SUPREME COURT NO. 96006-2

NO. 34710-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER JOHNSON,

Petitioner.

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

The Honorable Michael P. Price, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Alexander Johnson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Johnson, No. 34710-9-III, filed May 24, 2018. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Accused persons have a constitutional right to trial by an impartial jury. Before trial, Juror 2 declared her faith that any evidence presented by the prosecutor was true. Was petitioner's right to an impartial jury violated?

2. When a defendant returns after missing part of the trial, the court must provide an opportunity to explain before making a final determination of voluntary waiver of the constitutional right to be present. Was petitioner's right to be present violated when he returned after missing most of the trial and the court failed to afford him a chance to explain his absence?

3. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. Here, two witnesses, who did not see the shooting opined appellant was the shooter. Did the opinion testimony violate petitioner's constitutional right to a jury trial?

4. Accused persons are entitled to effective assistance of defense counsel at trial. Was this right violated when petitioner's attorney (a) failed to challenge for cause a juror who expressed that she had faith the state's evidence was the truth; (b) failed to object to hearsay establishing the pellet gun as a deadly weapon; and (c) failed to object to improper opinion testimony on guilt?

C. STATEMENT OF THE CASE

Petitioner Alexander Johnson lived with Noelle Beck in an apartment across an alley from Eric Leggett, with windows looking out on both South Adams Street and the alley. RP 250-51.

Leggett had been friendly with Johnson and Beck. RP 340-42. Leggett was openly gay, but Johnson did not seem bothered by that fact. RP 342-43. However, another acquaintance testified Johnson was upset that Leggett was hitting on him. RP 372. Johnson admitted placing notes on Leggett's window. RP 391-92. The notes included statements such as "Wish for a quick death," and "We will take the man on the couch and your fag friends too." Exs. 1-4; RP 275-80.

A few weeks later, Leggett heard something hit his window and went outside to investigate. RP 349. No one was in the alley outside the window, but the sound continued. RP 349-50. On the street, he saw Beck. RP 351-52. As he walked towards her, he heard a zing and felt a small projectile hit him

in the ribs. RP 352. He was already on the phone with 911 and was able to convey that he had been shot before dropping his phone. RP 354. The impact left a red welt that broadened into a bruise on the side of his back near his armpit and a small hole in his shirt. RP 302-03, 356. Leggett told police he believed Johnson was responsible. RP 356.

Surveillance video showed Johnson with a pellet gun in the lobby of the apartment building, on the sidewalk, and in the alley before Leggett was shot. RP 462-82. Other witnesses encountered Johnson with his pellet gun in the hallway and lobby that evening. RP 290-91, 367. Johnson told them he was protecting the neighborhood. RP 290-91, 369.

Detective Randy Lesser described the pellet gun as looking like a rifle. RP 395. He quoted the manufacturer's warning, "Misuse or careless use may cause serious injury or death. May be dangerous up to 600 yards." RP 396-97.

There is a direct line of sight from Johnson and Beck's windows to Leggett's window and the location where Leggett was struck. RP 312, 418, 424. The holes in the window screen and window itself indicated a downward right trajectory consistent with coming from Johnson and Beck's third floor window. RP 315-17, 413-14.

Kurtzhall testified that, after police visited her to review the surveillance video, she saw Johnson in his car across the street. RP 262-64.

She claimed he made a motion as if shooting a gun and smiled. RP 263-64. She testified this frightened her because "I knew that he had taken this, whatever, pellet gun or whatever it was and shot Eric with it." RP 268.

During jury selection, both sides asked confusing questions about proof and belief. The prosecutor asked Juror 2, "If I present evidence to you to prove a proposition and the evidence does prove that proposition, can you believe that?" RP 123. Juror 2 responded, "Yes." RP 124. But she continued, "I have faith that you are giving us the truth and that the evidence that you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it." RP 124. No further questions were asked of her. Defense counsel exercised no challenges for cause and no peremptory challenges. RP 135-40; CP 137-38. Juror 2 was selected to serve on the jury. CP 136-38.

Early in the second day of trial, the information was amended, and Johnson indicated his belief that the jury was already unfair to him. RP 211. After a bathroom break, he did not return. RP 220. Counsel phoned him but got no answer. RP 220-21. The court issued a bench warrant and recessed the trial until 1:30. RP 229. At lunchtime, hospitals and jails were contacted. RP 229, 237. At 1:40 p.m., the court commenced with opening statements. RP 237-39. Five witnesses testified over the rest of the day. RP 247-336.

The third day of trial began with Leggett's testimony. RP 338. Late in the morning, the prosecutor reported police were about to enter Johnson's house to serve the warrant. RP 427-28. That morning, two more witnesses, in addition to Leggett, testified. RP 365-436. After lunch, the court reported Johnson was in custody. RP 437. The court permitted Johnson to confer with counsel and then inquired whether he wished to remain, reminding him of his right to be present, or not. RP 443, 446-47. The court warned Johnson no disrespectful behavior would be tolerated. RP 447. Johnson remained for the rest of Lesser's testimony and closing arguments. RP 462-546.

On appeal, Johnson argued Juror 2's comments showed actual bias in violation of his right to an impartial jury; the court's failure to inquire about the reasons for his absence from trial violated his constitutional right to be present; his attorney was ineffective in failing to object to the manufacturer's warning as inadmissible hearsay, and Leggett and Kurtzhall both offered improper opinion testimony on guilt. The Court of appeals affirmed his convictions. Johnson now asks this Court to grant review and reverse.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. JOHNSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

During voir dire, Juror 2 made an unequivocal statement that she would believe the State's evidence. RP 124. Yet neither the court nor

defense counsel took action. The result was a violation of Johnson's constitutional right to an impartial jury.

The Court of Appeals concluded, "with some reluctance" that Juror 2's comments did not show actual bias. App. at 16. The court agreed that "juror two's answer to the prosecutor's question suggests the juror might not challenge the State's evidence if Johnson presented no evidence." Id. The Court declared its "wish the juror would have been questioned further." Id. Nevertheless, the Court of Appeals concluded that, since the juror had not yet been instructed regarding the presumption of innocence or the burden of proof beyond a reasonable doubt, the question and answer "tell us little about the mental state of the juror and whether he or she could be impartial." Id. at 17. Johnson therefore asks this Court to grant review of this constitutional issue under RAP 13.4(b)(3).

The federal and state constitutions guarantee every defendant the right to an impartial jury. State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036 (2016) (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)). A potential juror must be excused if his views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"

State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)).

A potential juror should be dismissed if he or she shows actual bias, "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." RCW 4.44.170. A challenge must be sustained when the juror cannot disregard such opinion and try the issue impartially. RCW 4.44.190.

Certain statements are "clear indicator[s] of bias" that should prompt either questioning to neutralize the bias or a challenge for cause. Irby, 187 Wn. App. at 195 (discussing Gonzales, 111 Wn. App. at 282). Juror 2's statements are of this ilk. She declared in open court her "faith" that the prosecutor is "giving us the truth and that evidence you're giving us is reliable." RP 124. These comments are similar to those deemed to show actual bias in Gonzales.

