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NO. 36018-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL VERDUZCO,

Appellant.

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

The Honorable Michael McCarthy, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

In the state's prosecution against Manuel Verduzco for two counts of first degree murder for the shooting deaths of two Moneytree employees, Verduzco pleaded not guilty by reason of insanity. The majority of questioning during voir dire centered on the legitimacy of the insanity defense.

Juror 95 indicated he believed Verduzco was guilty regardless of insanity because: "He pulled the trigger. He's done. He's the one that did it." RP 368. Regardless of any instructions given by the court, Juror 95 had made up his mind. RP 382. When asked who agreed with Juror 95, the following jurors raised their hands: 1, 3, 27, 92, 57 and 12. RP 382.

Thereafter, defense counsel and Juror 57 had the following exchange:

> MR. MAZZONE: Who else had their hand up? Juror No. 57, what can you tell us about what we've been talking about?
>
> JUROR NO. 57: I'm probably from the old school as well.
>
> MR. MAZZONE: Which is what?
>
> JUROR NO. 57: I just feel that if he did the shooting he's going to have to pay the time. This insanity stuff, I had a grandson who pulled that crap in school. He wanted out of school. Now he's 20, 21.

> He wished he hadn't done that because he can't get a gun. How he sold that leaves me in doubt of a lot.
>
> MR. MAZZONE: Could you make room for the possibility that there may be a situation in which somebody is actually insane?
>
> JUROR NO. 57: Today I couldn't tell you that.
>
> MR. MAZZONE: But as far as this case goes, what I'm hearing from you is that your mind is made up?
>
> JUROR NO. 57: At this point.

RP 386.

Defense counsel further questioned all jurors who agreed with Juror 95 (Jurors 1, 3, 27, 92 and 12) except Juror 57. RP 389-400. Defense counsel successfully moved to excuse for cause Jurors 95, 1, 3, 27 and 92. RP 387-88, 391-92, 394, 398. Defense counsel exercised a peremptory challenge against Juror 12. RP 420.

Defense counsel never moved to excuse Juror 57 for cause or exercised a peremptory challenge against him and he ultimately served on the jury. RP 422, 1766.

Although Verduzco presented evidence at trial that he suffers from schizophrenia and was obeying a command hallucination at the time of the shootings and therefore unable to

appreciate the wrongfulness of his conduct (RP 1073, 1138, 1199, 1201-1203), the jury convicted Verduzco as charged. CP 261-63. He is serving back-to-back life sentences. CP 279.

B. ASSIGNMENTS OF ERROR

1. Manuel Verduzco did not receive a trial by a fair and impartial jury.

2. Defense counsel rendered constitutionally ineffective assistance of counsel in failing to ensure Verduzco received a trial by a fair and impartial jury.

Issues Pertaining to Assignments of Error

1. Did the court violate its duty to sua sponte strike jurors with actual bias where: (1) Juror 57 stated his belief that if Verduzco "did the shooting he's going to have to pay the time;" (2) Juror 57 compared this "insanity stuff" to "crap" his grandson pulled in school; (3) Juror 57 confirmed his mind was made up "at this point;" and (4) neither the court nor prosecutor attempted to elicit an assurance that Juror 57 had an open mind on the issue of guilt?

2. Did defense counsel render constitutionally ineffective assistance of counsel by failing to inquire of the juror who expressed actual bias and in failing to move to excuse this juror for cause?

C. STATEMENT OF THE CASE

On March 30, 2016, the Yakima County prosecutor charged appellant Manuel Verduzco with first degree burglary and two counts of first degree aggravated murder for the shooting deaths of Marta Martinez and Karina Morales outside a Yakima area Moneytree on March 26, 2016. CP 6-7. The state's theory was that the murders were the result of a robbery "gone bad."[1] RP 268, 1710-1712. The state claimed Verduzco planned the robbery due to mounting financial pressure. RP 1712-1713.

