SUPREME COURT NO. 98204-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARIO ROBERTO GUEVARA DIAZ,

Respondent.

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

The Honorable George F. Appel, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF ANSWERING PARTY

Respondent Mario Roberto Guevara Diaz, the appellant below, answers the state's petition for review as directed by Department I's June 3, 2020 order.

B. COUNTERSTATEMENT OF THE ISSUE

In a pretrial jury questionnaire, one of the jurors who ultimately sat on Guevara Diaz's jury indicated she could not be fair in a case involving allegations of sexual assault or abuse. During voir dire, no one asked the juror any follow-up questions as to her ability to decide the case impartially. Is the court of appeals decision correct in concluding (1) this error may be raised as a manifest error affecting a constitutional right for the first time on appeal and (2) that the seating of a juror who expressed actual bias deprived Guevara Diaz of his constitutional rights to an impartial jury, necessitating reversal of his conviction and a new trial?

C. COUNTERSTATEMENT OF THE CASE

Juror 23 indicated she could not be fair in a case involving sexual assault or abuse in her juror questionnaire. CP 113. Given that seven jurors had answered the same, defense counsel asked that the jurors be questioned individually. RP 41-43. The court denied the request, stating that the jurors could be questioned in the presence of the entire venire. RP 44-45. Defense counsel asserted these jurors were "presumptively not going to be fair in this

case. They are going to be 'for cause' challenges." RP 45. The trial court responded, "They may well be. I fully anticipate that some of them will wind up getting challenged for cause successfully. And depending on what they say, others might not, but we'll have to hear from them first." RP 45.

No one at trial ever heard from two of these jurors about their questionnaire answers, Juror 23 and Juror 27. Juror 27 did not speak once during jury selection. Juror 23 responded to one question about whether she would be inclined to compromise on finding the defendant guilty based on the possibility of punishment and stated, "No compromising. That's for sure." RP 599. Aside from this response, Juror 23 did not speak at any other time during voir dire. Juror 27 was designated as the alternate and Juror 23 participated in deliberations. RP 469-70; CP 76, 82-83.

Guevara Diaz appealed. CP 15. He argued, among other things, that seating Juror 23 despite her unequivocal statement of bias violated his constitutional rights to an impartial jury. He also contended that the issue was a manifest constitutional error that could be considered for the first time on appeal. The court of appeals agreed with Guevara Diaz, applying well-settled case law to the questions before it. State v. Guevara Diaz, 11 Wn. App. 2d 843, 851-61, 456 P.3d 869 (2020).

D. ARGUMENT

1. THE PROSECUTION FAILS TO SHOW ANY PROCEDURAL ERROR OR CONFLICT IN THE CASE LAW WITH RESPECT TO THE COURT OF APPEALS' APPLICATION OF RAP 2.5(a)(3)'S MANIFEST CONSTITUTIONAL ERROR STANDARD

a. The record is not silent on key facts but manifestly shows that Juror 23 exhibited actual bias that was never addressed

All the state's procedural arguments depend on the proposition that Juror 23 did not express actual bias. But she plainly did. She answered "NO" to the question, "Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?" CP 113. She also answered that both she and a close family member or friend had been victims of sexual assault or abuse. CP 113. During the entirety of voir dire, she spoke once when she answered the state's question, "Do you think it will be your role or any juror's role to compromise a situation because they didn't want someone to get in trouble after a conviction?", and she said, "I would be able to. No compromising. That's for sure." RP 598-99.

Actual bias means "the existence of a state of mind on the part of a juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Juror 23 answered no in writing when she was asked directly whether she could be

fair in Guevara Diaz's trial. This expressed a "state of mind" indicating she "cannot try the issue impartially and without prejudice." Cf. id. No one ever questioned her about her response. And her only spoken words during voir dire suggest strong bias against the defense in particular: "No compromising. That's for sure." RP 599. Juror 23 expressed that she could not be impartial in this trial and, despite this, she never ensured anyone she could be impartial.