In Gonzales, Juror 11 several times expressed outright faith in the truthfulness of the police. Gonzales, 111 Wn. App. at 278-79. When asked if she could follow an instruction to presume the defendant innocent, she answered, "I don't know." Id. The court denied defense counsel's challenge for cause. Id. at 280. On appeal, the court found Juror 11 had "unequivocally admitted a bias regarding a class of persons (here, a bias in favor of police witnesses)" and did not express confidence in her ability to follow the

court's instructions. Id. at 281-82. The court held Juror 11 should have been excused and Gonzales was entitled to a new trial. Id.

In this case, Juror 2 also stated unequivocal bias in favor of a certain type of evidence, namely, evidence presented by the prosecutor. RP 124. Even when a juror indicates actual bias, the juror can be rehabilitated if he or she subsequently expresses the ability, or at least the willingness to try, to follow the court's instructions to be impartial. But here, as in Gonzales, "no rehabilitation was attempted." 111 Wn. App. at 281.

Trial judges have an independent obligation to ensure an impartial jury by not seating a juror who has manifested actual bias. Irby, 187 Wn. App. at 193. A trial judge must excuse a potential juror where grounds for a challenge for cause exist, regardless of whether a party exercised a challenge. State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012); CrR 6.4 (c)(1).

It is only speculation that the juror meant to say she would gauge the credibility of all evidence presented, even though what she said was "I have faith that you are giving us the truth and that the evidence you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it." RP 124. First, even if the juror meant to say she would also believe all evidence put forth by the defense, this does not rehabilitate her because the defense has no burden to

put on any evidence. Moreover, the court should reject such speculation as it did in Irby, 187 Wn. App. at 197. There, the State argued there may have been something in the juror's tone or demeanor that outweighed the literal meaning of the words "I would like to say he's guilty." The court rejected this argument. Id.

Juror 2 offered an unambiguous statement of bias. RP 124. There was no rehabilitation. Permitting her to serve was manifest constitutional error that requires reversal of Johnson's convictions. Irby, 187 Wn. App. at 188. "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." Id. at 193 (citing United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)).

2. JOHNSON'S RIGHT TO BE PRESENT WAS VIOLATED WHEN THE COURT FAILED TO INQUIRE, AFTER HIS RETURN, ABOUT THE REASON FOR HIS ABSENCE.

The trial court failed in its duty to protect Johnson's constitutional right to be present at trial. After a bathroom break the day after jury selection, Johnson missed most of the trial. RP 220, 437. His right to be present was violated because trial continued in his absence, and the court failed to inquire, upon his return, whether his absence was voluntary.

Both the state and federal constitutions protect the fundamental right of an accused person to be present at trial. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); U.S. Const. amends. V, VI, XIV; Const. art. 1, sec.

22. The right to presence accrues at every critical stage of the proceedings, and particularly includes substantive testimony. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

A voluntary absence, after trial has begun, constitutes an implied waiver of the right to be present. Garza, 150 Wn.2d at 367. The trial court determines whether an absence is voluntary by following a three-part process. Id. (discussing test established by State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994)). The presumption against waiver is the "overarching principle" of the inquiry. Garza, 150 Wn.2d at 368. First, the court looks into the totality of the circumstances. Id. Second, the court makes a preliminary determination regarding voluntariness. Id. Third, if the person returns, the court must afford the person an "adequate opportunity to explain his absence." Id. At a bare minimum, the court must "listen to the defendant's explanation" of the absence. State v. Cobarruvias, 179 Wn. App. 523, 533, 318 P.3d 784 (2014) abrogated on other grounds by State v. Thurlby, 184 Wn.2d 618, 359 P.3d 793 (2015). The court must then determine what happened and assess the reasonableness of the defendant's actions. Id.

The court here essentially skipped the third step. Upon Johnson's return, he was not given an opportunity to explain his absence. RP 443-47. The only inquiry was whether he wished to stay. RP 446-47.

The trial court's voluntariness determination is reviewed for abuse of discretion. Garza, 150 Wn.2d 365-66. Use of an incorrect legal standard constitutes an abuse of discretion. Cobarruvias, 179 Wn. App. at 528 (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). The failure to exercise discretion is also an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, the trial court failed to apply the correct legal standard and failed to exercise its discretion when it did not ask Johnson to explain his absence upon his return to the courtroom. RP 437-61. Nor did the court make a final determination on voluntariness. RP 437-61.

The court abused its discretion and Johnson's right to be present was violated. The Court of Appeals rejected this argument, finding Johnson could have explained his absence when the court offered him the opportunity for allocution at sentencing. App. at 18. This reasoning would eliminate critical protection of the constitutional right to be present. Johnson therefore asks this Court to grant review under RAP 13.4(b)(3) and (4) and reverse.

Allocution is specific to sentencing and has no bearing on the existence of a voluntary waiver of the right to be present at trial. The right to allocution before sentencing is derived from the common law and the Federal Rules of Criminal Procedure. In re Pers. Restraint of Echevarria, 141 Wn.2d 323, 332-33, 6 P.3d 573 (2000). Federal criminal rule 32 (4)(A)

affords the defendant the opportunity to "speak or present any information to mitigate the sentence." Similarly, the Sentencing Reform Act requires courts to consider arguments from the offender at sentencing "as to the sentence to be imposed." RCW 9.94A.500 (1).

By offering Johnson allocution, the court was offering to hear his comments on the sentence, not an explanation of his absence from trial. RP 585. The court specifically informed Johnson he had the right to make a statement called "allocution." RP 585. Nothing about this discussion indicated the judge was offering Johnson an opportunity to explain his absence during the trial or revisit the waiver decision. The court merely afforded Johnson his right to allocution, his right to be heard on the issue of his sentencing, as required by statute.

In mandating that an absent defendant who returns be afforded the opportunity to explain his absence, the courts are referring to something more than the right to allocution. The right to allocution is a statutory right offered to every defendant at sentencing by law. RCW 9.94A.500. If this were sufficient, there would be no reason to mandate that the court provide the defendant an adequate opportunity to explain his absence because that opportunity would already exist at sentencing.

The court was required to afford Johnson an "adequate opportunity" to explain his absence. Id. at 881, 883. An adequate opportunity must be a

meaningful one. It must be clear what is being offered. The mere offer of allocution at sentencing does not suffice. The three-step voluntary waiver analysis "amply protects" the constitutional right to be present at trial. Thomson, 123 Wn.2d at 883. Appellate courts should not eliminate one third of the process.

3. JOHNSON'S TRIAL WAS TAINTED BY IMPROPER OPINIONS ON GUILT.

Kurtzhall and Leggett both testified to opinions on guilt in violation of Johnson's right to a jury trial. The jury's role as fact-finder is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); Const. art. I, §§ 21, 22. Expressions of personal belief as to guilt are "clearly inappropriate" in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

Kurtzhall's comments arose in the context of discussing Johnson's gun-like gesture with his fingers. RP 263-64. She claimed it frightened her because "I knew that he had taken this, whatever, pellet gun or whatever it was and shot Eric with it." RP 268.

On direct examination, the prosecutor focused on Leggett's opinion of who shot him, as relayed to police at the time.

> Q. And at that time, did you indicate to the police who you thought was responsible for your injuries?
>
> A. I did.

> Q. And who was the person you thought responsible for your injuries?
>
> A. Alex Johnson.
>
> . . .
>
> Q. Okay. Now, is it because of the incident from March 21 that you believed Mr. Johnson to be responsible for the April 12 incident?
>
> A. That and the vantage of the – of their apartment, yes, to be able to shoot both the window and me in a different perspective. I thought it was very likely and I directed the officers to go that direction with their investigation.