In contrast, the defense theory was that Verduzco suffers from schizophrenia and was acting according to a delusional belief system at the time of the murders. RP 1056, 1060, 1071, 1078, 1092-94, 1190, 1197, 1747, 1198. In the days leading up to March 26, the voice he began hearing in his teens became increasingly malevolent and pressured Verduzco to hurt employees of Moneytree, which whom Verduzco formerly worked and whom the voice said were "demons;" the voice threatened to kill Verduzco's mother or hurt his family if he did not obey. RP 1040-42, 1045, 1178, 1198, 1747, 1051, 1056, 1058, 1067-68, 1071-73, 1075, 1128, 1138, 1177, 1178, 1198.

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[1] See e.g. State v. Ramos, 189 Wn. App. 431, 450, 357 P.3d 680 (2015).

The day of the murders Verduzco was in a weakened state from depression, constant headaches and increased drinking to drown out the voice. RP 917, 927-29, 933, 937-38, 946, 953, 956-57, 966-67, 977, 983, 987, 1049-50, 1059-60, 1065-67, 1069, 1075, 1179, 1198, 1199, 1200. In this weakened state, Verduzco could no longer fight off the voice's command and was unable to appreciate the wrongfulness of his actions when he shot Martinez and Morales. RP 1073, 1138, 1199, 1201-1203. In other words, Verduzco was legally insane at the time of the crimes. RP 1203.

Trial proceedings began on March 27, 2018. RP 124. The legitimacy of the insanity defense was a major topic during voir dire. Several jurors were questioned individually due to their request (on the juror questionnaire) for a more private setting. RP 288.

Juror 6 was one such juror. He believed the insanity defense should be abolished. RP 290-91. Lead defense counsel Peter Mazzone moved to excuse Juror 6 for cause but was denied. RP 291. Mazzone later exercised a peremptory challenge against this juror.[2] RP 420.

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[2] The court gave each side 6 peremptory challenges for the first 12 jurors and 1 peremptory challenge for each of the three alternates for a total of nine peremptory challenges. RP 418. Defense counsel used all his peremptory challenges. RP 420-21.

Juror 17 was a former Moneytree client and saw Verduzco more than a dozen times when he worked there. RP 297. Following the murders, Juror 17 and his mother switched to a different Moneytree. RP 298. The court denied Mazzone's initial motion to excuse Juror 17. RP 300. The court later excused Juror 17 with no objection from either party. RP 347.

Juror 90 indicated that she did not believe a person who uses a loaded firearm to shoot another person "forget[s] right and wrong." RP 307. When Mazzone asked whether she could "make room for the possibility" that certain people suffer from severe mental illness and may not be able to process information in the same way as she, Juror 90 said she was unsure. RP 309. Following up, the court confirmed Juror 90 did not know whether she could be fair and impartial if firearms were involved. RP 310. The court granted Mazzone's request to excuse juror 90. RP 309-10.

Juror 93 indicated her brother and father had undiagnosed mental illness and that her brother took his own life. RP 311. She was unsure how open minded she could be "as far as someone claiming mental illness" as "the reason they committed a crime." RP 311. Ultimately, juror 93 indicated she may have prejudged the

case, and the court excused her with no objection from defense counsel or the prosecutor. RP 312-13.

Juror 30 was the last juror questioned individually. RP 314. Juror 30 had seen the case on the news and indicated he thought the defendant was "grasping at straws" by pleading insanity. RP 314-15. Although the prosecutor tried to rehabilitate Juror 30, the court indicated it was inclined to dismiss him. RP 317. Mazzone indicated: "Then I have no questions." RP 317.

During the court's later general questioning, Juror 76 indicated he did not believe in insanity as a defense and was not sure if he could accept the law as the court gave it. RP 346-47, 421. Mazzone did not follow up with Juror 76, but later exercised a peremptory challenge against him. RP 421.

During the state's first round of voir dire, the prosecutor indicated part of the state's job is to ensure a fair trial and asked whether anyone should not sit on this jury. RP 368. Juror 95 stated: "I believe he's guilty." RP 368. Juror 95 elaborated: "He pulled the trigger. He's done. He's the one that did it." RP 368.