In State v. Gonzales, 111 Wn. App. 276, 281, 45 P.3d 205 (2002), Juror 11 indicated bias in favor of police witnesses, admitting that this would affect her deliberations and that she did not know if she could apply the presumption of innocence. "[N]o rehabilitation was attempted." Id. This required reversal for "actual bias" because "[a]t no time did Juror 11 express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence." Id. at 282. Actual bias has been established in other, similar circumstances. In State v. Irby, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015), a juror stated she "would like to say [Irby]'s guilty" during voir dire. This was an unqualified statement of bias, which was followed by a "'conspicuous lack of response"' in the remainder of voir dire to explain the juror's statement. Id. (quoting Hughes v. United States, 258 F.3d 453, 458 (6th Cir. 2001)). This amounted to actual bias. Id. at 196-97. In Hughes, relied on by Irby, the problem juror said, "I don't think I could be fair" and answered "No" to "You don't think you could be fair?"

258 F.3d at 456. No one ever followed up, which was a "complete lapse" by the trial court in carrying out its obligation to ensure an impartial jury for the accused. Id. at 464.

No distinction exists between these cases and Guevara Diaz's. Juror 23's answer that she could not be fair in this case, followed up only by the statement that it was "for sure" she would never compromise, amounted to an unqualified statement of bias under Irby, Gonzales, and Hughes. And, as in those cases, no one ever followed up to ensure Juror 23's impartiality.

The state claims we don't have a good enough record for bias because the trial court mentioned reasons that a juror might answer "no" to the questionnaire's fairness question and still be impartial. Pet. for Review at 11 (citing RP 43-45). It is indeed conceivable that such a juror might be rehabilitated. But there was no rehabilitation here. The state's reliance on the trial court's statements is odd, given that the trial court in fact emphasized the need for follow-up with the jurors who answered they could not be fair in the questionnaire: "I fully anticipate that some of them will wind up getting challenged for cause successfully. And depending on what they say, others might not, but we'll have to hear from them first." RP 45 (emphasis added). Contrary to the state's reading of the record, the trial court believed Juror 23 and other jurors had expressed actual bias, hence the need to hear from them to determine whether they could serve on the jury.

The state also claims the record is silent on key facts because it does not show whether or how Juror 23 answered questions directed at the entire venire. Pet. for Review at 11-13. The state does not address or acknowledge the case law that makes this argument inapposite. In Irby, the court of appeals held "such questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias." 187 Wn. App. at 196 (citing Hughes, 258 F.3d at 461). And "few [jurors] will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions." State v. Fire, 100 Wn. App. 722, 728, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001).

The state relies on State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991), to argue that the trial court is in the best position to ascertain whether a juror is biased based on demeanor. Pet. for Review at 12-13. But Noltie involved a juror's equivocal answers, which did not require the juror to be removed for cause. 116 Wn.2d at 839. And Noltie did not hold that body language alone can overcome an unqualified verbal or written statement of actual bias. Rather, Noltie emphasized the importance of observing jurors' demeanor to "evaluate and interpret the responses." Id. The court was not interpreting demeanor in a vacuum, but alongside the answers given by the juror in question. Id. at 839-40. Noltie therefore provides no support to the prosecution's position.

In any event, the state misleadingly omits that the prosecutor did not merely ask "whether they could give both sides a fair trial. Some or all of them nodded 'yes.'" Pet. for Review at 12 (citing RP 601-02). The prosecutor also asked, "Do you agree that the State . . . has the burden of proof in this case?" and "Do you all also agree that the State is also entitled to a fair trial?" RP 601. Only after these additional questions did the prosecutor say, "There's a lot of nodding of heads, and I take that . . . the universal language of nodding heads, you all mean, yes, right?" to which unspecified jurors responded, "Yes." RP 601-02. Setting aside the ridiculous proposition that the state—the sovereign—is entitled to a fair trial, even if Juror 23 was one of the jurors who answered affirmatively, an affirmative answer to the prosecutor's compound questions provides no clarification or mitigation of the actual bias Juror 23 had already expressed. Juror 23 expressed actual bias and the prosecutor's general questions to the venire cannot and did not rehabilitate her.