RP 356.

This testimony was mere opinion. In determining whether opinion testimony is improper, courts distinguish factual observations from testimony about guilt. Quaale, 182 Wn.2d at 198-99. But Kurtzhall saw nothing the night of this incident. Leggett likewise did not see who shot him. RP 363. Their testimony as to the shooter's identity was not based on observation.

A nearly explicit opinion on guilt can be raised for the first time on appeal when it causes identifiable consequences that prejudice the defendant. State v. Kirkman, 159 Wn.2d 918, 926-27, 936, 155 P.3d 125 (2007). That is the case here because the practical and identifiable consequences were greater than in Montgomery, 163 Wn.2d 577. In Montgomery, the court found improper opinion testimony was not manifest constitutional error

because the jury was presumed to follow the instructions that it is the sole judge of credibility and may disregard expert opinion. Id. at 595-96. But the Montgomery court explained it would not hesitate to reverse if were there any sign the opinions influenced the verdict. Id. at 596 n. 9. That is the case here.

In this case, two witnesses offered opinions on guilt, without comment by either attorney or the court. RP 268, 356. The instruction telling jurors they could disregard expert opinion testimony did not apply to Leggett and Kurtzhall who did not speak from specialized knowledge. See CP 54. Their opinions were likely to influence the jury and reversal is required.

4. JOHNSON'S ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO A BIASED JUROR, INADMISSIBLE HEARSAY, AND IMPROPER OPINION TESTIMONY.

Accused persons are entitled to effective assistance of defense counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That constitutional right is violated when counsel's performance is unreasonably deficient and there is a reasonable probability that, without the errors, the outcome of the trial would have been different. State v. Ortiz, 196 Wn. App. 301, 306-07, 383 P.3d 586 (2016) (discussing Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel here failed to

challenge a juror who showed actual bias, failed to challenge inadmissible hearsay declaring the pellet gun was a deadly weapon, and failed to object when two witnesses offered opinions on guilt. Johnson asks this Court to grant review of this constitutional issue under RAP 13.4(b)(3) and reverse.

a. There was no strategic reason for allowing a biased juror to serve on the jury.

The failure to challenge juror 2 was deficient performance because counsel failed to protect his client's right to an impartial jury. There was no strategic reason to allow a biased juror to serve. When the court fails to remove a biased juror, defense counsel "certainly should" challenge the juror for cause. State v. Slert, 186 Wn.2d 869, 877, 383 P.3d 466 (2016) (citing CrR 6.4 (c)).

Juror 2 showed actual bias in favor of the State. RP 124. She expressed no understanding of her duty as a juror to independently judge the credibility of the testimony. RP 124-41. She did not indicate she could set aside her preconceived decision. RP 124-41. Counsel's failure to take any action in the face of a biased juror was unreasonably deficient performance. The prejudice from this error is shown by the fact that Juror 2 was actually biased and was permitted to serve on the jury. Irby, 187 Wn. App. 183, 193 (presuming prejudice when biased juror serves). Trial counsel failed to ensure Johnson received a fair trial by an impartial jury.

b. There was no strategic reason not to object to inadmissible hearsay that the pellet gun was deadly.

Counsel also performed deficiently when he failed to object to out-of-court statements by the pellet gun manufacturer. Reasonable counsel would have objected because the statements were hearsay, inadmissible under any exception to the general ban. It is reasonably probable that, without this error, the trial would have had a different outcome because the court was likely to sustain an objection and, without an objection, the jury likely relied on the warnings to find the pellet gun was a deadly weapon.

The Court of Appeals agreed with the State's claim that counsel had a valid strategic reason for not objecting. App. at 24. The failure to object to inadmissible evidence cannot be condoned as a trial strategy when the evidence is central to the State's case. See State v. Dawkins, 71 Wn. App. 902, 910, 863 P.2d 124 (1993).

Dawkins is illustrative. The State charged Dawkins with molesting two girls and presented evidence of Dawkins's prior sexual contact with one of them. Although the evidence may have been admissible under ER 404 (b), the trial court could have excluded it if its prejudice outweighed its probative value. Defense counsel did not object, and the jury convicted as to that girl only. 71 Wn. App. at 904-06. The trial court granted a new trial based on ineffective assistance, finding the evidence would probably have been

excluded and the jury probably relied on it to convict. Id. at 906, 910-11. The Court of Appeals affirmed. Id. at 911.

Here, counsel failed to object to inadmissible hearsay purporting to establish that a pellet gun is a deadly weapon, an essential element of second-degree assault. RP 396-98; RCW 9A.36.021. A deadly weapon is one that is "readily capable of causing death or substantial bodily harm." RCW 9A.04.110 (6). The manufacturer's warning was central to the State's case because "a BB gun will not be capable of causing death or serious injury in most situations." State v. Majors, 82 Wn. App. 843, 847, 919 P.2d 1258 (1996). But here, Lesser recited the warning that "Misuse or careless use may cause serious injury or death." RP 396-97.

The only other evidence of harm was a broken window, a bruise, and a small hole in a shirt. RP 302-03, 317, 356. It is reasonably probable the jury would have found reasonable doubt as to whether the pellet gun was a deadly weapon. On testimony so central to the State's case, the failure to object is not valid strategy. See Dawkins, 71 Wn. App. at 910. The failure to object was ineffective, and Johnson's assault conviction should be reversed.

c. Counsel Was Ineffective in Failing to Object to Opinions on the Identity of the Shooter.

Improper opinions on guilt are constitutional error that violates the right to a jury trial. State v. Quaale, 182 Wn.2d 191, 201-02, 340 P.3d 213

(2014). There is no strategic or tactical reason not to take steps to ensure the trial is not tainted by improper opinion testimony on guilt. Counsel's failure to object was unreasonably deficient performance that undermines confidence in the outcome of the trial. Strickland, 466 U.S. at 687-89. Reasonably competent counsel would have recognized the testimony as improper opinion and objected.

There was no strategic reason for failing to object. Even if the jury had already heard the opinions, it could have been instructed to disregard them. Courts presume juries follow the court's instructions. Montgomery, 163 Wn.2d at 596. These were not merely passing mentions, such that counsel could have opted to avoid drawing attention. The prosecutor delved into the reasons for Leggett's opinion and repeated it over the course of several questions. RP 356.

Counsel's failure to object "undermines confidence in the outcome" because it led to admission of opinions that were likely to influence the jury and affect the outcome of the trial. Strickland, 466 U.S. at 694. An objection would likely have been sustained or a curative instruction given. Montgomery, 163 Wn.2d at 596. But without any objection or instruction, and with two witnesses offering opinions, the jury was likely to view the opinions as valid evidence. This error undermines confidence in the outcome and requires reversal.

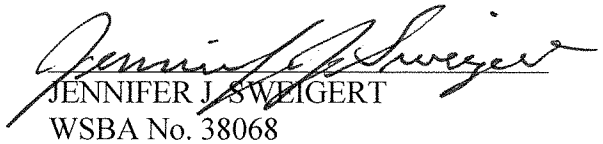
E. CONCLUSION

Because this case raises significant constitutional issues and issues of substantial public interest, Johnson requests this Court grant review under RAP 13.4 (b)(3) and (4).