During the defense's first round, Mazzone followed up with Juror 95:

> MR. MAZZONE: No. 95, I think you told us early on when you were asked that the reason why you didn't want to sit on this case was because you believe that Mr. Verduzco is already guilty, right?
>
> JUROR NO. 95: Right.
>
> MR. MAZZONE: You have your opinion about it, and you will maintain your opinion regardless of what instructions are given to you. Am I paraphrasing that accurately?
>
> JUROR NO. 95: Pretty close, yes.
>
> MR. MAZZONE: What part is not exactly right?
>
> JUROR NO. 95: That you're stating that I might change my mind. No, I probably won't.
>
> MR. MAZZONE: How many people feel like No. 95? No. 1, No. 3, No. 27, No. 92, No. 57, and No. 12.

RP 382.

Responding to Mazzone's follow-up, Juror 1 indicated he or she did not think the defense would be able to convince him or her that "these acts were committed because the defendant was insane at the time." RP 383. Nonetheless, Juror 1 would "listen to the judge[.]" RP 383.

When defense counsel returned to Juror 95, Juror 95 was steadfast: "I'm with Juror No. 1 where you do the crime and you do the time. You pull the trigger, and so you're the one." RP 383-84.

Juror 3 concurred with Jurors 95 and 1 and stated: "I'd probably speak for everyone here thinking like everybody knows he's guilty." RP 384. Juror 92 felt similarly: "I've discussed this in detail with a lot of my neighbors. I'm pretty prejudiced to the fact that he's guilty. I doubt if I'll change my mind." RP 385.

Mazzone next inquired of Juror 57:

> MR. MAZZONE: Who else had their hand up? Juror No. 57, what can you tell us about what we've been talking about?
>
> JUROR NO. 57: I'm probably from the old school as well.
>
> MR. MAZZONE: Which is what?
>
> JUROR NO. 57: I just feel that if he did the shooting he's going to have to pay the time. This insanity stuff, I had a grandson who pulled that crap in school. He wanted out of school. Now he's 20, 21. He wished he hadn't done that because he can't get a gun. How he sold that leaves me in doubt of a lot.
>
> MR. MAZZONE: Could you make room for the possibility that there may be a situation in which somebody is actually insane?
>
> JUROR NO. 57: Today I couldn't tell you that.
>
> MR. MAZZONE: But as far as this case goes, what I'm hearing from you is that your mind is made up?
>
> JUROR NO. 57: At this point.

RP 386.

At this point, defense counsel's motion to excuse Jurors 92 and 95 was granted. RP 387-88.

Mazzone returned to Juror 1. Juror 1 confirmed that although he or she did not know the law with respect to insanity, the juror thought "he did it because he did it." RP 389. Mazzone's challenge for cause was denied after the prosecutor elicited that the juror would listen to the evidence and court's instructions. RP 390.

Mazzone returned to Juror 3. Juror 3 reiterated the belief that "insanity, I think, is a bailout, kind of a coward move in my mind." RP 391. Defense counsel moved to excuse Juror 3. RP 391. The prosecutor tried to rehabilitate Juror 3, but Juror 3 maintained: "Guilty is guilty. I mean he killed two people cold blooded pretty much." RP 392. Juror 3 would listen to the judge's instructions but admitted: "I don't think I'd be able to change my mind off of that." RP 392. The court excused Juror 3. RP 393.

Mazzone returned to Juror 1, who reiterated: "Like I said three or four times, I don't think you're going to convince me that insanity was a reason for this person to do that." RP 394. Juror 1 would listen to the evidence but did not believe it would make a difference. RP 394. The court granted Mazzone's renewed motion to excuse Juror 1. RP 394.

Mazzone next asked Juror 27 whether he believed the defense of insanity is "bogus," to which Juror 27 nodded affirmatively. RP 395-96. Juror 27 elaborated: "Well, I just think, you know, it's an excuse, a copout." RP 396. Juror 27 would be willing to listen to the evidence but did not believe it would change his mind. RP 396. The court granted Mazzone's motion to excuse Juror 27 with no objection or attempt at rehabilitation from the state. RP 398.