Finally, the state complains generally that the "[a]pplication of the 'manifest error' test is a recurring problem." Pet. for Review at 13. Yet the state does not attempt to give its preferred application of RAP 2.5(a)(3) "manifest error affecting a constitutional right" standard anywhere in its petition or in its briefing below. Guevara Diaz points the court and the state to State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015), in which the showing required for manifestness was explained quite clearly. To

demonstrate manifestness, the appellant must show actual prejudice. Id. at 584. "'To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (alteration in original) (internal quotation marks omitted) (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007))). To determine whether an error is practical and identifiable, "'the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.'" Id. (quoting O'Hara, 167 Wn.2d at 100).

Under this standard, the constitutional error in Guevara Diaz's trial was manifest. The parties discussed problematic questionnaire responses on the record when defense counsel asked to question certain jurors individually. RP 41-43. The trial court said no to this request, but nevertheless expressed the need for follow-up with the jurors, albeit in the ordinary course of general venire questioning. RP 44-45 ("we'll have to hear from them first"). The potential seating of a juror who had expressed actual bias therefore had practical and identifiable consequences. The court knew of the juror bias issue because counsel brought it up. Had the court ensured that it "hear[d] from [the jurors] first," it could also have ensured that Juror 23, who made an unqualified statement of bias, did not sit on Guevara Diaz's jury. Knowing

what the trial court knew, the error was manifest under the analysis set forth in Kalebaugh because the trial court knew enough to have corrected the error. The state offers no competing analysis under this, the correct standard for raising error for the first time on appeal, and its general complaints about the RAP 2.5(a)(3) standard itself do not merit review. The state's petition should be denied.

b. None of the pre-RAP 2.5 cases cited by the state addressed the constitutional right to an impartial jury or involved jurors who stated they could not be impartial, so there has been no "abandon[ment] of an established rule" as the state claims

Not only insistent that the manifest constitutional error standard is wrong or should not apply, the prosecution also attempts to pretend the standard does not exist, relying on pre-rule cases, State v. Perry, 24 Wn.2d 764, 167 P.2d 173 (1946); State v. Jahns, 61 Wash. 636, 112 P. 747 (1911); State v. Crawford, 21 Wn. App. 146, 151, 584 P.2d 442 (1976). Pet. for Review at 6-7, 9. Not only did these cases not apply RAP 2.5(a)(3), none involved an issue of actual bias expressed by a juror. The cases and the state's arguments about them should be disregarded because they do not support review under any RAP 13.4(b) criterion.

In Perry, there was no challenge for cause because no juror had expressed bias. Rather, the issue was that the trial court told the jury that Perry had acted peculiarly but had had two doctors examine his mental health, and

that he was "mentally all right." 24 Wn.2d at 767-68. Counsel took no exception to these remarks and voir dire proceeded as usual. Id. at 768. This is not a case involving the Sixth Amendment and article I, section 22 right to an impartial jury based on a juror's expression of bias. The state's discussion of it should be ignored.

In Jahns, there was no expression of juror bias. The juror said he had no opinion as to the guilt or innocence of the defendant based on what he had heard or read, and merely answered yes to whether "he believed a woman was murdered in Stevens county on October 28th." 61 Wash. at 638. The juror said he could consider the evidence, had no fixed opinion or belief, and could render an impartial verdict. Id. There was no direct expression of bias toward the defendant or toward the outcome of the case, and therefore it was not unreasonable for the defense to decline to renew its for-cause challenge based on bias after the prosecution withdrew its objection to the challenge. Id. Jahns did not involve a claim of actual juror bias and therefore it does not conflict with cases applying the RAP 2.5(a)(3) standard.