DATED this 21st day of June, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

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CASE # 347109
State of Washington v. Alexander Travis Johnson
SPOKANE COUNTY SUPERIOR COURT No. 151022521

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable Michael P. Price

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

STATE OF WASHINGTON, Respondent, v. ALEXANDER TRAVIS JOHNSON, Appellant.	)	No. 34710-9-III UNPUBLISHED OPINION

FEARING, J. — A jury found Alexander Johnson guilty of harassment, second degree assault, malicious harassment, and third degree malicious mischief. On appeal, Johnson challenges evidentiary rulings, the performance of his trial counsel, the trial court's handling of his unannounced absence from trial, and the objectivity of a juror. We find error in one evidentiary ruling but deem the error harmless.

FACTS

This prosecution concerns the relationship between defendant Alexander Johnson and victim Eric Leggett, occupants of adjoining apartment buildings in downtown Spokane. Alexander Johnson is the significant other of Noelle Beck. Noelle Beck resided at 319 Cornerstone Courtyard Apartments (Cornerstone) in Spokane, operated by

the Spokane Housing Authority. Beck's apartment lay on the third floor of the apartments, with windows facing Adams Street and a side alley.

Alexander Johnson regularly stayed in Noelle Beck's apartment despite being an unauthorized guest. Rules promulgated by the Spokane Housing Authority barred unauthorized guests from staying beyond fourteen days. Johnson, with the assistance of the Cornerstone manager Melanie Kurtzhall, applied to the housing authority to add his name to Beck's lease. The housing authority denied Johnson's application.

Eric Leggett occupied a first floor unit in an apartment building adjoining Cornerstone. Presumably because of Leggett's and Alexander Johnson's smoking habits, the two became acquainted when smoking cigarettes on the sidewalk adjoining the two apartment buildings. During these respites, the two discussed many topics, including politics and religion.

The cordial relationship between Eric Leggett and Alexander Johnson deteriorated when Leggett told Johnson he was gay and HIV positive. Thereafter and on March 20, 2016, Leggett found four threatening notes taped to his apartment window. The first note read: "'Wish for a quick death to,'" "'Eric.'" Report of Proceedings (RP) at 276. The second declared: "'To,'" "'Eric, don't fuck with us.'" RP at 278. The third stated: "'To,'" "'Eric,'" "'we will take the man on the couch and your fag friends too.'" RP at 279. The fourth and final note announced: "'To Eric,'" "'Eric, do not disrespect anyone with your comments. You will be hurt and kept alive.'" RP at 280. Leggett reported the

menacing messages to Cornerstone manager Melanie Kurtzhall, who advised Leggett to contact the police.

Melanie Kurtzhall reviewed Cornerstone surveillance tapes following her conversation with Eric Leggett. The footage showed Alexander Johnson pacing outside the Cornerstone apartments before placing objects on an exterior window of the adjoining building and walking away. Kurtzhall also called the police who investigated and took possession of the notes.

On April 12, 2015, Eric Leggett heard a sporadic tapping noise, like the sound of pebbles, at his window. Leggett exited his apartment, checked the alleyway abutting his apartment's ground floor window, and, after seeing no one, returned inside his apartment. The tapping sound resumed, which lured Leggett outside again. A fearful Leggett also called 911. He noticed a crack in his glass window, and, while still on the phone with law enforcement, felt the pop of a bullet hit his skin, which sensation caused him to drop his phone. He deemed his life to be in danger.

Spokane Police Officer Joshua Laiva responded to Eric Leggett's emergency call. Officer Laiva saw a bright red welt on Leggett's ribcage near his armpit with a corresponding projectile hole in his shirt. Leggett told Officer Laiva that the shot originated from the third floor of Cornerstone and that he suspected Alexander Johnson to be the shooter.

Alexander Johnson resided with Noelle Beck on April 12. Beck allowed Officer

Joshua Laiva to view her apartment, although Johnson was absent. Officer Laiva observed windows on the south wall of the apartment. One window was open one inch and its blinds pushed to the left. Officer Laiva also noticed Eric Leggett's window was broken, the window screen had a hole from a projectile, and the window framing had been damaged. Laiva concluded that the damage to Leggett's window came from a projectile moving at a downward angle.

Melanie Kurtzhall viewed security footage again after learning of Eric Leggett's injury. Kurtzhall saw Alexander Johnson exiting and entering Cornerstone. Once inside Noelle Beck's apartment, Johnson peered out a window while holding a rifle. While outside, Johnson paced on the sidewalk. A caseworker for tenants at Cornerstone, Angel Willson, also saw Johnson that day with a rifle.

Later on April 12, Melanie Kurtzhall noticed Alexander Johnson sitting in his car outside Cornerstone. Johnson motioned as if shooting an imaginary gun at Kurtzhall. A frightened Kurtzhall returned inside Cornerstone.

On the evening of April 12, Jack Swanstrom visited his girlfriend's apartment at Cornerstone. Swanstrom saw Alexander Johnson bearing a rifle. Johnson previously told Swanstrom he believed Eric Leggett had flirted with him, which purported seductive behavior bothered Johnson.

Spokane County Detective Randy Lesser reviewed Cornerstone security footage and saw on the videotape Alexander Johnson, fourteen minutes before Eric Leggett's

injury, walking around the apartments with a pellet gun. Detective Lesser questioned Johnson several days after the shooting. Johnson denied shooting Leggett, but admitted to owning a pellet gun, which law enforcement seized. Johnson acknowledged to Lesser that he knew of Leggett's homosexuality.

PROCEDURE

The State of Washington charged Alexander Johnson with felony harassment, second degree assault, malicious harassment, and third degree malicious mischief.

Most of the issues on appeal concern trial procedure. Trial commenced on June 20, 2016. The first day of trial involved jury selection and a hearing to admit Alexander Johnson's statements to law enforcement. The following exchange occurred, during voir dire, between the State's attorney and prospective juror two:

> [Prosecutor]: One of the things that [defense counsel] talked about was having evidence to prove something and believing in something. And I can't remember whether it was juror No. 5—sorry, you would think I could remember ten minutes ago, but if—and I'll ask juror No. 2. If I present evidence to you to prove a proposition and the evidence does prove that proposition, can you believe that?
>
> JUROR NO. 2: Yes. I have faith that you are giving us the truth and that the evidence that you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it.

RP at 123-24. No one asked juror two any further questions on this same subject. Defense counsel exercised no challenges for cause and no peremptory challenges. Juror two served on the jury.

On the second day of trial, Alexander Johnson was present when the court convened in the morning. The trial court recessed around 9:45 a.m. for five minutes, which recess Johnson used for a restroom break. Johnson did not return to the courtroom thereafter. For the next half hour, defense counsel phoned Johnson to inquire of his location. Law enforcement also searched for Johnson to no avail. The State informed the trial court of a desire to continue with the trial nonetheless. No witnesses had yet to testify.