Mazzone turned to Juror 12. RP 398. Juror 12 expressed disbelief insanity could cause someone to shoot two people. RP 398. Juror 12 believed the defendant knew what he was doing. RP 399. As juror 12 elaborated: "I don't know what the court's explanation for insanity is. I don't know. It doesn't seem like that would carry water for me." RP 400. Juror 12 acknowledged a "possibility" she could change her mind. Nonetheless, "lots of things would have to become true in order for [Juror 12] to change [her] mind." RP 400.

Juror 63 felt similarly. RP 401. According to Juror 63, "now that he's gotten caught, it's kind of like a way out. That's how I feel about the insanity plea. That's just the way I've always felt." RP 401. When asked if the juror's mind was made up, Juror 63 stated:

"No, I'll sit and listen to all the scientific reasoning and all that." RP 401. Juror 63 indicated a change of mind was "possible." RP 401. When asked who else agreed with Juror 63, Juror 57 raised his hand. RP 402.

Defense counsel switched topics and asked who had a relatively open mind about insanity as a defense. RP 402. After speaking with several of these jurors, counsel returned to Juror 63 and confirmed he would listen to the evidence. RP 405, 406.

Mazzone switched topics again by asking who believed they heard too much about the case to be fair. RP 406. Juror 29 indicated: "I've got him guilty at this point, no matter if it's insane or whatever terminology you want to use. It's like the old devil and the angel on the shoulders. I mean, I've got myself so worked up I feel ill." RP 406. The court ultimately dismissed Juror 29 due to this and the juror's anxiety. RP 406-409.

Mazzone's last question to the panel was whether there were any jurors who believed they could not be fair. RP 410. Presumably, no one raised a hand as defense counsel turned over voir dire to the prosecutor. RP 410.

As the prosecutor had no additional questions, Mazzone immediately began the defense's second round of voir dire. RP

410. Defense counsel addressed why someone may have "inconsistencies" in how they described an event. RP 410-13.

Next, Mazzone indicated he wished to have a "frank discussion with a couple of you," particularly Juror 12, Juror 63, and Juror 83. RP 414. RP 410-16. Mazzone did not move to excuse these jurors for cause, but later exercised peremptory challenges against 12 and 63. RP 420-421.

Mazzone's final question was whether any remaining jurors had a reason they could not be fair. Jurors 16 and 76 raised their hands. RP 416. Mazzone exercised peremptory challenges against these jurors. RP 421.

The following jurors were seated:

1. Carol Hamilton (#5)
2. Kerry Turley (#11)
3. Nichole McQuiston (#13)
4. Birtie Sires (#14)
5. Bryce Duehn (#18)
6. William Steele (#20)
7. Mary Johnson (#26)
8. Roger Berg (#38)
9. Lisa Hagreen (#40)
10. Eva Lindstrand (#43)
11. Elisabeth Dodd (#45)
12. James Elliott (#46)
13. Barbara Skjelstad (#54)
14. Buddy Meier (#56)
15. Norman Cleveringa (#57)

RP 422. Thus, the highest number was Juror 57. RP 422.

At the end of the evidence, jurors 10, 13 and 8 were randomly picked to be the alternates. RP 1766. The jury convicted Verduzco as charged. CP 261, 263. The court sentenced him to

two consecutive life sentences. CP 279. This appeal follows. Cp 285.

D. ARGUMENT

1. ACTUAL BIAS EXPRESSED BY A JUROR SEATED FOR VERDUZCO'S TRIAL VIOLATED HIS RIGHT TO A FAIR AND IMPARTIAL JURY

Juror 57 raised his hand when asked who else agreed with Juror 95. Juror 95 stated he already believed Verduzco was guilty and Juror 95's mind was made up regardless of the court's ultimate instructions. In his own words, Juror 57 stated "if he did the shooting he's going to have to pay the time." RP 386. Juror 57 compared "[t]his insanity stuff" to "crap" his grandson pulled to get out of school. RP 386. Like Juror 95 (who was subsequently excused for cause), Juror 57 said his mind was made up "[a]t this point." RP 386.