Crawford is somewhere in between Jahns and Perry. The larger issue in Crawford was the trial court's statement on the record in front of the venire that officers were subduing Crawford, whom the court pointed out was shackled because he tried to escape earlier. 21 Wn. App. at 150. Despite this remark, as in Perry, defense counsel engaged in voir and passed each member

of the final panel for cause. Crawford, 121 Wn. App. at 150. The defense did claim on appeal that an individual juror was prejudiced against him due to reading a newspaper article about the defendant's escape. Id. at 151. But the article was not in the record; nor is there any indication in the record that the juror who read the article expressed an inability to be impartial. Id. Thus, as in Jahns and Perry, the Crawford case did not involve a situation where a juror unequivocally expressed an inability to be fair. The pre-rule cases relied on by the state do not support review.

Indeed, of the cases that actually do address actual juror bias under the correct RAP 2.5 standard, all are consistent that the error may be raised for the first time on appeal. See State v. Phillips, 6 Wn. App. 2d 651, 661-62, 431 P.3d 1056 (2018) (addressing merits of juror bias claim on appeal despite no objection to seating the juror at trial), review denied, 193 Wn.2d 1007, 438 P.3d 116 (2019); State v. Lawler, 194 Wn. App. 275, 283, 374 P.3d 278 (2016) ("If the jury demonstrates actual bias, empaneling the biased juror is manifest error."); Irby, 187 Wn. App. at 193 ("if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error. Irby's failure to challenge the two jurors for cause at trial does not preclude him from raising the issue of actual bias on appeal"). There is no conflict or inconsistency in Washington case law that correctly applies the "manifest

error affecting a constitutional right" standard in the context of juror bias, pre-rule cases notwithstanding. The state's petition for review should be denied.

c. The prosecution wrongly seeks to undermine the constitutional rights to an impartial jury by deferring to the trial court or defense counsel rather than effecting a knowing, voluntary, and intelligent waiver from the accused

The state's waiver theory suggests that inaction on the part of the trial court or defense counsel when confronted with actual juror bias means that either or both believed the juror could be fair based on something other than the juror's statements that she could not be. Pet. for Review at 6, 10. The state is wrong for two reasons. First, it ignores the trial court's independent obligation to honor the accused's constitutional right to an impartial jury. Second, when a juror expresses actual bias and no one follows up, the only person who can waive the accused's constitutional right to an impartial jury is the accused him- or herself, and such waiver must be knowing, voluntary, and intelligent.

"Criminal defendants have a federal and state constitutional right to a fair and impartial jury." State v. Irby, 187 Wn. App. at 192-93 (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136 157, 892 P.2d 29 (1995)); U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22. [S]eating a biased juror violates this right." Irby, 187 Wn. App. at 193 (citing In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296

P.3d 872 (2013)). The trial judge has an independent obligation to protect the right to an impartial jury, regardless of inaction by defense counsel. State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012); Irby, 187 Wn. App. at 913; accord Hughes, 258 F.3d at 464.

The trial court had its own obligation to follow up with Juror 23 because she expressed actual bias. Allowing a juror to serve who has expressed bias in a criminal case constitutes a "complete lapse by the trial court . . . in carrying out its obligation on *voir dire*." Hughes, 258 F.3d at 464; accord Irby, 187 Wn. App. at 193. The prosecution fails to acknowledge or address Washington Supreme Court precedent applying RCW 4.44.170 and CrR 6.4 that is in accord with Hughes and Irby. As this court has stated, "a trial judge may excuse a potential juror where grounds for a challenge exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so." Davis, 175 Wn.2d at 316 (emphasis added). Given Juror 23's statement of actual bias, the trial court had an independent obligation to ensure she was not seated or that she was questioned further to ensure she could be impartial. The trial court failed to do so, constituting the "complete lapse" that correctly required reversal in Irby and Hughes.

In addition, the accept the state's premise that defense counsel meant to seat Juror 23 despite her statement of actual bias is to allow counsel to waive

the constitutional rights to an impartial jury without express consent. The Hughes court correctly rejected this notion categorically:

> If counsel's decision not to challenge a biased vernireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' Taylor v. Illinois, 484 U.S. 400, 417 n.24, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury.