The trial court issued a bench warrant for Alexander Johnson's arrest. The court then commented:

> His absence does appear to be voluntary on the face but I suppose there could be an explanation that we're otherwise unaware of. I'll give him the benefit of the doubt but if he's not here at 1:30 and we haven't otherwise located him in an emergency setting . . . it's inconvenient to our jurors but I don't want to have to try this case again. We don't need to declare a mistrial, which is my first concern.
>
> . . . .
>
> So again, Counsel, I apologize for the inconvenience, but I guess in fairness it's not my fault. It's not your fault, and [defense counsel], just so we have a clear record . . . I would be surprised if we locate [Johnson] in an emergency room or someplace else. I think he's just trying to avoid being here for whatever reason . . . but that's besides the point. If he shows up, and if he doesn't, we'll go forward without him at 1:30.

RP at 229-231. Following this colloquy, the court recessed for the remainder of the morning and the noon hour. When the court reconvened in the afternoon, the trial court remarked:

> [F]irst of all . . . in this case [Alexander Johnson] is not just late or delayed and whether he's truly just not coming back, and we'd been waiting since thereabouts 10:00 this morning. It is now about 20 minutes to the hour, 20 minutes to 2:00 in the afternoon. Seems pretty clear to me [Johnson] isn't going to return and during our recess we checked the local hospitals. Might seem like an exercise in silliness but just to be sure that Mr. Johnson wasn't there, and we also checked our jail roster in case in some fashion he happened to get picked up. No sign of Mr. Johnson anywhere.
>
> We also checked our clerk's office to see if for some reason he might be there. There is no sign of him and I'm satisfied that I've laid down enough of a record, as has counsel, and foundation for us to go forward with the trial without [Johnson] here.

RP at 237-38. Trial then proceeded during the afternoon with opening statements and testimony from some of the State's witnesses.

Cornerstone manager Melanie Kurtzhall testified she felt frightened when Alexander Johnson motioned his finger, as a gun, in her direction. Kurtzhall added that she knew that Johnson had already shot Eric Leggett, which knowledge enhanced her fear.

The State questioned Eric Leggett about who he believed the "shooter" to be:

> [DEPUTY PROSECUTOR]: And who was the person you thought responsible for your injuries?
>
> [LEGGETT]: Alex Johnson.
>
> [DEPUTY PROSECUTOR]: Okay. And that's the same Alexander Johnson who you believe put the notes on your window?
>
> [LEGGETT]: Yes, ma'am.
>
> [DEPUTY PROSECUTOR]: Okay. Now, is it because of the incident from March 21 that you believed Mr. Johnson to be responsible for the April 12 incident?
>
> [LEGGETT]: That and the vantage of the – of their apartment, yes, to be able to shoot both the window and me in a different perspective. I

> thought it was very likely and I directed the officers to go that direction with their investigation.

RP at 356-57.

The trial court admitted the pellet gun confiscated from Alexander Johnson as an exhibit. Detective Randy Lesser identified the gun as a Crosman Fury NP pellet gun, and he testified that the gun looks like a rifle to the average person. A scope sits on the top of the gun's barrel, and the scope allows the shooter to aim from afar. Detective Lesser averred that warning labels accompany the purchase of the pellet gun. Lesser researched the labels on the manufacturer's Internet website. He read the label warning to the jury:

> "Warning: Not a toy. This air gun is recommended for adult use only. Misuse or careless use may cause serious injury or death. May be dangerous up to 600 yards."
> . . . Police and others may think it is a firearm.
> . . . .
> If you're firing a lead pellet, the velocity is up to 1,000 feet per second. If you're firing an alloy pellet, the velocity is up to 1200 feet per second.

RP at 396-97.

The third day of trial, June 22, 2016, began with more testimony from a State witness without Alexander Johnson present. After only minutes of testimony and with the jury excused, the trial court announced that law enforcement had surrounded a home occupied by Johnson and officers were attempting to garner Johnson's cooperation in returning to the courthouse or seize his person and bring him to the courthouse. The court then recessed for the rest of the morning.

By early afternoon, June 22, law enforcement held Alexander Johnson in custody. At 1:40 p.m., the trial court reconvened, and the court commented:

> It's about 20 minutes to 2:00 and it's the 22nd of June, 2016, and we talked before the break about potential for [Alexander Johnson] to join us again since he's been absent from the trial after we recessed after the jury was selected and he didn't come back but now I understand [Johnson] is in custody. He is actually physically down here on the County property. He is not, as the jail staff just advised me, he is not portable in terms of his appearance, so I guess I just wanted to, Counsel, run it by all of you about procedurally that, to be quite frank, I've never had a situation like this develop yet. I'm not sure if we should go forward right now. I mean I've got jurors waiting or whether we stop and get him over here and he—if he wants to be in the courtroom. I can't have him in the courtroom looking the way I understand he looks based on what the jail has told me.
>
> . . . .
>
> He [Alexander Johnson] looks like he's been in a scuffle. Let me put it that way, that's what I understand. His pants are torn up. He's got jail slippers. But then again, the concern I have is . . . arguably he's already indicated his intentions to not be here. Maybe I need to get him over here for him to formally tell us on the record what he would like to do one way or another. If he doesn't want to be here for the rest of the trial, maybe he can waive that appearance on the record.

RP at 437-38. Counsel and the trial court discussed questions surrounding Johnson's return to the courtroom, the physical appearance of Johnson, and the admissibility of evidence of Johnson's absconding.

Law enforcement transported Alexander Johnson to the courtroom that afternoon. The trial judge and Johnson engaged in the following conversation after Johnson's arrival:

> THE COURT: Mr. Johnson, good afternoon.
> [JOHNSON]: Good afternoon.

> THE COURT: Sir, I just wanted to verify you had a chance to speak with [defense counsel], correct?
>
> [JOHNSON]: Yes, sir.
>
> THE COURT: And have you made a decision, sir, that you would like to remain in the courtroom for the balance of the trial?
>
> [JOHNSON]: Yes, sir.
>
> THE COURT: Okay. And you feel that's a decision you made after being fully advised by [defense counsel] regarding your rights? To remain in the trial?
>
> [JOHNSON]: Yes.
>
> THE COURT: Okay. And, sir, you do understand that [defense counsel] explained to you, you do have a right not to be present at trial if you want, as long as you make a knowing and voluntary waiver of that. But so I'm clear, sir, your determination is you would like to stay, you would like to participate in the trial and be here, correct?
>
> [JOHNSON]: Correct.

RP at 446-47.

With Alexander Johnson present, Detective Randy Lesser completed his testimony. Johnson called no witnesses and the trial recessed for the third day.

On the fourth day, counsel delivered their respective summations. Defense counsel commented:

> The State talked about the weapon [pellet gun] as a firearm. It does fire a projectile. The State talked about the foot-per-second velocity of whether it's a lead pellet or an alloy pellet. We know that where the window was shot there are some of what [Eric Leggett] believes were the pellet but the detective says, you know, he can't tell. Was it lead at 1,000 feet per second or an alloy at 1200 feet [per] second . . . .
>
> The State also talked to you about that the weapon may be dangerous up to 600 yards. The distance here is shorter than 600. I don't think anybody would argue that. The quote she had was that "it may be dangerous up to 600 yards." Not deadly, may be. At one point it can possibly cause death under the circumstances in which it is used. But it doesn't say what those circumstances were.

> I think you have to look at the day that this assault allegedly took place. There are assumptions that the shot came from apartment 319, which is the residence of [Noelle Beck] and [Alexander Johnson]. There's no indication at the time that the shot, and this was testimony, who was in the apartment.

