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NO. 96779-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID PHILLIPS,

Appellant.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

David Phillips seeks review of his conviction because the trial court did not sua sponte excuse Juror 10 for bias. In context, Juror 10's statements evince both mindfulness of implicit bias and a determination not to let unfounded prejudice overwhelm his rational thought processes. There was no showing of actual bias, and no reason for the trial court to intrude on defense counsel's jury selection strategy.

Phillips also seeks review of the trial court's decision to admit his victim Sara's Smith[1] affidavit as substantive evidence, arguing that the statement is insufficiently inconsistent with her trial testimony and was unreliable. The record belies Phillips' claim. There was no abuse of discretion.

The Court of Appeals decided this case correctly. Its decision does not conflict with other decisions. The issue of the trial court's authority or obligation to remove biased prospective jurors over the parties' wishes, while significant and of public interest, is not presented here because the record demonstrates no actual bias.

[1] State v. Smith, 97 Wn.2d 856, 861, 651 P.2d 207 (1982).

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

1. THE ASSAULT, INVESTIGATION, ARREST, AND JAIL CALLS.

On July 1, 2016, Phillips came home late and argued with his wife, Sara, who told him to leave. RP 458-60, 465, 738. Sara gave her phone to her teenage daughter, Joe'll, and told her, "If he hits me, call the police." RP 466, 739. The argument continued, and Phillips pushed Sara down as she held their four-month-old baby. RP 742. Joe'll saw Phillips stand over Sara and put his hands around her neck. RP 743. She heard her mother gasping for air. RP 743-44. She called 911. RP 745. Phillips left the house before the police arrived. RP 471.

Responding officers found Sara crying in the living room. RP 527. While Sara described the altercation, Deputy Spiewak wrote a statement, read it back to her, and let her read it herself, after which she signed the statement under penalty of perjury. RP 463-65, 513-14, 529-31, 541. In her statement, Sara explained that when she tried to pick up her baby, Phillips called her a bitch, pushed her down, and "grabbed [her] around the throat with both hands." RP 468-69. Sara reported that it was "hard for [her] to breathe," that Phillips was "grabbing [her] throat for about a minute," and that she "felt like [she] was going to pass out." RP 469. While she was on the ground, Phillips kicked her, told her to "quit faking," grabbed her by the arm, and "was trying to push [her] down the stairs." RP 469. Spiewak found Sara "distraught, hesitant, nervous, upset, and fearful" and took pictures documenting a number of blunt force injuries including bruises, red marks, and scratches. RP 532, 537, 696-701.

Firefighter/EMT Bartlett treated Sara at the scene. RP 623. Sara told him that she had been choked and had felt like she was going to pass out. RP 624. She reported pain to her neck, and despite poor lighting, he was able to confirm "trauma" to her neck. RP 624. Sara refused to go to the hospital. RP 625.

Phillips was arrested and booked into jail in the very early morning hours of July 1. Beginning at 3:28 a.m. that day, and over the next two

days, he called Sara about two dozen times. RP 640-47. Phillips berated Sara for talking to the police and demanded that Sara come get him out of jail. RP 479; CP 414-57. In one of these calls, Sara denied that she turned Phillips in, stating, "The fuckin' marks on my fuckin' neck turned you in." CP 417. Sara reminded Phillips that he was in jail because he "sat there and fucking choked the fuck out of me[.]" RP 503, 510; CP 423. In another call, Sara asked why she should help Phillips "when you grab me by … neck … with both your fuckin' hands." CP 441.

2. JURY SELECTION AND JUROR 10.

During voir dire, Juror 10 indicated personal experience with domestic violence. RP 315-16. He had two family members who had been involved in abusive relationships with intimate partners. RP 321. Although he considered himself fair and impartial, Juror 10 admitted that it was a "deeply personal issue" and he did not know "what will come up in the course of the story and how that will affect me." RP 322-23.

During individual voir dire, Juror 10 described another experience that he said left an "emotional print" on him: following an intramural college basketball game, an African American player on the opposing team assaulted him. RP 373. Juror 10 explained, "I don't live this way; I don't believe this; but I'm also aware that feelings happen in reality that black men are more prone to violence. … And that's another narrative;

that those who are violent try to get out of it; so those are two personal emotions [sic] imprints that are there, as well." RP 373-74. Juror 10 then expounded on other "emotional imprints," including his feeling that domestic violence is an underreported societal problem, that women including his own family members suffer because of it, and that "domestic violence that isn't prosecuted or isn't punished leads to worse tragedy and grief." RP 375. "On the other hand," he explained, "I trained as a scientist and I hold it as a personal principle to be fair and objective, and I do believe that I could hear and see what happens in this trial fairly and objectively." RP 375.