Hughes, 258 F.3d at 463. Certain waivers cannot be made by defense counsel without express consent by the accused, and the waiver of the right to an impartial jury is one of them.

The state's waiver theory improperly undermines the constitutional rights to an impartial jury under the Sixth Amendment and article I, section 22. There is no conflict in the case law applying the manifest constitutional error standard to claims of actual bias on the part of a juror. The court of appeals applied the correct manifest constitutional error analysis in this case, and the record shows that the issue of Juror 23's bias was indeed manifest and could have easily been corrected by the trial court, had the trial court performed its duties. No RAP 13.4(b) criterion supports review and the state's petition should accordingly be denied.

2. THERE IS NO CONFLICT WITH LAWLER

The state claims that the decision under review "is in fundamental conflict with Division Two's analysis in Lawler." Pet. for Review at 14. The state recites six factors the Lawler court considered and addresses them. Pet. for Review at 14-18.

There is no conflict. The Lawler court's factors where not considered until after it made the determination that the juror's (coincidentally, Juror 23's) statements was not unqualified statements of bias. Lawler's Juror 23 said, "I don't see how" when asked whether the could be objective; he did not say he definitely could not be objective. Lawler, 194 Wn. App. at 283. The juror characterized having to set aside his personal experience and judge the case on the merits as a "pain in the neck" and doubted he "would be able to do that with all these experiences." Id. As the Lawler court correctly determined, these were not statements of actual bias but equivocal statements that merely suggested he would have difficulty with impartiality. Id. (juror did not state "he definitely could not" judge the case on the merits).

Here, by contrast, Juror 23 stated unequivocally she could not be fair in the questionnaire. As discussed, this expressed actual bias, not just difficulty in being fair. There was no equivocation. And, unlike the juror in Lawyer, Juror 23 provided no elucidation to her statement. The record shows nothing indicating that Juror 23 could be fair after she stated she could not be.

The Lawler court readily acknowledged that actual statements of bias would "require[] a new trial without a showing of prejudice. Id. at 282-83 (citing Irby, 187 Wn. App. at 193). "If the juror demonstrates actual bias, empaneling the biased juror is manifest error." Id. Because the Lawler court would have reversed Guevara Diaz's conviction because of Juror 23's statement of unequivocal bias, there is no conflict between this case and Lawler. Review should be denied.

In addition, the Lawler court found it significant that defense counsel did not exercise any remaining peremptory challenge to excuse the juror in question, 194 Wn. App. at 288, 290, whereas here, the defense exercised all peremptory challenges. Defense counsel might have been alert to removing other jurors

And the state again reads Lawler to emphasize the importance of demeanor and not treading on defense counsel's strategic decision. But Guevara Diaz can find no case that stands for the proposition that potential but unrecorded observations of a juror's demeanor can trump on-the-record statements of actual bias, and the prosecution cites none. Demeanor is no doubt an important consideration, but demeanor is considered alongside and in conjunction with the juror's actual statements, not in a vacuum. See Noltie, 116 Wn.2d 839-40. And, again, where the juror expresses actual bias, the trial court cannot defer to counsel but has an independent obligation to excuse the

juror or ensure she can perform her function impartially, which Lawler itself recognizes.

There are no conflicts in the standards applied in this case and in Lawler. The cases are consistent in requiring reversal when a juror expresses actual bias and the juror's statements are never mitigated, explained, or elucidated in any way. The state fails to satisfy any RAP 13.4(b) criterion and its petition for review should be denied.

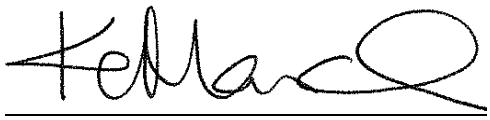
E. CONCLUSION

Because the state meets none of the RAP 13.4(b) review criteria, review should be denied.

DATED this 18th day of June, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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