The only other interaction during voir dire with Juror 57 occurred after defense counsel questioned Juror 63. Juror 63 stated: "now that he's gotten caught, it's kind of like a way out. That's how I feel about the insanity plea." RP 401. However, Juror 63 stated he would listen to all the evidence and that a change of mind was "possible." RP 401.

When asked who agreed with Juror 63, Juror 57 raised his hand. RP 402. However, neither the court nor prosecutor clarified the nature of Juror 57's agreement. Was he merely reiterating his previously expressed view that the insanity defense is just a "way out" after getting caught? In light of Juror 57's earlier statement that his mind was already made up, Juror 57's ambiguous agreement with Juror 63 does not qualify as "redemption." See e.g. State v. Phillips, __ Wn. App. __, __ P.3d __, 2018 WL 65990832 (recognizing a distinction between a juror that says they cannot be fair, without redemption, and a juror that only expresses reservations).

Because the record established actual bias with a "conspicuous lack of response," the seating of Juror 57 on Verduzco's jury violated his right to a fair and impartial jury. Hughes v. United States, 258 F.3d 453, 458 (6th Cir. 2001). This structural error requires reversal of Verduzco's convictions and remand for a new trial before 12 jurors who are actually fair and impartial.

"Criminal defendants have a federal and state constitutional right to a fair and impartial jury." State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (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)). "A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant." Id. (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012); Hughes v. United States, 258 F.3d 453, 464 (6th Cir. 2001)).

In indicating he believed Verduzco was guilty and that the insanity defense was "crap," Juror 57 manifested actual bias. Actual bias means "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). When it appears a juror has formed an opinion about the case, "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.

Juror 57 agreed with Juror 95's belief that Verduzco was already guilty regardless of the court's ultimate instructions. That Verduzco committed the shootings was not contested. Juror 57 also stated that if Verduzco committed the shootings he should have to pay the time. Thus, this statement was tantamount to an opinion on guilt. Juror 57 compared insanity to "crap" his grandson pulled to get out of school. He confirmed his mind was already made up.

Under the pertinent statutory definitions, Juror 57 expressed a "state of mind" indicating he "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." Nor could any court be satisfied under any circumstances that Juror 57 could disregard his initial expression or opinion of unfairness because no one ever questioned Juror 57 further.

In State v. Phillips, Division One of this Court held the trial court did not err when it failed to sua sponte excuse Juror 10 for bias reasoning that defense counsel redeemed Juror 10. Phillips was on trial for domestic violence offenses. Juror 10 stated the issue of domestic violence weighed heavily on him as his sister and wife's sister-in-law were in abusive relationships. He also stated he was beat up on the basketball court by a black player and that he

believed black men are more prone to violence. Phillips was African-American. Phillips, 2018 WL 6599832, *2.

However, Juror 10 also stated that as a scientist, he held it as a personal principle to be fair and objective. He also clarified he did not think his past experience on the basketball court would affect his evaluation of the guilt or innocence of Philipps. Finally, Juror 10 confirmed he "absolutely" felt comfortable taking an oath saying he would abide by the law and look at the case in the manner instructed by the court. Phillips, 2018 WL 6599832, * 3. Under these circumstances, Division One held the trial court did not err in failing to sua sponte excuse Juror 10. Id., *6.

The same cannot be said here where there was no follow-up. As indicated, Juror 57 raised his hand when asked who agreed with Juror 63. But Juror 63 had stated he believed the insanity defense was merely a way to get out of trouble after getting caught. Thus, Juror 57's agreement to this does not in any way negate Juror 57's previous expression of actual bias. Although Juror 63 also stated he would listen to the evidence and that a change of mind was "possible," it was never clarified whether Juror 57 agreed with this part of Juror 63's statement. Moreover, Juror 57 previously agreed with Juror 95 who stated he already believed

Verduzco was guilty regardless of what the court ultimately instructed. Under these circumstances, the trial court failed in carrying out its obligation to ensure a fair and impartial jury.

