99985-6

Supreme Court No. (to be set)
Court of Appeals No. 37253-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE A. TENINTY,

Appellant.

PETITION FOR REVIEW
BY THE APPELLANT, DALE A. TENINTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
THE HONORABLE RAYMOND F. CLARY, JUDGE

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I. IDENTITY OF PETITIONER

Dale A. Teninty, the Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

II. COURT OF APPEALS DECISION

Mr. Teninty seeks review of the opinion of the Court of Appeals issued on May 11, 2021, and published in part on June 15, 2021. A copy of this decision is attached, see App. at 2-15. Mr. Teninty moved for reconsideration of this opinion, which was denied, see App. at 1-2.

III. ISSUE PRESENTED FOR REVIEW

Should this Court grant review and reverse when the trial court removed a juror based on a factor that disproportionately excludes people of color from juries?

IV. STATEMENT OF THE CASE

Dale Teninty resided in the same household as A.E. from about November 2014 to October 2016. RP 483, 487, 663. In October 2016, when A.E. was seven, she accused Mr. Teninty of touching her inappropriately. RP 435, 483. In June 2018, Mr. Teninty was charged with four counts of child molestation in the first degree. CP 1-2. The case proceeded to trial in October 2019. CP 154-161.

Jury selection for this case occurred on October 15 and 16, 2019. CP 154. During jury selection, the parties and the court questioned Juror 34 individually. RP 256. Juror 34 had a friend who was charged and acquitted for sexual assault of a minor. RP 256-58, 260. About 10 years prior, his friend was in his 30s and was accused of assaulting a teenage girl, the daughter of his girlfriend at the time. RP 257-58. Juror 34 testified on behalf of his friend. RP 257. Juror 34 believed that his friend was unfairly treated by the alleged victim in this case, but not by law enforcement or the courts. RP 259-60. He said that the trial process had "panned out, in my opinion, correctly." RP 260. He said that it was "possible" this experience could impact him. RP 262. However, Juror 34 was adamant that he could be unbiased and impartial and could follow the court's instructions. RP 262-63. He said that he would convict if there was "proof" or acquit if there was not. RP 258.

The state moved to exclude Juror 34 for cause because "he believed his friend was wrongfully charged." RP 263. Mr. Teninty objected, arguing that Juror 34 stated his ability to be impartial. RP 264. The trial court agreed with the state. RP 265. The court found it "significant" that Juror 34 was a witness for his friend and "thought his friend was wrongfully charged." *Id*. The court found that Juror 34 was "predisposed" and thus excluded him for cause. *Id*.

The jury convicted Mr. Teninty of two counts of child molestation in the first degree. RP 773-74.[1] The trial court sentenced Mr. Teninty on December 4, 2019. RP 786. The court sentenced him to an indeterminate sentence, 82 months to life, as well as lifetime community custody. RP 808; CP 189-205. Mr. Teninty appealed. CP 218-19. The Court of Appeals, Division III, denied his appeal. App. at 2-15. Mr. Teninty seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Teninty respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals. This Court grants review under four circumstances:

> (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 a published 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). Here, review is appropriate under subsections (3) and (4).

The trial court in this case excluded a potential juror for cause on a racially disparate basis—because the juror was friends with a person

[1] During trial, the state amended the first count to attempted child molestation. CP 97-98. The jury acquitted Mr. Teninty of the attempt count and of the last child molestation count. RP 773-74.

acquitted of a crime. This factor is unconstitutional because it disproportionately excludes people of color from Washington juries. No legitimate basis justified removing this juror, who repeatedly stated he could be fair and unbiased. This Court should grant review and reverse because the trial court's actions violated due process and affect the legitimacy of the courts—an issue of substantial public interest. RAP 13.4(b)(3), (4).

A. Excluding Jurors in a Racially Disproportionate Manner Violates the U.S. and Washington Constitutions.

Every defendant has the constitutional right to a fair trial by an impartial jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); U.S. Const. amends. VI, XIV; Wash. Const. art. I, section 22. Ultimately, courts must ensure that defendants receive due process of law. *See, e.g.*, *State v. Oppelt*, 172 Wn.2d 285, 288, 257 P.3d 653 (2011); *City of Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004). Within our criminal justice system, juries serve as a "vital a check on government power." *State v. Pierce*, 195 Wn.2d 230, 231, 455 P.3d 647 (2020).