RP at 540-41. The jury found Alexander Johnson guilty of all four crimes charged: felony harassment, second degree assault, malicious harassment, and third degree malicious mischief.

At the sentencing hearing, the State mentioned that it had filed bail jumping charges against Alexander Johnson because of his absence from some of the trial. The State also commented that the sentencing court could consider Johnson's absconding from the courtroom when sentencing. During the hearing, the court afforded Johnson an opportunity for allocution. The sentencing court did not ask Johnson to explain his absence, however. Johnson declined to render any statement.

LAW AND ANALYSIS

Juror Bias

Issue 1: Does Alexander Johnson show actual bias of juror two?

Answer 1: No.

On appeal, Alexander Johnson first assigns error to the trial court's failure to remove juror two from jury service and his trial counsel's failure to object to the seating of juror two. Johnson contends that juror two's response to a question during voir dire showed actual bias against him because the juror declared he or she would believe the

State's evidence. We previously quoted the colloquy between the State's attorney and juror two but repeat it here, because of the critical nature of the precise comments:

> [Prosecutor]: One of the things that [defense counsel] talked about was having evidence to prove something and believing in something. And I can't remember whether it was juror No. 5—sorry, you would think I could remember ten minutes ago, but if—and I'll ask juror No. 2. If I present evidence to you to prove a proposition and the evidence does prove that proposition, can you believe that?
>
> JUROR NO. 2: Yes. I have faith that you are giving us the truth and that the evidence that you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it.

RP at 123-24.

The State understandably asked juror two if the juror would accept a proposition if the State proved the proposition. The question indirectly sought to determine if the juror would acquit the defendant despite the State proving all of the elements of the crime. The question thereby searched for bias against the prosecution. The question did not query the juror as to whether he or she will accept all of the evidence presented by the State as the truth. The question did not ask if the juror will accept the evidence of the State regardless of whether Alexander Johnson presents conflicting evidence or regardless of whether Johnson presents no evidence.

Juror two's answer journeyed beyond the State's question. In addition to the juror affirming that he or she would convict if the State proved the elements of the crime, the juror disclosed that he or she would accept all State's evidence as the truth. This

disclosure would suggest bias in favor of the State, but the juror did not end his or her answer there. The juror also stated that she or he would deem all evidence presented by "this party" as reliable. RP at 124. The juror did not name to whom "this party" referred. Nevertheless, we suspect "this party" references Alexander Johnson, since the juror already mentioned that she or he would accept the evidence presented by the State as dependable, and the trial involved no other party beside Johnson.

The unique response of juror two raises the question of whether a juror holds actual bias if the juror impliedly states that he or she will consider the State's evidence as the truth if the defendant presents no countervailing evidence. The juror answer suggests that the juror will, contrary to constitutional principles, ignore a presumption of innocence and require the defendant to bear a burden of producing evidence in order to acquit himself rather than demanding that the State prove its case beyond a reasonable doubt. Neither party addresses this nuance in his or its briefing.

Alexander Johnson contends that juror two's statement reveals actual bias. The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 22 of the Washington Constitution, guarantee a criminal defendant the right to trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). The right to trial by jury means a trial by an unbiased and unprejudiced jury. *State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (1998). Even one biased juror denies the accused a

constitutional right to an impartial jury. *State v. Irby*, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016). If the potential juror demonstrates actual bias, the trial court must excuse the juror for cause. *State v. Fire*, 100 Wn. App. 722, 726, 998 P.2d 362 (2000), *reversed on other grounds by* 145 Wn.2d 152, 34 P.3d 1218 (2001).

Two Washington statutes address juror bias. RCW 4.44.170(2) defines actual bias:

> For 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, and which is known in this code as actual bias.

RCW 4.44.190 reads:

> A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

Under the Washington statutes, even if a juror has a preconceived idea, such opinion shall not disqualify the juror unless the court is satisfied, from all the circumstances, that the juror in reference to the action or to either party cannot disregard such opinion and try issues impartially. *State v. Lawler*, 194 Wn. App. 275, 281, 374 P.3d 278, *review denied*, 186 Wn.2d 1020, 393 P.3d 1027 (2016). Stated differently, the

juror will be excused for cause if his or her views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and his or her oath. *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986).

"Actual bias" must be established by proof. *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 283, 857 P.2d 1094 (1993). A defendant must prove actual bias. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). A defendant must show more than a mere possibility that the juror was prejudiced to successfully challenge the trial court's decision on appeal. *State v. Noltie*, 116 Wn.2d at 840; *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008), *aff'd*, 169 Wn.2d 47, 234 P.3d 169 (2010). A juror's "equivocal answers alone" do not justify removal for cause. *State v. Noltie*, 116 Wn.2d at 839. The appropriate question is "whether a juror with preconceived ideas can set them aside" and decide the case on an impartial basis. *State v. Noltie*, 116 Wn.2d at 839.

Many Washington decisions address whether the trial court should have excused a venire person for actual bias. We mention three of the decisions where a court answered the question in the affirmative: *State v. Irby*, 187 Wn. App. at 192 (2015); *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), and *State v. Fire*, 100 Wn. App. 722.

In *State v. Irby*, the potential juror in a murder prosecution remarked that she might favor the prosecution because of her work in Child Protective Services. The prosecutor then asked, "[w]ould that impact your ability to be a fair and impartial juror? Do you think you could listen to both sides, listen to the whole story so to speak?" *State*

v. Irby, 187 Wn. App. at 190. The potential juror responded, "I would like to say he is guilty." *State v. Irby*, 187 Wn. App. at 190. The court sat the juror absent objection, and this court found manifest constitutional error requiring a reversal of all convictions.

In *State v. Gonzales*, 111 Wn. App. 276 (2002), the juror stated she, based on her upbringing, deemed law enforcement officers honest and straightforward. According to the juror, she would believe a law enforcement officer would tell the truth unless proven otherwise and would encounter difficulty deciding against the testimony of an officer. When told that the court might instruct her to presume the defendant as innocent, the juror responded that she did not believe she could follow this presumption.

In *State v. Fire*, 100 Wn. App. 722 (2000), the challenged juror stated, "'I consider him [defendant charged with child molestation] a baby raper, and it should just be severely punished.'" *State v. Fire*, 100 Wn. App. at 728. The juror added: "I'm very opinionated when it comes to this kind of crime." *State v. Fire*, 100 Wn. App. at 728. The potential juror, who served on the panel, also admitted that his strong feelings about this kind of case could affect his determination of guilt or innocence, in light of his belief in the innocence of children and the relative lack of credibility of adults.

With some reluctance, we hold that Alexander Johnson fails to show actual bias in juror two. Because juror two's answer to the prosecution's question suggests the juror might not challenge the State's evidence if Johnson presented no evidence, we wish the juror would have been questioned further. Nevertheless, the juror, uneducated in the law,

had not yet been instructed by the trial court as to the presumption of innocence or the State's burden of proving the crime beyond a reasonable doubt. Most potential jurors at the outset of a trial trust that evidence presented will be truthful. Cross-examination of witnesses and argument of counsel dispel this notion. The voir dire question and answer tell us little about the mental state of the juror and whether he or she could be impartial to the parties and the nature of the charges. The record lacks a showing that juror two could not put aside any bias and fairly decide the case on the facts and the law.

