. Schultz*, noted at 141 Wn. App. 1017, 2007 WL 3138050 (2007), rather than *State v. Kirkman*, to support his analysis. In *Schultz*, Division One of this court held that a detective's statement that a victim "seemed to be pretty honest" was an explicit statement concerning the victim's credibility. 2007 WL 3138050, at *9.

not specific to S.G. Because Detective Moss did not make an explicit or almost explicit statement about S.G.'s credibility, the admission of his opinion testimony was not a manifest constitutional error. Therefore, Townsend waived this point of appeal.

We affirm Townsend's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Maxa, A.C.J.

Melnick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 48127-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 9, 2016

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