"To perform their vital function, juries must be fairly selected." *Id*. (citing *State v. Lanciloti*, 165 Wn.2d 661, 667-68, 201 P.3d 323 (2009)). Jury selection must be done in a "fair way that does not exclude qualified

jurors on inappropriate grounds, including race." *Id*. at 231-32 (citing *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017); *Batson*, 476 U.S. 79; GR 37).

People of color in Washington are overrepresented at every stage of the criminal justice system. Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 87 Wash. L. Rev. 1, 18 (2012). Data about "arrests, charges, convictions, and imprisonment" show "racial and ethnic disproportionalities" in Washington's criminal justice system. *Id*. Notably, this disparate treatment extends to charging: "prosecutors are significantly less likely to file charges against white defendants than they are against defendants of color," even after accounting for after legally relevant factors such as the seriousness of the offense. *Id*. at 25.

In short, people of color in Washington are charged with crimes at a disparate rate. *Id*. at 18, 25. Excluding a juror because a member of their community was charged with a crime is not race neutral, regardless of whether that person was convicted or acquitted. This basis disproportionately removes people of color from Washington juries and is thus unconstitutional. *See Pierce*, 195 Wn.2d at 242-43.

In *Pierce*, this Court addressed racially disparate practices in jury selection. 195 Wn.2d at 242-43. In that case, Pierce and a co-defendant

were tried and found guilty of first-degree felony murder. *Pierce*, 195 Wn.2d at 232. During voir dire, the state improperly elicited a conversation about the death penalty. *Id*. at 240. Many jurors expressed reluctance to serve on a jury in a capital case. *Id*. At the time of trial, the parties and the court could not alleviate the jurors' concerns by telling them that this was not a death penalty case. *Id*. at 239 (citing *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) (holding that it was error to inform potential jurors of sentencing consequences, including the death penalty)). Juror 76 was "dismissed for cause based on her emotional reaction to the idea of sitting on a death penalty case." *Id*. at 237.

The *Pierce* Court overruled *Townsend*, finding that courts could properly inform potential jurors that a case did not involve the death penalty. *Id*. at 244. This Court found that "*Townsend* is harmful because of the unnecessary pressure it puts on potential jurors, as well as the distorting effect that pressure likely puts on the selection process itself and on the ultimate makeup of the jury." *Id*. at 242. Specifically, "death-qualifying juries disproportionally exclude people of color." *Id*. This Court ruled that "Hewing to a rule that has a disproportional effect of eliminating people of color undermines our commitment to fostering juries that reflect our society." *Id*. at 243.

The Court of Appeals in this case found that *Pierce* was inapplicable:

> The primary authority cited by Mr. Teninty is the plurality opinion of *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020). *Pierce* had to do with the State interjecting bias into the jury pool by eliciting a conversation about the death penalty. It had nothing to do with for-cause challenges.

App. at 10. Respectfully, the Court of Appeals misinterpreted *Pierce* and should be reversed.

Contrary to the Court of Appeals' conclusion, *Pierce* did address racially disproportionate for cause challenges, making it applicable to Mr. Teninty's case. In *Pierce*, Juror 76 was dismissed for cause based on a metric (death-qualifying) that disproportionately excludes people of color. 195 Wn.2d at 237, 243. Here, Juror 34 was dismissed for cause based on a metric (friendship with someone accused of a crime) that also disproportionately excludes people of color, who are overrepresented in the criminal justice system due to structural racism. This metric for excluding jurors violates due process. Mr. Teninty respectfully requests that this Court grant review and reverse.

B. The Trial Court Abused its Discretion by Excluding Juror 34 Based on his Friendship with a Man Who was Tried and Acquitted.

The trial court in this case also lacked a legitimate basis for removal because Juror 34 did not display bias or an inability to serve as a juror. The

only reasonable explanation is that Juror 34 was excluded because his friend was charged with a crime and acquitted—an unconstitutional and racially disparate basis.

Appellate courts review a trial court's decision to discharge a juror for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). A trial court abuses its discretion if its decision is "manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotations omitted).

