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80807-9-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION ONE

RONALD LINDAHL

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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

The Honorable Judge Bill Bowman

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Ronald Lindahl, appellant below, ask this Court to review the decision of the court of appeals referred to in Section B below.

B. COURT OF APPEALS DECISION

Division One of the court of appeals affirmed Mr. Lindahl's conviction and exceptional sentence for DV assault in the second degree. *State v. Ronald Lindahl,* (Slip Op. No. 80807-9-II, filed August 2, 2021).

C. INTRODUCTION TO THE CASE AND ISSUES PRESENTED

1. A social worker at a hospital regularly assisted domestic violence victims. On her written questionnaire she informed the court she believed she could not be fair to both parties and would tend to believe the woman making the allegations. Despite rehabilitation efforts by the State, the juror never completely repudiated her earlier statement. The court nevertheless refused to

excuse her for cause and the defense had to spend a preemptory challenge to remove her.

On appeal, petitioner was aware that under the federal law, there is no constitutional violation if the biased juror is not seated on the jury panel. Accordingly, petitioner presented a *Gunwall*[1] analysis as why the Washington constitution provides greater protection. The court of appeals refused to consider the argument, incorrectly reasoning that *State v. Fire*[2] had resolved that issue. But *Fire* specially declined to consider a *Gunwall* analysis because none had been presented. Where the court of appeals has failed to consider a state constitutional claim, and misconstrued a decision from this Court, is review appropriate under RAP 13.4(b)(1), (3) & (4)?

2. In addition to first-degree assault, the State filed an alternative charge of assault in the second degree which included the aggravating circumstance that the injury "substantially

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[1] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).
[2] *State v. Fire,* 145 P.2d 152, 34 P.3d 1218 (2001).

exceeded the level of bodily harm necessary to constitute substantial bodily harm." Because there was evidence that some or all the injuries may have been self-inflicted, the court modified the instruction to clarify that only injuries caused by the defendant could be considered for this aggravator. Neither the court nor the parties noticed, however, that the special verdict form had not been modified to reflect this change. When the error was discovered, defense counsel brought a timely motion for a new trial. The trial court denied that motion.

Ignoring cases from this Court, the court of appeals concluded that a timely motion for a new trial does not preserve the objection. The court of appeals also misconstrued the record, and confused the invited error doctrine with a failure to object. Where the verdict form was very misleading should this Court accept review under RAP 13.4(b)(1) and (3)?

3. Cindy Lindahl has a history of self-harm dating back many decades. Much of it intentional, some of it due to mishaps while intoxicated. There was medical evidence that many

of the complained injuries in the current case were most likely due to a fall rather than an assault by Ron. The defense sought to introduce evidence of prior self-inflicted injuries. The court excluded all except an incident where Cindy stabbed herself in the stomach and initially blamed it on Ron. The judge explained that he did not believe the evidence admissible but invited the defense to present any additional evidence relating to those incidents.

Characterizing this as a tentative ruling, the court of appeals held that the issue was not preserved on appeal. Where the court of appeals continues to erect unreasonable barriers to meaningful appellate review, is review appropriate under RAP 13.4(b)(1) & (b)(3)?

D. STATEMENT OF FACTS

1. Overview of Trial Testimony

Cynthia ("Cindy") Lindahl suffered significant injuries during her week-long alcohol binge at home. The primary issue at trial was whether her injuries were caused by her husband Ronald ("Ron") Lindahl or were self-inflicted while she was

intoxicated. As such, much of the testimony focused upon Ron and Cindy's drinking, their conflicting accounts of what transpired during that week, and the expert testimony relating to those injuries.

Cindy has struggled with alcohol addiction for many years. She has entered court ordered treatment multiple times, but her sobriety never lasted. *RP 537.* Her drinking was particularly bad when she was alone. As a commercial fisherman, Ron was away from home five to six months of the year. During these periods, Cindy turned to vodka. A close neighbor noted that while Ron was gone, Cindy was often drunk. *RP 790.* Because of her near constant state of inebriation, Cindy had was often falling or tripping over obstacles such as the dog ramp in the bedroom.