The deputy prosecutor asked Juror 10 whether he would hold the State to its burden or simply accept whatever the State alleged. RP 376. Juror 10 indicated that he would not uncritically accept whatever the State alleged. RP 376.

Defense counsel followed up extensively on the juror's opinions on unconscious bias and domestic violence.[2] Juror 10 clarified that "this is most definitely not personal and it's not something I carry as a daily bias or prejudice. It's just something embedded in my emotional history that I wanted you to be aware of." RP 378-79. Juror 10 endorsed another

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[2] Defense counsel's rehabilitative questioning of Juror 10 spanned five pages of transcript. RP 377-81.

juror's remark that being aware of potential bias allows one to "consciously deal with that." RP 379. He added that "it must be the merits of this situation and the evidence and the stories that are presented here that need to establish what the reality is in this particular case." RP 380. Juror 10 stated that he would be comfortable with someone like himself on his own jury because of "what I know I bring to the table with the ability and intent to be objective and fair," while at the same time expressing some ambivalence about how he would react emotionally to the evidence: "for someone to have the history that I have and to realize that emotion inevitably plays into who we are as humans, I wouldn't know." RP 381. When defense counsel asked Juror 10 directly whether he felt comfortable taking an oath to abide by the law and the judge's instructions, Juror 10 stated, "Absolutely," and promised to "absolutely do my best." RP 381. Neither party challenged Juror 10 for cause.

Following the remainder of individual voir dire, the State accepted the panel without using any peremptory challenges. RP 412. Phillips used peremptories to strike several jurors. RP 412-14. With one peremptory challenge left, Phillips accepted the panel. RP 414. Juror 10 was seated.

3. SARA'S APPEARANCE AT TRIAL.

Neither Sara nor Joe'll willingly cooperated with the prosecution at trial. RP 443, 445, 517, 746. Outside of the presence of the jury, Sara

expressed frustration over pretrial rulings precluding her from testifying to her belief that Phillips was not a bad man; he just needed mental health and substance abuse treatment. RP 443-45. Sara questioned, "what's the purpose of me being here" to testify about what happened, since "you guys have a written statement for that." RP 445.

During her testimony, Sara claimed not to remember much of the incident, which had occurred less than four months before,[3] and only "somewhat" recalled making a statement to police. RP 462-63. She seemed to disavow the statement, pointing out that she did not write it herself and explaining that officers ask questions and then "interpret [the answer] how they want to interpret it and put it down on paper." RP 464. On the other hand, when the State asked Sara to tell the jury what she could remember, she replied, "I'm going to say, like I said before, if that's [her written statement] what you want to go off of, here it is." RP 464-65. When asked whether the written statement accurately reflected what she remembered, Sara agreed, "some of it, yes." RP 465. But beyond her name and the fact that she had an "altercation" with Phillips, Sara refused to indicate what parts of her statement aligned with her memory. RP 465. Sara claimed that she did not remember what the couple argued about. RP

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[3] The State alleged that the assault occurred on July 1, 2016. CP 1. Sara testified on October 18, 2016. RP 455.

458. She did not recall Phillips calling her a bitch when she picked up her baby, grabbing her around the throat with both hands, or kicking her and telling her to "quit faking" while she was on the ground. RP 469. She was "not sure" if she remembered whether it was ever hard to breathe or whether she felt like she would pass out, and she did not remember if she felt pain in her neck. RP 469, 474.

Notably, Sara's memory was fine with respect to the events before and after the assault. She recalled that she argued with Phillips, that he told her not to touch the baby when she wanted to breastfeed her, that she told Joe'll to call the police if the argument escalated, and that the argument became physical. RP 462, 465. Moreover, although she claimed that she did not recall Phillips putting his hands around her neck, she did remember telling the police that he grabbed her throat for a minute and she felt like she would pass out. RP 469.

While Sara largely professed lack of memory, she also specifically denied certain of the allegations in her statement. Sara testified that Phillips did not hit her in the face or push her to the ground. RP 466, 468. She also seemed to deny that Phillips grabbed her arm and tried to push her down the stairs, stating when asked about that, "Like I told you, we were sitting there both tussling with each other – you know?" RP 469. Given Sara's reluctance to testify and her evasive responses, the trial court

had "concerns about whether there's a true lack of memory or a disinterest in participating fully in prosecution." RP 491.