In short, Johnson has failed to carry his burden of showing prejudice. Johnson presents no decision directly on point. Juror two never stated she would believe officers' testimony over other witness testimony. The juror never commented that the defendant bore a presumption of guilt. The juror never mentioned a predisposition about the nature of the charges.

Issue 2: Did trial defense counsel perform ineffectively by failing to seek to remove juror two for cause?

Answer 2: No.

Alexander Johnson also claims his trial counsel was ineffective because he did not challenge juror number two for bias or for cause. Since we hold that Alexander Johnson shows no bias, we need not address this assignment of error. Johnson does not argue that trial counsel should have exercised a preemptory challenge to remove juror two.

Johnson Absence from Trial

Issue 3: Did the trial court err when failing to expressly ask Alexander Johnson, before sentencing, as to his reason for being absent from a portion of the trial?

Answer 3: No, since the trial court afforded Johnson an opportunity to allocate during sentencing.

Alexander Johnson contends the trial court failed to protect Johnson's constitutional right to be present at trial. Johnson assigns error to the trial court's failure to inquire whether he voluntarily waived his constitutional right. We disagree because the trial court afforded Johnson an opportunity to explain his absence.

An accused possesses a fundamental constitutional right to be present during trial. *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). The right derives from Washington Constitution article I § 22, which provides: "the accused shall have the right to appear and defend in person, or by counsel . . . [and] to meet the witnesses against him face to face." *State v. Thomson*, 123 Wn.2d at 880 (alterations in original). The right to be present accrues at every critical stage of the proceedings and includes trial testimony. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

The accused may waive the right to be present during trial. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); *State v. Thomson*, 123 Wn.2d at 880. Any waiver must be voluntary and knowing. *State v. Thomson*, 123 Wn.2d at 880. Once trial has begun in the defendant's presence, a subsequent voluntary absence operates as an implied

waiver, and the trial may continue without the defendant. *State v. Garza*, 150 Wn.2d at 367.

In line with constitutional principles and case law, CrR 3.4 reads:

> **(a) When Necessary.** The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.
>
> **(b) Effect of Voluntary Absence.** The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.
>
> **(c) Defendant Not Present.** If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

When the accused disappears during trial, Washington Supreme Court precedent directs the trial court to engage in a three-step process: (1) inquire, in the defendant's absence, of the circumstances of his or her disappearance, (2) render a preliminary finding of voluntariness, if justified, and (3), if and when the accused reappears, afford the defendant an adequate opportunity to explain his absence before imposing sentence. *State v. Garza*, 150 Wn.2d at 367 (2003). The third prong of the analysis provides an opportunity for the defendant to explain his or her disappearance and rebut the finding of voluntary absence before the proceedings have been completed. *State v. Thurlby*, 184

Wn.2d 618, 630, 359 P.3d 793 (2015); *State v. Thomson*, 123 Wn.2d at 883. Nevertheless, the third prong does not shift the burden to the State to prove the voluntary nature of the absence. *State v. Garza*, 150 Wn.2d at 368.

In performing the three-step analysis, the court indulges every reasonable presumption against waiver. *State v. Garza*, 150 Wn.2d at 367-68. This presumption may conflict with the concept of an implied waiver of the right to be present if the defendant voluntarily absents himself during trial.

We review a trial court's decision regarding a criminal defendant's voluntary absence for abuse of discretion. *State v. Garza*, 150 Wn.2d at 365-66. Alexander Johnson attended the first day of trial. Johnson could not be found after a recess on the second day of trial. Defense counsel called several of Johnson's known phone numbers to no avail. Following a deliberation on how to navigate the circumstances, including consideration of CrR 3.4 and *State v. Thurlby*, the trial court authorized a bench warrant for Johnson's arrest. The trial court also commented that officers would search hospitals and emergency rooms in an effort to determine if Johnson had an explanation for his disappearance. The trial court waited an additional three hours for Alexander Johnson to return. The next day, June 22, law enforcement located Johnson and arrested him pursuant to his bench warrant. Upon his return, the trial court apprised Johnson of his right to be absent, and also requested Johnson remain respectful, which he agreed to do.

During sentencing, defense counsel advised the trial court that the State recently charged Alexander Johnson with bail jumping. The State also informed the sentencing court that Johnson's absence from trial constituted a sentencing factor. The court advised Johnson of his right to speak and afforded Johnson an opportunity to comment. Johnson declined the invitation. The State believes Johnson offered no explanation at this juncture at the behest of counsel and to prevent self-incrimination.

The totality of the circumstances confirm that Alexander Johnson voluntarily waived his right to be present. Johnson informed counsel he was going to use the restroom, and without warning, left the courthouse. Johnson failed to respond to or answer any of the numbers he had provided to his attorney. The court waited hours for Johnson to return, calling local hospitals and jails, presuming his absence was involuntary. Law enforcement eventually found Johnson at a Spokane house.

We prefer that the trial court specifically mention to the accused of the right to explain his absence, but we do not determine the specific mention to be constitutionally required under these circumstances. The court allowed Johnson an opportunity to speak on Johnson's return to the court and during sentencing. He could have then complained about the continuation of his trial in his absence and presented a valid reason for the absence. His counsel could have also asked for a new trial if Johnson held a valid reason for his absence.

In *State v. Thomson*, 123 Wn.2d 877 (1994), Christopher Thomson absented himself from his trial on delivery of cocaine. He never reappeared during the trial but presented himself at sentencing. The record does not show the trial court's expressly offering Thomson the opportunity to speak about his absence. Nevertheless, Thomas apologized for his absence at trial without further explanation. The Washington Supreme Court affirmed the trial court's ruling that Thomson's disappearance was voluntary.

We distinguish Alexander Johnson's circumstances from the defendant's situation in *State v. Garza*, 150 Wn.2d 360 (2003). Law enforcement arrested Benjamin Garza in Snohomish County while in route to his trial in King County. Garza allegedly told arresting officers that someone needed to alert King County of his absence, but no one contacted the King County superior court judge, who proceeded with trial without any real inquiry. The Supreme Court reversed Garza's conviction.

Because we conclude the trial court committed no error, we do not address the State's argument that any error was harmless.

Pellet Gun Manufacturer Warning

Issue 4: Whether defense trial counsel performed ineffectively when failing to object as hearsay to testimony of the pellet gun manufacturer's warning?

Answer 4: No.

Alexander Johnson next asserts ineffective assistance of counsel in regards to his trial defense counsel's failure to object to Detective Randy Lesser's reading to the jury of

the manufacturer's warning on the pellet gun. Lesser found the warning on the pellet gun manufacturer's website. The State concedes the reading of the warning constituted hearsay. The State argues that defense counsel did not object to use of the warning as part of trial strategy.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test: (1) that his or her counsel's assistance was objectively unreasonable, and (2) that, as a result of counsel's deficient assistance, he or she suffered prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate the first prong, deficient performance, a reviewing court adjudges the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland v. Washington*, 466 U.S. at 690. This court gives great deference to trial counsel's performance and begins the analysis with a strong presumption counsel performed effectively. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015).