The trial court in this case abused its discretion by removing Juror 34 on a racially disparate basis, despite no legitimate reason justifying his removal. A court does not have unlimited discretion to remove a potential juror. *See, e.g.*, *Miller v. State*, 29 P.3d 1077, 1083-84 (Ok. Crim.App. 2001) (court's discretion to dismiss selected juror for good cause "ought to be used with great caution"); *People v. Bowers*, 87 Cal.App.4th 722, 729 (Cal.App. 2001) (court's discretion to dismiss juror is "bridled to the extent" that juror's inability to perform his or her functions must appear in the

record as a "demonstrable reality, and court[s] must not presume the worst of a juror.").

In Washington, RCW 4.44.170 limits the trial court's discretion to dismiss a potential juror. *See State v. Sassen Van Elsloo*, 191 Wn.2d 798, 808, 425 P.3d 807 (2018) (RCW 4.44.170 outlines "three reasons" for removing jurors for cause). The court can dismiss a juror based on "implied bias, actual bias, [or] physical inability." RCW 4.44.170. Here, the record does not reflect that Juror 34 had a physical inability to serve as a juror or any implied bias, such as consanguinity or a financial interest in the action. *See* RCW 4.44.180 (defining implied bias).

Instead, the state challenged Juror 34 based on his alleged preconceived notions and inability to be impartial. This is a challenge based on actual bias, which is defined as:

> [T]he existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging . . .

RCW 4.44.170(2). A showing of actual bias requires more than a juror expressing an opinion:

> 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***.

RCW 4.44.190 (emphasis added). In other words, actual bias must "be established by proof." *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

Equivocal answers, without more, cannot establish "actual bias warranting dismissal of a potential juror." *Id*. at 839. Instead, "the question is whether a juror with preconceived ideas can set them aside." *Id*. The trial court must be satisfied that a potential juror is unable to "try the issue impartially and without prejudice to the substantial rights of the party challenging" before dismissing the juror for actual bias. RCW 4.44.170(2). Additionally, a mere possibility of bias is not sufficient to prove actual bias; the record must demonstrate "that there was a ***probability*** of actual bias." *Noltie*, 116 Wn.2d at 838-39 (emphasis added).

In this case, Juror 34 disclosed that his friend was charged with a tangentially similar crime, that Juror 34 testified in this trial, and that his friend was acquitted. RP 257-58, 260. Mere connection to a case does not establish actual bias and does not warrant removal. *See State v. Kloepper*, 179 Wn. App. 343, 353, 317 P.3d 1088 (2014) (acquaintance with complaining witness did not reveal bias warranting removal where juror indicated it would not affect his ability to serve); *State v. Tingdale*, 117

Wn.2d 595, 601, 817 P.2d 850 (1991) (social relationship between prosecutor and juror not grounds for disqualification).

Here, Juror 34 was not even connected to the case at bar; he was merely involved with a somewhat similar case tried a decade ago. His friend's case was different from the present case in several critical ways. First, the alleged victim in the friend's case was a teenager, 14 or 15, while A.E. was between 5 and 7 during the critical points of this case. RP 257. Second, the friend's case was remote in time: Juror 34 estimated that the trial occurred about 10 years ago. RP 260

Most importantly, Juror 34 repeatedly assured that he could be unbiased and impartial. RP 257-58, 262-63. He repeatedly said that he could be fair to both parties, that he did not resent law enforcement or the justice system, and that he would carefully consider the evidence presented before reaching a decision. RP 258-60, 262-63. Juror 34 said that he would follow the court's instructions, consider the evidence, and convict if the evidence supported the charged crimes. RP 258, 262-63.

Juror 34 believed his friend was treated "unfairly," but by his accuser, not "law enforcement or the courts." RP 259-60. He did not hold "negative" views "towards how law enforcement handled their investigation." RP 260. When asked about "the actual trial process," Juror 34 acknowledged that it was a "hardship" for his friend to be incarcerated

pending trial, but stated that, "It all panned out in the end, in my opinion, correctly." RP 260. He also did not feel anything "negative" regarding testifying at his friend's trial. RP 260-61.

The state specifically asked Juror 34 whether "anything from [his] experience" could "impact [his] view in our case here in court." RP 261. Juror 34 was equivocal and said that it depended on the evidence presented:

> You know, I guess I can't really say because I don't know the circumstances. But I guess if I feel it's along the same lines, I could be persuaded by the situation. . . . I mean, like it was the same circumstances and somebody was saying this and this and I knew that it wasn't true . . . I could be persuaded [to acquit].