The State moved to admit her written statement as a Smith[4] affidavit, allowing it to be considered as substantive evidence. The trial court reserved ruling until Deputy Spiewak testified about the circumstances of his taking the statement, and ultimately ruled that the written statement, redacted to omit reference to Phillips' drug use, would be admitted. RP 596.

D. THIS COURT SHOULD DENY REVIEW

1. THE JUROR BIAS ISSUE DOES NOT MERIT REVIEW; THE RECORD ESTABLISHES NO ACTUAL BIAS.

Phillips seeks review of the trial court's failure to sua sponte remove a juror that neither party wanted to remove. He contends that a trial court's obligation to act on its own to remove a biased juror is a significant constitutional question warranting review under RAP 13.4(b)(3). If the record demonstrated that Juror 10 harbored actual bias, Phillips would have a point. But as the record instead shows Juror 10 had a sophisticated understanding of implicit bias and was determined not to allow unchallenged prejudices to interfere with his duty as a juror, there was no actual bias. Accordingly, there was no reason for the trial court to

[4] State v. Smith, 97 Wn.2d 856, 861, 651 P.2d 207 (1982).

act contrary to the parties' decision to keep Juror 10 on the panel, and no significant constitutional question is presented.

The Sixth Amendment guarantees criminal defendants the right to trial by an impartial jury. U.S. CONST. amend. VI; State v. Davis, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). To effectuate this right, the trial court will excuse prospective jurors whose views would preclude or substantially hinder them in the performance of their duties in accordance with the court's instructions and the jurors' oath. State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002).

Either party may challenge a prospective juror for cause. RCW 4.44.130. In addition, Division One of the Court of Appeals has observed in the context of an absent, pro se defendant that "[a] trial judge has an independent obligation to protect [the constitutional right to an impartial jury], regardless of inaction by counsel or the defendant." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036, 379 P.3d 953 (2016). Accordingly, "if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error" of constitutional magnitude, warranting review under RAP 2.5(a)(3) despite failure to object below. Id. at 192-93. Allowing a biased juror to serve on a jury requires a new trial without a showing of prejudice. Id.

Actual bias is grounds to excuse a juror for cause. RCW 4.44.170(2). It exists when a juror demonstrates "a state of mind … 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." Id.

Where a party does challenge a juror for cause, the trial court's ruling is reviewed for manifest abuse of discretion. State v. Lawler, 194 Wn. App. 275, 283, 374 P.3d 278 (2016). "The reason for this deference is that the trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." Id. at 282 (quoting Davis, 175 Wn.2d at 312).

Phillips argues that Juror 10's comments about the "emotional imprint" he carries as the victim of an assault by an African American man established that he could not try the case impartially and without prejudice. But "the mere fact that a juror expresses or forms an opinion is not itself sufficient to sustain a challenge." Lawler, 194 Wn. App. at 281; RCW 4.44.190. Rather, "the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

Here, after candidly disclosing his emotional impressions, Juror 10 clearly and repeatedly stated that he would not allow these admittedly unjustified feelings to supersede his rational thought process. Juror 10 stated that "I don't live this way; I don't believe this[.]" RP 375. As a trained scientist, Juror 10 "hold[s] it as a personal principle to be fair and objective[.]" Id. Although he felt it important to disclose his "emotional truths," he believed that he "could hear and see what happens in this trial fairly and objectively." Id. He denied that he would simply accept the State's allegations absent proof, and denied that his feelings would "tip the scale" even though the allegations involved violence by an African American man. RP 376, 378-79. Importantly, Juror 10 agreed that being aware of his biases allowed him to consciously counteract their impact. RP 379.

With respect to the "emotional truth" of his strong feelings about domestic violence, Juror 10 reiterated, "I understand and ascribe to the principal [sic] that it must be the merits of the situation and the evidence and the stories that are presented here that need to establish what the reality is in this particular case." RP 380. When asked whether he would like a juror like himself on his jury if he was charged with domestic violence, he expressed confidence "in terms of what I know I bring to the table with the ability and intent to be objective and fair," despite

acknowledging that "emotion inevitably plays into who we are as humans[.]" RP 381. Finally, when asked whether he was comfortable taking the juror's oath and following the law as instructed by the judge, Juror 10 was unequivocal: "Absolutely." RP 381.