Alcohol led her to poor decision making. For instance, in 2012, upset that Ron had received a birthday card from his ex-wife, Cindy stabbed a steak or butcher knife deep into her own stomach. *RP 533-545, 1059-1066.* Embarrassed at what she had

done, she initially claimed Ron had stabbed her, only to admit the truth a short time later. When the police arrived at her house, Cindy gave a false name because of an outstanding warrant for her arrest. *RP 601.* She was hospitalized with life threatening injuries, after which she went to detox. RP 1062, 1067.

On January 6, 2018, Cindy called a neighbor and reported that she had hurt her head and wanted 911 called. The police performed a welfare check, at which time Cindy told the police she had fallen. *RP 983.* She was unsteady and smelled of alcohol. *RP 978, 984.* After speaking with both Cindy and Ron individually, the police left without making an arrest or forwarding charges to the prosecutor.

A couple of days later, Cindy asked her neighbor to call her daughter to call the police. This time Cindy claimed it was Ron who had hurt her. It was later determined that she had suffered a subdural hemorrhage. Her doctors and surgeons could not say her injuries resulted from abuse. *RP 810, 945.* The emergency room doctor who treated Cindy acknowledged that

intracranial hemorrhages are more common in elderly patients and alcoholics. *RP 677.* A forensic pathologist, retained by the defense, explained that the serious injuries were much more consistent with a fall than physical abuse. *See 1016-1018.* In fact, some of the injuries could only have been caused by a fall. *RP 1014.*

A more detailed account of the trial testimony is set forth in appellant's opening brief at pages 8 through 24, and is incorporated by reference.[3]

E. WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals' refusal to consider whether the Washington constitution provides greater trial rights than its federal counterpart

[3] There are multiple inaccurate statements of fact in the court of appeals decision. For instance, in the 2013 incident, Ron did not hit his wife but threw a can of food at the wall and scared her. There are also significant missing facts relating to the circumstances surrounding his statement to the police. While it is tempting to chase these statements down, they are not necessarily germane to the appeal. As such they will not be addressed in this petition in order to save space.

should be reviewed under RAP 13.4(b)(1), (3) and (4).

People accused of a crime have a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Irby,* 187 Wn. App. 183, 192, 347 P.3d 1103 (2015). "The bias or prejudice of even a single juror is enough to violate that guarantee." *US v. Kechedzian,* 902 F.3d 1023, 1027 (9th Cir. 2018).

If "a juror has formed an opinion that could prevent impartial judgment of the facts, the trial judge should excuse that juror." *State v. Slert,* 186 Wn.2d 869, 877-78, 383 P.3d 466 (2016). Although review of cause challenges is for an abuse of discretion, "appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp." *State v. Fire,* 100 Wn. App. 722, 729, 998 P.2d 362 (2000) *(reversed on other grounds,* 145 Wn.2d 152 (2001)). Any doubts about bias should be resolved in favor of striking the juror. *Kechedzian,* 902 F.3d at 1027.

a. The trial court denied a challenge for cause against a social worker who assists domestic violence victims.

Before voir dire began, all potential jurors completed a written questionnaire which included questions about domestic violence. Juror 9 wrote on her questionnaire that she is a mental health professional and has training related to domestic violence. *RP 120.* She also wrote that she would not be able to be fair and impartial to both sides in a case involving an accusation of domestic violence. *RP 126.* She expressed a desire to talk about this individually rather than as part of the larger group. *RP 120.*

In court, Juror 9 explained that she is a hospital emergency room social worker, previously at Harborview and more recently at Children's Hospital. In many cases, she encounters victims of domestic violence. It is her job to gather information and help victims plan their next steps. *RP 126.* She receives in-house training at Children's Hospital in domestic violence issues and takes continuing education courses in domestic violence. *RP 124-25.*

Juror 9 stated that she thought about her answers for a long time before stating that she could not be fair. In response to the court asking her why she did not believe she could be fair, Juror 9 explained:

> Well, I guess my -- I struggled with that for quite a while, actually. My experience has pretty much entirely been in the domestic violence area, anyway, entirely done working with people who are accusers, victims. And so that's been all of my experience in this area. *And so my bias is that a person is coming forward to report domestic violence, I think that it's more likely than not that there's something there.* So that's just the truth of my bias as I (inaudible) to my -- to be as honest as possible in my reaction to that question.