RP 261-62. Answering leading questions from the state, Juror 34 stated that it was "possible" he could he "impacted" by his experiences, which "could affect [his] ability to be fair" in the present case. RP 262. However, when questioned by defense counsel, Juror 34 stated that he could set aside his experiences, follow the court's instructions, remain unbiased towards either party, and "look at the evidence as presented." RP 262-63.

The state challenged Juror 34 for cause. RP 263. The state argued that Juror 34 "believed his friend was wrongfully charged," "testified in the case as a character witness," and "indicated that [his experiences] could affect his ability to be fair and impartial." RP 263-64. The trial court agreed and grated the state's request. RP 265. The court acknowledged that this

situation was "difficult," but found it "significant" that Juror 34 "was a character witness" and "thought [that] his friend was wrongfully charged." *Id*. The court pointed out that Juror 34 acknowledged that his experience "could affect his thinking in this case." *Id*. On balance, the court found that Juror 34 was "predisposed" and removed him for cause. *Id*.

The trial court erred and abused his discretion. All persons carry their experiences with them onto juries. That is the point of a jury—to gather a fair cross-section of the community with a breadth of experiences. We do not expect jurors to be blank slates with no life experiences or preconceived ideas. Instead, the relevant inquiry is whether "a juror with preconceived ideas can set them aside." *Noltie*, 116 Wn.2d at 839. Here, Juror 34 was equivocal about whether his experiences could impact his ability to be fair. RP 261. Equivocal answers, without more, cannot establish actual bias. *Id*. at 839. By contrast, Juror 34 was unequivocal when asked whether he could be impartial. RP 257-58, 262-63. He repeatedly assured the parties and the court that he could set aside his experiences and remain unbiased. *Id*. This evidence barely establishes the possibility of bias, let alone the "***probability*** of actual bias" required to remove a juror for cause. *Id*. at 838-39 (emphasis added).

The trial court also abused its discretion by basing its decision on the fact that Juror 34 "thought his friend was wrongfully charged." RP 265.

The limited information we have about his friend's case establishes that his friend ***was*** wrongfully charged—he was jailed for a considerable amount of time and then acquitted of wrongdoing. RP 260. Persons accused of a crime are innocent until proven guilty. The fact that Juror 34's friend was acquitted carries the presumption that he was innocent of the alleged conduct. It violates public policy to hold an acquittal against Juror 34, particularly given the racially disparate impact of the criminal justice system discussed above. This Court should grant review and reverse because no legitimate basis justified removing Juror 34. *See* RCW 4.44.170.

C. Excluding Juror 34 Based on a Racially Disparate Factor was Structural Error and Prejudiced Mr. Teninty.

The only appropriate remedy in this case is to grant review, reverse, and remand for a new trial. The trial court committed structural error. Even if prejudice is required, the court's decision also prejudiced Mr. Teninty.

The right to a fair trial guarantees that jurors "are selected pursuant to non-discriminatory criteria." *Batson*, 476 U.S. at 85-86. Denial of the right fair trial "is a classic structural error, requiring reversal without a showing of prejudice." *State v. Berniard*, 182 Wn. App. 106, 123-24, 327 P.3d 1290 (2014) (citing *Chapman v. California*, 386 U.S. 18, 24 n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535, 47

S.Ct. 437, 71 L.Ed. 749 (1927) (reversing the defendant's conviction despite clear evidence of guilt because "[n]o matter what the evidence was against him, he had the right to have an impartial judge")). An error is "structural" when "it taints the entire proceeding." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Structural errors are not subject to harmless error analysis and require "automatic reversal." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999)).

Structural error specifically includes "racial discrimination in the selection of a grand jury." *State v. Paumier*, 176 Wn.2d 29, 46, 288 P.3d 1126 (2012). "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try"; it also "shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race." *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by Erickson*, 188 Wn.2d 721 (quoting *Batson*, 476 U.S. at 87). Racial discrimination in jury selection also "undermine[s] public confidence in the fairness of our system of justice" and "offends the dignity of persons and the integrity of the courts." *Id*. (internal quotations omitted).

These detrimental effects extend to racially disparate criteria for selecting jurors. Every criminal defendant has the right to a jury selected

fairly, without using racially disproportionate bases for removing jurors. *See Pierce*, 195 Wn.2d at 242-43. The denial of this basic right results in a jury unfairly selected pursuant to discriminatory criteria. *Id*. The race of the individual juror removed is irrelevant—the harm is using discriminatory criteria to decide upon a jury. This structural error requires reversal regardless of prejudice. *See Coristine*, 177 Wn.2d at 380.