The Sixth Circuit's decision in Hughes, which the Irby court heavily relied on, supports Verduzco's position. See Irby, 187 Wn. App. at 194-95 (discussing Hughes). In Hughes, one of the jurors stated, "I don't think I could be fair" and also answered, "No" to the question, "You don't think you could be fair?" 258 F.3d at 456. The trial court never followed up on this exchange and the juror did not respond to general questions by defense counsel. Id. This was "a complete lapse" by the trial court in carrying out its obligation during voir dire to ensure empanelment of a fair and impartial jury. Id. at 464.

In State v. Gonzales, 111 Wn. App. 276, 281, 45 P.3d 205 (2002), Juror 11 indicated bias in favor of police witnesses that "would likely affect her deliberation. Juror 11 also candidly admitted she did not know if she could presume Gonzales innocent in the face of officer testimony indicating guilt." "[N]o rehabilitation was attempted." Id. This court reversed and remanded for a new trial: "At 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. Juror 11 demonstrated actual bias, and the trial court erred in rejecting Gonzales' cause challenge." Id. at 282.

Gonzales, Hughes, and Irby all require reversal of Verduzco's convictions and remand for a new trial. Juror 57 expressed actual bias. No one followed up to ensure this juror's impartiality. The biased juror sat on Verduzco's jury and deliberated. The remedy is reversal and a new trial.

The state might point out that defense counsel asked the entire venire at the end of voir dire whether there were any jurors who could not be fair and only Jurors 16 and 76 raised their hands. RP 416. From this, the state might argue that this court can infer Juror 57's impartiality.

This argument has already been rightly rejected. In Irby, the "State contend[ed] that juror 38's impartiality can be inferred from the fact that she, like the rest of the potential jurors, made no response to" a question whether "everybody here think[s] that they can basically make a finding of guilty or not guilty based on the evidence that you hear?" Irby, 187 Wn. App. at 196. This court held, "such questions directed to the group cannot substitute for

individual questioning of a juror who has expressed actual bias." Id. (citing Hughes, 258 F.3d at 461).

Similarly, defense counsel's general question here is no substitute for individually questioning Juror 57 regarding his pre-judgment of the case and dismissal of the insanity defense as "crap." Nothing in the record mitigates or neutralizes Juror 57's expression of actual bias.

The state might also attempt to argue that Verduzco waived his right to a fair and impartial jury because he did not object or move to strike Juror 57 for cause. However, the seating of a juror who has expressed actual bias is a manifest constitutional error under RAP 2.5(a)(3). Irby, 187 Wn. App. at 192-93. "[I]f 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." Id. at 193. Seating Juror 57 on Verduzco's jury was manifest constitutional error and can be considered on appeal regardless of defense counsel's actions or inactions.

Finally, this error is not and could never be harmless. "The presence of a biased juror cannot be harmless; the error requires a

new trial without a showing of prejudice." Irby, 187 Wn. App. at 193 (citing United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)). "[T]he presence of a biased juror, like the presence of a biased judge, is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis[.]" Hughes, 258 F.3d at 463 (quoting Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992) (citing Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991))). The presence of Juror 57, a biased juror, on Verduzco's jury was structural error that is not subject to harmless error analysis.

Because Verduzco was not provided a trial by a fair and impartial jury, this Court should reverse his convictions and remand for a new trial.

2. ALTERNATIVELY, COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE FOR FAILING TO INQUIRE OF JUROR 57 OR IN FAILING TO CHALLENGE HIM FOR CAUSE

"A trial judge has an independent obligation to protect [the jury trial] right, regardless of inaction by counsel or the defendant." Irby, 187 Wn. App. at 193 (citing Davis, 175 Wn.2d at 316). Nonetheless, this Court may alternatively consider the jury bias

issue as a denial of Verduzco's right to effective assistance of counsel.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation." Estes, 188 Wn.2d at 457. "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Id. at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the

evidence standard; "it is a probability sufficient to undermine confidence in the outcome." Id.