Juror 10's candid responses during voir dire do not evince an inability to disregard his predispositions and try the case impartially. Rather, they demonstrate exactly the sort of consciousness of and willingness to confront implicit bias that many courts have recently encouraged.[5]

This case is not like Irby, on which Phillips relies. There, Division One held that the trial court erred by failing to sua sponte excuse a juror who demonstrated actual bias, in the unusual circumstance where the pro se defendant absented himself from jury selection. 187 Wn. App. at 196-97. The juror in that case explained she might not be fair because she was "more inclined towards the prosecution" and "would like to say [the defendant] is guilty." Id. at 190. There was no follow up, and the juror

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[5] For example, federal district courts in Western Washington use a video and jury instructions to educate prospective jurors about implicit or unconscious bias and the importance of making conscious efforts to counteract bias. The video and accompanying jury instructions can be found at: http://www.wawd.uscourts.gov/ jury/unconscious-bias (last visited 1/14/2018). See also Judge Theresa Doyle, "U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias," Bar Bulletin, King County Bar Ass'n (April 2017), available at https://www.kcba.org/ kcba/newsevents/barbulletin/BView.aspx?Month=04&Year=2017&AID=article11.htm (last visited 1/16/2018).

was seated. Division One regarded the juror's statements as "an unqualified statement expressing actual bias," and held that seating the juror was manifest constitutional error. Id. at 188.

Unlike in Irby, Juror 10's answers expressed no inability to be fair. At worst, his answers suggest that he was unsure whether he could be objective given his acknowledged emotional predispositions. Unlike in Irby, defense counsel actively participated in voir dire; indeed, it was defense counsel's rehabilitating questioning that produced Juror 10's unequivocal commitment to confront his feelings and consider the case fairly and objectively. Thus, when Phillips accepted the panel with Juror 10 on it and one peremptory challenge remaining, the trial court could reasonably conclude that Phillips wanted Juror 10 to serve on the jury. See Lawler, 194 Wn. App. 275, 288-89, 374 P.3d 278 (2016) (urging trial courts to be cautious about intruding on jury selection absent clear bias; noting that defendant's failure to exhaust peremptory challenges leads to a presumption that defendant was satisfied with the jury).

Juror 10 did not demonstrate actual bias. He instead demonstrated a relatively sophisticated understanding of the idea of implicit bias and the determination not to allow it to interfere with his duty as a juror to be fair and impartial, to base his decision on the evidence presented, and to follow the court's instructions on the law. Since both parties apparently

wanted Juror 10 on the jury, there was no reason for the trial court to intervene to remove him. The case presents no constitutional question. This Court should deny review.

2. THE *SMITH* AFFIDAVIT WAS PROPERLY ADMITTED, ENTIRELY CONSISTENT WITH EXISTING COURT OF APPEALS AND SUPREME COURT DECISIONS.

Phillips argues that the trial court abused its discretion by admitting Sara's Smith affidavit. He variously argues that Sara "did not testify inconsistently with the Smith affidavit" and that she "expressly disavowed the statement" in her testimony. The record demonstrates that Sara's affidavit bears the minimal guarantees of truthfulness required by Smith, and that her testimony was inconsistent with the affidavit with respect to the nature of the altercation, Phillips' specific conduct, and Sara's ability to remember. The Court of Appeals correctly concluded there was no abuse of discretion.

Under ER 801(d)(1), prior inconsistent statements by nonparty witnesses may be admitted as substantive evidence if the statements were "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." A statement given to police during an investigation into alleged criminal activity can be such an "other proceeding." State v. Otton, 185 Wn.2d 673, 690, 374 P.3d 1108 (2016).

A four-factor test guides the trial court's determination whether such a statement is sufficiently reliable. Id. at 688, 689. Among other things, the test requires consideration of "whether there were minimal guaranties of truthfulness." Otton, 185 Wn.2d at 680 (quoting State v. Thach, 126 Wn. App. 297, 308, 106 P.3d 782 (2005)).

a. Minimal Guarantees Of Truthfulness.

Phillips contends that Sara's statement should not have been admitted because it lacks minimal guarantees of truthfulness. He points to the fact that the statement was written by an officer rather than Sara herself and contained the officer's interpretation of her words rather than a verbatim account. But where a witness testifies that she gave a statement and voluntarily signed it, "the mere fact that [she] did not write the statement herself" does not render the statement unreliable. State v. Nelson, 74 Wn. App. 380, 389, 874 P.2d 170 (1994).