Even if this Court requires a showing of prejudice, Mr. Teninty was prejudiced in this case. He was entitled to a fairly selected jury and was denied that right. Additionally, jurors are not interchangeable:

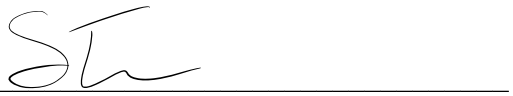
> It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

State v. Irby, 170 Wn.2d 874, 886-87, 246 P.3d 796 (2011) (discussing the accused's right to be present during jury selection). The same is true here. The state cannot show that Juror 34's dismissal had no effect on the verdict. This Court should therefore grant review, reverse, and remand for a new trial.

VI. CONCLUSION

Mr. Teninty respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals, Division III.

RESPECTFULLY SUBMITTED this 15th day of July, 2021.



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VII. APPENDIX

Renee S. Townsley
Clerk/Administrator

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June 15, 2021

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CASE # 372537
State of Washington v. Dale Albert Teninty
SPOKANE COUNTY SUPERIOR COURT No. 181027978

Counsel:

Enclosed is a copy of an order 1) denying the appellant's motion for reconsideration and 2) granting the State's motion to publish in part this court's May 11, 2021, opinion. The May 11 opinion has been withdrawn and a new opinion has been filed this same date.

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

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of this decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. 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 the attached order and opinion (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Raymond F. Clary

c: **E-mail** Dale Albert Teninty (DOC #352334 – Coyote Ridge Corrections Center)

FILED
JUNE 15, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DALE A. TENINTY, Appellant.	)))))))))	No. 37253-7-III ORDER: (1) DENYING MOTION FOR RECONSIDERATION AND (2) GRANTING MOTION TO PUBLISH IN PART

THE COURT has considered appellant Dale Teninty's motion for reconsideration of our May 11, 2021, opinion; the State's motion to publish in part our May 11, 2021, opinion; the response of the appellant to the motion to publish; and the record and file herein.

IT IS ORDERED that the motion for reconsideration is denied.

IT IS FURTHER ORDERED that the motion to publish in part is granted. This court's May 11, 2021, opinion is withdrawn and a new opinion is filed herewith.

PANEL: Judges Pennell, Fearing and Staab.

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

FILED
JUNE 15, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DALE A. TENINTY, Appellant.	)))))))))	No. 37253-7-III OPINION PUBLISHED IN PART

PENNELL, C.J. — Dale Teninty appeals his convictions for two counts of child molestation. He argues the trial court erroneously granted the State's motion to strike a prospective juror for cause based on actual bias. According to Mr. Teninty, the State's motion was improper because the type of bias attributed to the juror is something that might be disparately shared by people of color. Mr. Teninty does not claim that the struck juror was a person of color. He instead claims that certain types of bias cannot serve as the basis for striking a juror for cause because doing so will result in a diminished pool of racial and ethnic minorities who are eligible to serve as jurors.

We disagree with Mr. Teninty's reasoning. Both the prosecution and defense have the right to fair and impartial jurors. A juror who cannot fulfill the charge of impartiality may be stricken for cause regardless of the nature of the juror's bias. Even if the juror's bias is one that might be disproportionately shared by racial or ethnic minorities, the right to an impartial jury must prevail and the juror may be stricken for cause. Mr. Teninty's convictions are affirmed.

FACTS

When A.E. was seven years old, she disclosed to her cousin and then her mother that she had been molested by Dale Teninty, a man who had previously lived in her family's home. Prior to this disclosure, the mother and the cousin had warned A.E. about bad touches and told her that they had been the victims of molestation when they were young. A.E.'s mother contacted the police and A.E. participated in two forensic interviews. Mr. Teninty was subsequently charged with one count of attempted first degree child molestation and three counts of completed first degree child molestation. The case went to trial.