It could never be considered reasonable for defense counsel to waive his client's right to trial by a fair and impartial jury. As the Hughes court put it, "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." 258 F.3d at 463 (citing United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

Here, counsel initially followed up with Juror 57 for agreeing with Juror 95. However, counsel never returned to Juror 57 after that initial questioning and after successfully excusing Jurors 95 and 92. Significantly, defense counsel followed up with every other juror who agreed with Juror 95 – 1, 3, 27, 92 and 12. Defense counsel successfully moved to excuse every one of these jurors except 12, for whom he exercised a peremptory challenge. However, counsel never returned to Juror 57, moved to excuse him for cause or used a peremptory challenge on him. No tactic or strategy could explain this failure, considering counsel did so for all

other jurors who were like-minded, i.e. had pre-judged Verduzco's guilt and did not believe in the legitimacy of the insanity defense.

This is not a situation as in Phillips where Division One found defense counsel acted strategically in keeping Juror 10. As indicated in the argument section above, Juror 10 in Phillips' case redeemed himself during questioning by the defense:

> Here, the record is clear that defense counsel was alert to the possibility of biased jurors. Defense counsel actively questioned juror 10, including questioning whether, despite juror 10's concerns, the juror would follow the court's instructions and base his decision on the evidence presented. As a result, defense counsel did not challenge juror 10. This suggests that defense counsel observed something during voir dire that led counsel to believe juror 10 could be fair. It is also significant that Phillips used his peremptory challenges to strike several jurors, but but had one peremptory challenge remaining when he accepted the jury, including juror 10. Again, this suggests that defense counsel either wanted juror 10 on the jury, or did not want one or both the next potential jurors on the panel.

Phillips, WL 6599832, *7.

Defense counsel here likewise was alert to the possibility of biased jurors, as indicated by his questioning of all jurors who agreed with Juror 95. But unlike counsel in Phillips, counsel here never returned to question the biased juror or confirm the biased juror would follow the court's instructions and base his decision on

the evidence presented. Yet, counsel did so with every other juror who expressed a view similar to 95's. Thus, counsel's failure to return to Juror 57 or move to strike him for cause appears to have been inadvertent not strategic.

Juror 57's later ambiguous agreement to Juror 63's statements does not give rise to an inference defense counsel's failure to follow up with Juror 57 was legitimate strategy, particularly where counsel used a peremptory challenge against Juror 63. Clearly defense counsel did not perceive Juror 63 could be fair. Thus, counsel's failure to challenge Juror 57 cannot be construed as sound strategy.

It was not legitimate strategy to allow a biased juror to sit on the jury. As the Hughes court stated:

> If counsel's decision not to challenge a biased venireperson 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 . . . . We find not sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Hughes, 258 F.3d at 463. Defense counsel's performance was objectively deficient, and the first prong of Strickland is satisfied.

The prejudice prong is also satisfied, given that the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. Irby, 187 Wn. App. at 193; Hughes, 258 F.3d at 463. "[G]iven that a biased juror was impaneled in this case, prejudice under Strickland is presumed, and a new trial is required." Hughes, 258 F.3d at 463. Strickland's second prong is also satisfied, perfecting Verduzco's ineffective assistance of counsel claim.

In response to this claim, the state might argue that defense counsel purposely did not follow up with Juror 57 in order to provide Verduzco with a potential issue on appeal. In other words, the state might argue that defense counsel was sandbagging. The Hughes court squarely addressed and rejected this concern: "no such risk [of sandbagging] would exist but for the possibility of a complete lapse by the trial court, as in this case, in carrying out its obligation on *voir dire*." 258 F.3d at 464. This court should likewise reject any similar argument from the State in this case.

In failing to ensure Verduzco was tried by a fair and impartial jury, defense counsel provided ineffective assistance of counsel. This failure affected the outcome of trial within a reasonable probability. Accordingly, this court must reverse Verduzco's convictions and remand for a new trial.

E. CONCLUSION

Because he did not receive a trial by a fair and impartial jury and because he did not receive effective assistance of counsel, Verduzco asks that his convictions be reversed and that this matter be remanded for a new and fair trial.

Dated this 20th day of December, 2018

Respectfully submitted

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