Sara testified that she signed the statement after speaking with the officer. The signature, date, and place of execution lines appear immediately below the line stating "I certify (or declare) under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct." CP 412. This language satisfies statutory requirements for treating an unsworn statement as a sworn one. Nelson, 74 Wn. App. at 389-90; RCW 9A.72.085. Deputy Spiewak testified that he wrote down

what Sara reported and read it back to her, including the perjury warning, before she signed the statement. RP 529, 541. Sara's report of being grabbed by the arm and throat is also consistent with her report to the EMT and with the EMT's observation of trauma to her neck, with Spiewak's observations documented on the supplemental domestic violence form, and with photos showing what the defense expert described as "blunt force injury" in these areas. RP 531-33, 624-25, 694-701.

Further, Sara essentially affirmed the accuracy of the account provided in her written statement outside of the jury's presence. She explained that she did not want to testify and argued there was no point in her testifying about the incident because "you guys have a written statement for that[.]" RP 445. Once the judge explained that "typically written statements can't be used as evidence," Sara had no further questions and proceeded to testify. RP 445, 455. When asked to tell the jury what she remembered, Sara referred to the statement and said "like I said before, if that's what you want to go off of, here it is." RP 465-65. Under the circumstances, the trial court reasonably concluded that Sara's remarks indicated that "she didn't wish to testify further because the statement sort of says what it says and includes all of the information that she has to share." RP 491. The record demonstrates that Sara's detailed

statement to police immediately following the assault bears sufficient guarantees of truthfulness.

b. Sara's Testimony Was Sufficiently Inconsistent With Her *Smith* Affidavit.

Phillips also contends that the Smith affidavit was inadmissible because it was not "inconsistent with the declarant's testimony" as required under ER 801(1)(d)(i). He argues that Sara's testimony that she did not recall whether or not Phillips choked her is not sufficiently "inconsistent" with her written statement describing those events. The record supports the trial court's conclusion that Sara feigned her lack of memory; this, combined with her direct contradiction of certain assertions in her statement, rendered the statement sufficiently inconsistent for purposes of ER 801(d)(1)(i).

Although Sara claimed not to remember being choked, her memory was fine with respect to the events before and after the assault. She recalled that she argued with Phillips, that he told her not to touch the baby when she wanted to breastfeed her, that she told Joe'll to call the police if the argument escalated, and that the argument became physical. RP 462, 465. Moreover, although she claimed that she did not recall Phillips putting his hands around her neck, she *did* remember telling the police that he grabbed her neck for a minute and she felt like she would

pass out. RP 469. Additionally, she did not say she did not remember whether other parts of the assault occurred; instead, she specifically recanted her prior statement that Phillips punched her, slapped her, or pushed her to the ground. RP 466, 468.

The trial court noted that Sara's specific contradictions were "clearly inconsistent" with her prior statement. RP 488. Further, Sara's inconsistent statements and implausible memory lapses gave the trial court "concerns about whether there's a true lack of memory or a disinterest in participating fully in prosecution." RP 491. The trial court considered the matter carefully:

> Given the detailed nature of the statement; given the relative recency of the events; given the allusion, at least, to the fact by Ms. Phillips-Suffia that she didn't wish to testify further because the statement sort of says what it says and includes all of the information that she has to share; and given the sort of severe and traumatic nature of these allegations, if proven, the Court finds that this is an appropriate case for the Court to allow impeachment by a prior inconsistent statement.

RP 492-92.

The record supports the trial court's conclusion that Sara's statement was sufficiently inconsistent with her trial testimony to justify admission under ER 801(d)(1). There was no abuse of discretion. Phillips does not show how the trial court's discretionary call in this case is

inconsistent with precedent from this Court or the Court of Appeals. This Court should deny review.

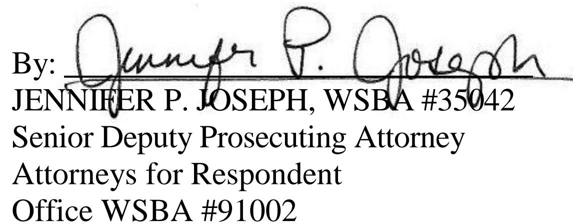
E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 13th day of March, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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