During voir dire, juror 34 disclosed he had a friend who had been accused of child molestation. Juror 34 explained he had testified as a character witness for the friend and that the events occurred roughly a decade or so ago, when the friend was in his 30s and

the child was 14 or 15. When the court asked juror 34 if he could be impartial, the following colloquy occurred:

> JUROR NO. 34: I think—well, yeah. Basically, I think that you're going to have to prove to me that he did it before I'm going to. Other than that, yeah.
>
> THE COURT: Okay. So you said that with a fair amount of conviction.
>
> JUROR NO. 34: Well, yeah.
>
> THE COURT: So did you think your friend was wrongfully charged?
>
> JUROR NO. 34: I do.
>
> THE COURT: All right.
>
> JUROR NO. 34: But I will tell you that he walked out of there, the jury was 11 in favor of him and one in favor of guilty. So my opinion is the fellow spent several months in jail for nothing, you know, what I mean.
>
> THE COURT: Yes, I do. That's helpful.
>
> So do you think given that experience and particularly what you just highlighted about you[r] friend having spent undue time in jail, that you would be inclined to hold the State to a higher burden?
>
> JUROR NO. 34: I'm not sure what you mean by that. I don't think that—well, I think if there's proof and I believed that somebody did something, well, then I'm going to say guilty. But if I don't fully believe that they did something, I would not say guilty. So I don't think that—I don't think it would—I don't think it would change my opinion, you know what I mean.
>
> THE COURT: So let me ask you a little different[ly].
> Do you think you can be unbiased?
>
> JUROR NO. 34: I do, actually.
>
> THE COURT: And impartial?
>
> JUROR NO. 34: Yeah, I do.

2 Report of Proceedings (RP) (Oct. 15, 2019) at 257-59. The prosecutor then questioned him further.

[THE PROSECUTOR]: Fair to say you think your friend was treated unfairly?

JUROR NO. 34: Well, given—yeah, pretty much.

[THE PROSECUTOR]: Do you think that was—who would be treated unfairly by, law enforcement or the courts or what specific part of it?

JUROR NO. 34: I wouldn't say that law enforcement or the courts. Basically, it was the person accusing my friend. It's just that laws are what they are and he had to go where he had to go until matters were resolved, so to speak.

. . . .

[THE PROSECUTOR]: So do you think that anything from that experience or those emotions could impact [how you view] our case here in court?

JUROR NO. 34: You know, I guess I can't really say because I don't know the circumstances. But I guess if I feel it's along the same lines, I could be persuaded by the situation.

. . . .

JUROR NO. 34: I mean, like it was the same circumstances and somebody was saying this and this and I knew that it wasn't true—basically I can tell you what the deal was in the end is the younger gal was trying to date an older guy like in his late 20s, okay. So he said no way, you can't do that because he was with her mother, you know. He was the father figure for three or four years at this point. And basically this was her way to get rid of him so she could have what she wanted. And that's the way the jury viewed it at the end. So if it's the same kind of thing, I could see where I could be persuaded to see it.

[THE PROSECUTOR]: Do you think some of that background information and things that you saw in your own experience could impact you?

JUROR NO. 34: It's possible.

[THE PROSECUTOR]: Okay.

JUROR NO. 34: I guess it could because I don't know what went on here, so I have no idea.

> [THE PROSECUTOR]: Okay. So would it be fair to say if things did start maybe making you think of your experience or started bringing some of that back, that that could affect your ability to be fair in our case?
> JUROR NO. 34: It is possible, yeah, now that you mention it like that. Yeah, I guess it is possible.

Id. at 259-62. The court subsequently granted the prosecutor's motion to strike juror 34 for cause over Mr. Teninty's objection.

At the conclusion of trial, the jury convicted Mr. Teninty of two counts of first degree child molestation. Mr. Teninty timely appeals his judgment and sentence.

ANALYSIS

Excusal of juror for cause

Mr. Teninty contends the trial court committed structural error by dismissing juror 34 for actual bias. According to Mr. Teninty, the prosecutor's justifications for striking juror 34 were discriminatory. Mr. Teninty does not allege juror 34 was a person of color or that the prosecutor had actual animus toward juror 34. Instead, Mr. Teninty makes a disparate impact argument. He points out that people of color are disproportionately targeted by the criminal justice system. Given this circumstance, striking a juror for cause because the juror has a friend who faced charges similar to the defendant's has a discriminatory impact and therefore deprives the defendant of his right to a fair and impartial jury.