Alexander Johnson argues his trial counsel's failure to object to testimony prejudiced him. In general, trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). The decision of when or whether to object to trial testimony is a classic example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to

object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. at 763. A criminal defendant can rebut the presumption of reasonable performance by demonstrating that no conceivable legitimate tactic explains counsel's performance. *In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The State astutely emphasizes instances when defense trial counsel highlighted the manufacturer's warning during counsel's summation, such that the counsel incorporated the language of the warnings into part of the trial strategy. Defense counsel referenced the manufacturer's warning to argue that the pellet gun was not deadly. Counsel also used information from the warning in an attempt to prove that law enforcement haphazardly investigated the Cornerstone Apartments the night of the shooting.

Based on trial counsel's remarks during closing, we conclude that the failure to object to the reading of the gun warning worked as a reasonable tactic. Therefore, we need not determine whether any failure to object prejudiced Alexander Johnson.

Witness Testimony about Guilt

Issue 5: Did witness Melanie Kurtzhall or Eric Leggett deliver inadmissible opinion testimony of the guilt of Alexander Johnson?

Answer 5: No.

Alexander Johnson contends that Melanie Kurtzhall and Eric Leggett testified to opinions on Johnson's guilt in violation of Johnson's right to trial by jury. Johnson's trial counsel did not object to the testimony.

When the defendant asserts no objection during trial to the challenged evidence, an appellate court reviews for manifest constitutional error. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A defendant must identify the error and demonstrate that the alleged improper opinion testimony resulted in actual prejudice and had practical and identifiable consequences. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct. *State v. Kirkman*, 159 Wn.2d at 935. Failure to object deprives the trial court of this opportunity to prevent or cure the error. *State v. Kirkman*, 159 Wn.2d at 935.

No witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant because such testimony unfairly prejudices the defendant and invades the exclusive province of the jury. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). Improper opinions on guilt usually involve an assertion pertaining directly to the defendant. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Testimony that does not directly comment on the defendant's guilt or on the veracity of a witness and otherwise assists the jury as based on inferences from the evidence does not constitute improper opinion testimony. *City of Seattle v. Heatley*, 70 Wn. App. at 578.

Testimony that is based on inferences from the evidence is not improper opinion testimony. *City of Seattle v. Heatley*, 70 Wn. App. at 578. The fact that an opinion supports a finding of guilt does not make the opinion improper. *State v. Collins*, 152 Wn. App. 429, 436, 216 P.3d 463 (2009).

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. *State v. Kirkman*, 159 Wn.2d at 936. An explicit or nearly explicit opinion on the defendant's guilt can constitute manifest error. *State v. Kirkman*, 159 Wn.2d at 936.

We first review Melanie Kurtzhall's testimony. After the shooting, Alexander Johnson motioned his finger, as if shooting a gun, in Melanie Kurtzhall's direction. During testimony, Kurtzhall stated she knew that Johnson shot Leggett with the pellet gun so she took Johnson's motion as a direct threat that frightened her.

As part of his trial defense, Alexander Johnson claimed that the State could not prove he fired the pellet gun. In turn, the State needed to prove beyond a reasonable doubt that Johnson fired the weapon.

Alexander Johnson knew Melanie Kurtzhall as the manager of Cornerstone. Melanie Kurtzhall knew of the threatening messages to Eric Leggett, and after the shooting, assisted law enforcement with reviewing security camera footage. The jury could infer that Johnson knew that Kurtzhall assisted Leggett and law enforcement. Johnson's threat toward Kurtzhall helped to establish that Johnson fired the pellet gun

toward Leggett, because Johnson made a similar shooting motion toward someone who knew of the crime and assisted the victim and law enforcement. The jury could conclude that Leggett shot the pellet gun, because he later sought to intimidate a witness with simulated conduct.

We question whether Melanie Kurtzhall needed to testify that she believed Leggett shot the pellet gun, but we do not consider admission of such testimony manifest constitutional error. Kurtzhall did not directly declare Alexander Johnson guilty. The jury would already have concluded that Kurtzhall considered Johnson the shooter without Kurtzhall declaring her belief.

Alexander Johnson next challenges testimony of Eric Leggett that he considered Johnson to be the shooter. Leggett based this conclusion on the threatening notes on his window and Johnson's vantage point from his window to Leggett's apartment.

We deem *State v. Blake*, 172 Wn. App. 515, 298 P.3d 769 (2012) helpful. On his appeal from a conviction for first degree murder, Jerome Blake argued, in part, that the trial court erroneously allowed testimony of two witnesses who identified him as the shooter without seeing him pull the trigger. Both witnesses testified to their conclusion based on directions from which a flash originated and Blake's positioning. Eric Leggett based his testimony on similar physical evidence.

Issue 6: Did trial counsel perform ineffectively by failing to object to opinion testimony of Melanie Kurtzhall or Eric Leggett?

Answer 6: No.

Alexander Johnson also asserts ineffective assistance of counsel for the failure to object to Eric Leggett's and Melanie Kurtzhall's testimony. We disagree.

We have already concluded the testimony to be proper. Even if objectionable, defense counsel may have tactically decided to not object as to not reemphasize the comment to the jury and because the jury would have already concluded that Kurtzhall and Leggett considered Johnson to be the shooter. The decision to object, or to refrain from objecting, to inadmissible testimony is a tactical decision not to highlight the evidence to the jury. *State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014). The lack of an objection generally does not merit a finding of ineffective assistance of counsel. *State v. Kloepper*, 179 Wn. App. at 355. Johnson fails to show that his counsel performed deficiently.

Johnson as Unauthorized Tenant

Issue 7: Did the trial court commit reversible error by allowing Melanie Kurtzhall to testify that Alexander Johnson was an unauthorized tenant?

Answer 7: No.

Finally, Alexander Johnson assigns error to the trial court's overruling of his objection to Melanie Kurtzhall's testimony regarding Johnson's status at Cornerstone as an unauthorized guest. Johnson claims this inadmissible testimony painted him as a

scofflaw and raised a forbidden inference that one who breaks the law on one occasion is likely to do it again on a different occasion. We agree.

An appellate court reviews a trial court's ruling on an objection for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Evidence that tends to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible. *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

Alexander Johnson's authorization, or lack thereof, to be at Cornerstone lacked any relevance to the issues at trial. The State contends that Johnson's application to reside at Cornerstone established how Melanie Kurtzhall, a key witness for the State, came to be familiar with Johnson. Nevertheless, Kurtzhall could have testified that Johnson applied to become a tenant and she became acquainted with Johnson during the application process, without Kurtzhall adding that the housing authority denied the application. Johnson being denied the application did not allow Kurtzhall to better identify Johnson or add to the evidence of guilt of Johnson.

We consider the admission of Melanie Kurtzhall's testimony of Alexander Johnson as being an unauthorized tenant as harmless error. Inadmissible evidence requires reversal only if the error within reasonable probability, materially affected the outcome. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The error is harmless if the evidence is of minor significance compared to the overall

evidence as a whole. *State v. Everybodytalksabout*, 145 Wn.2d at 469.

The State did not emphasize testimony of Alexander Johnson being an unauthorized tenant. Overwhelming evidence, such as Johnson's motive, Johnson's ownership of the pellet gun, the angle of the shots establishing that the shots came from Johnson's apartment, and Johnson's open window, established guilt.

CONCLUSION

We affirm Alexander Johnson's harassment, second degree assault, malicious harassment, and third degree malicious mischief convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, J.

Pennell, A.C.J.

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

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