Mr. Teninty's arguments miss the mark because he confuses the analysis applicable to for-cause challenges and peremptory challenges.[1]

A for-cause challenge is one based on a juror's individual qualifications for service. RCW 4.44.150; CrR 6.4(c). A juror's actual bias can serve as a reason for a for-cause challenge. RCW 4.44.170(2). But in order to grant a for-cause challenge based on actual bias, the court must be satisfied that the juror cannot disregard preexisting opinions and try the case impartially. RCW 4.44.190.

Peremptory challenges may be applied to prospective jurors who have not been excluded for cause. CrR 6.4(e)(2). "A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror." CrR 6.4(e)(1). "However, the Equal Protection Clause limits the exercise of peremptory challenges by prohibiting their use to exclude otherwise qualified and unbiased jurors based upon their race." *State v. Vreen*, 99 Wn. App. 662, 666, 994 P.2d 905 (2000). The current process for determining whether a peremptory strike violates equal protection is

[1] We also question the factual premise of Mr. Teninty's argument. While people of color are woefully over-represented in the criminal justice system, it is not clear that people of color make up a disproportionate number of individuals charged with child molestation.

set forth in GR 37.[2] Under the terms of the rule, a party or the court may object to the use of a peremptory challenge on the basis of improper bias. When a GR 37 objection is made, the party exercising the peremptory challenge must articulate reasons for the challenge. GR 37(d). The court must then make a determination as to whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge . . . ." GR 37(e). "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." *Id*. One of the considerations a court should make in assessing the discriminatory nature of a peremptory strike is whether the reason for a strike "might be disproportionately associated with a race or ethnicity." GR 37(g)(iv). Presumptively invalid reasons for peremptory strikes include a juror's "prior contact with law enforcement officers," "expressing a distrust of law enforcement," and "having a close relationship with people who have been stopped, arrested, or convicted of a crime." GR 37(h)(i)-(iii).

The prosecution challenged juror 34 for cause; it was not a peremptory challenge. As such, the only issue before the court was whether juror 34 was laboring under actual

[2] GR 37 was adopted in 2018 and was effective at the time of Mr. Teninty's 2019 trial.

bias. The right to an impartial jury applies to both the prosecution and defense. *Hayes v. Missouri*, 120 U.S. 68, 70-71, 7 S. Ct. 350, 30 L. Ed. 578 (1887) (explaining impartiality requires that "scales are to be evenly held" between criminal defendant and State); *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (noting "*both* the defendant *and the State* have a right to an impartial jury"). Safeguarding jury impartiality means a juror suffering from actual bias may be excluded from service, regardless of race or the reasons for the bias. Mr. Teninty correctly observes that the judiciary must be careful to enforce rules in an inclusive way and that does not disproportionately exclude racial and ethnic minorities from jury service. Judges should proceed with caution when a party seeks to remove a racial or ethnic minority from the jury panel. But if the party requesting a strike proves the proposed juror holds a bias that impairs the juror's ability to fairly and impartially decide the case, the strike should be sustained regardless of the juror's race or disparate impact concerns.

The primary authority cited by Mr. Teninty is the plurality opinion of *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020). *Pierce* had to do with the State interjecting bias into the jury pool by eliciting an irrelevant conversation about the death penalty. It had nothing to do with a for-cause challenge based on an individual juror's expression of bias, specifically tied to the facts of the case. *Pierce* does not undermine the rule that both

parties to a case have a right to exercise challenges for cause when faced with a prospective juror who is unable to impartially adjudicate a case based on a preexisting bias.

Mr. Teninty also claims that, regardless of his disparate impact argument, the trial court erred when it granted the State's motion to strike juror 34 for cause. To prevail on this argument, Mr. Teninty must show the trial court committed a "manifest abuse of discretion." *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). This is a difficult standard. When it comes to assessing a trial court's decision on a challenge for cause, we must keep in mind that the trial court has the advantage of observing a juror's demeanor and is therefore "in the best position to determine a juror's ability to be fair and impartial." *Id*. at 839. Even where reasonable minds can differ, we will uphold a trial court's decision so long as it falls within the broad range of reasonable decisions. *See id*.

The trial court here had a tenable basis for granting the State's motion to strike juror 34 for cause. During his colloquy with the court and prosecutor, juror 34 admitted that if the circumstances of Mr. Teninty's case caused him to start thinking about his friend's case, his ability to be fair would be impaired. Juror 34's concerns were about the veracity of the complaining witness in the friend's case. This circumstance was similar to the defense raised by Mr. Teninty in his case. While it would have been impossible

for the court to delve into juror 34's mind and assess whether the specifics of his prior experience would be triggered by the evidence to be elicited in Mr. Teninty's trial, the trial court did have an adequate basis for concluding juror 34 met the criteria of actual bias. *See* RCW 4.44.190. The trial court therefore properly exercised its discretion in granting the motion to strike. CrR 6.4(c).[3]

The judgment of conviction is affirmed.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Admission of child hearsay statements

Prior to trial, the State sought to admit out-of-court statements made by A.E. to her mother, her cousin, and the forensic investigator under RCW 9A.44.120. The trial court held an evidentiary hearing and ruled the hearsay statements admissible. The court issued written findings in support of its decision, consistent with the criteria set by the Supreme

[3] As previously noted, there is no allegation juror 34 was a racial or ethnic minority. Thus, it would not appear the trial court was faced with discerning whether the reason for the strike was a pretext for purposeful discrimination.

Court in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court found that all the applicable factors weighed in favor of admitting A.E.'s statements.

On appeal, Mr. Teninty argues the hearsay statements should not have been admitted because they were not reliable. Mr. Teninty does not assign error to any of the trial court's factual findings. Instead, Mr. Teninty broadly claims A.E.'s memories of abuse were irreparably tainted by her mother and cousin, both of whom warned A.E. about their own histories of abuse.

Mr. Teninty's child hearsay claim fails. While a mother's warning to her child about the dangers of sexual assault might provide fodder for cross-examination, it defies common sense to think that the mere provision of warnings will render a child incompetent to testify about her own experiences of victimization. In any event, there are no facts in the record suggesting the specific information relayed by A.E.'s mother and cousin were impermissibly suggestive. There is no indication that A.E.'s mother or cousin pressured A.E. to come forward against Mr. Teninty. Nor was there any indication that A.E.'s mother or cousin provided A.E. with details about their own experiences with abuse, let alone details similar to the ones alleged by A.E. Finally, Mr. Teninty has not challenged any of the trial court's findings, including the finding that A.E. had an

independent recollection of the events in question.[4] Given the record at hand, we have no basis for disturbing the trial court's child hearsay ruling. *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

Same criminal conduct

Mr. Teninty contends the trial court erred by counting his two convictions separately because they involved the same intent, victim, and location. The State counters that the court correctly separated the offenses as they occurred at different times and in different parts of the victim's home. Specifically, one count pertained to an incident on a green chair located on the porch of A.E.'s residence. The other count pertained to an incident inside the home on what was referred to as "'Papa's' chair." Clerk's Papers at 225. We agree with the State's assessment.

Two or more crimes can be treated as the "same criminal conduct" for sentencing purposes if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The burden of proving same criminal conduct falls on the defense and we review a trial court's same criminal conduct

[4] The court found, "A.E. retained an independent recollection of the timeframe and events in question." Clerk's Papers at 226. Although this finding was mislabeled as a conclusion of law, it is properly "treated as a finding of fact." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

decision for abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 537-39, 295 P.3d 219 (2013). We will only find an abuse of discretion when the record supports "only one conclusion on whether the crimes constitute the 'same criminal conduct.'" *Id*. at 538.

As noted by the State, Mr. Teninty's same criminal conduct argument fails because he cannot show the crimes against A.E. occurred at the same time and place. According to A.E., the abuse happened on different occasions in different locations of her home. The trial court properly denied Mr. Teninty's request to treat the two convictions as the same criminal conduct.

CONCLUSION

The judgment of conviction is affirmed.

Pennell, C.J.

WE CONCUR:

Fearing, J.

Staab, J.

Supreme Court No. (to be set)
Court of Appeals No. 37253-7-III

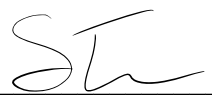
CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 15th, 2021, I electronically filed a true and correct copy of the Petition for Review of Appellant, Dale A. Teninty, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Larry D. Steinmetz Spokane County Prosecutor's Office	(X) via email to: lsteinmetz@spokanecounty.org, scpaappeals@spokanecounty.org
Gretchen Eileen Verhoef Spokane County Prosecutor's Office	(X) via email to: gverhoef@spokanecounty.org, scpaappeals@spokanecounty.org
Dale A. Teninty DOC # 352334 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326	(X) via U.S. mail

SIGNED in Port Orchard, Washington, this 15th day of July, 2021.



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