RP 126 (emphasis added).

The judge explained the role of a juror to her and asked her if she would be able to set aside those biases to decide the case in a "fair and impartial way." Juror 9 responded, "Certainly, I would hope that I could do that." *RP 129.* The judge told her "hope" was not enough, he wanted to know, "Do you think you could do it or do you think you can't do it." Juror 9 responded, "Well, I think I can, but I also want to be honest about what I

think my leanings might be coming into this. So yes, certainly I do think I have the capacity to do that, Your Honor." *RP 129.*

Defense counsel asked Juror 9 to explain her change in thinking where she initially believed she could not be fair, but then said she could be fair. *RP 133.* Juror 9 responded, "Well, I guess I think that both can be true. You know, my life experience, my professional experience, I do have certain biases that come with that." *Id.* Juror 9 explained that she understood that coming in as a juror, "I need to listen to the facts as they would be presented to me in the case and make a decision based on that." *RP 133.* Understandably concerned that she had not reputed her early statement, defense counsel sought to excuse her for cause. *RP 134.* Without allowing argument the court denied the motion, forcing the defense to use the last peremptory challenge. *RP 341-45.*

Ron challenged this ruling on appeal, citing to cases with similar facts. *See* AOB at 26-28, *citing* to *Kechedzian, supra; State v. Gonzales,* 111 Wn. App. 276, 45 P.3d 205 (2002); *State*

v. Fire, 100 Wn. App. 725-29; *State v. Witherspoon,* 82 Wn. App. 634, 919 P.2d 99 (1996). As Ron explained in the opening brief, Juror 9 gave equivocal answers until the trial court pushed her to say yes or no as to whether she could be fair Even then she did not repudiate her earlier statement that she did not believe she could be fair. *See Witherspoon*, 82 Wn. App. at 637 (fact that juror ultimately agreed that he would presume the defendant innocent, did not go far enough to mitigate earlier statements).

Juror 9's situation is like that of the juror in *Cheney v. Grunewald*, 55 Wn. App. 807, 808–09, 780 P.2d 1332 (1989), a DWI case where the potential juror was a member of MADD and had a niece killed by a drunk driver. He agreed with the defense that if he was charged with DWI, he doubted he would get a fair trial with six jurors similar to himself. The judge, however, asked a series of questions to rehabilitate the juror.

> THE COURT: ... do you think you can put all that aside and give both parties here a fair trial?
>
> MR. BAUMAN: I do.

> THE COURT: ... Do you understand that it's not illegal to drink and drive.
>
> MR. BAUMAN: I do.
>
> THE COURT: Do you think that you can keep a fair and open mind throughout that entire trial?
>
> MR. BAUMAN: Yes.

Grunewald, 55 Wn. App. at 808-09. The judge refused defense counsel's request to strike the juror for cause. The defendant was found guilty, but the court of appeals reversed the conviction. The appellate court explained, "it is a good rule for the trial judge to honor challenges for cause whenever he may reasonably suspect that circumstances outside the evidence may create bias or an appearance of bias on the part of the challenged juror" *Id. at 811* (internal citations omitted). The same result is required here.

b. The court of appeals refused to apply a *Gunwall* analysis, erroneously believing this Court had already rejected any argument based on the state constitution.

As a result of the trial court's erroneous ruling, defense counsel was forced to use a one of his preemptory challenges. This diminished defendant's opportunity to obtain a fair and

impartial jury. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd,* 143 Wn.2d 923 (2001) ("It is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury.)"

For over a hundred years, this was the rule in Washington. *See State v. Rutten,* 13 Wash 203, 204, 43 P. 30 (1895) ("if the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted."); *State v. Parnell,* 77 Wn.2d 503, 508, 463 P.2d 134 (1969) *(same).* This became known as the *Parnell* rule, and a defendant was entitled to relief if he had to exhaust his last challenge on a juror who should have been excused for cause.

This was also the rule followed in federal courts, thus there was little reason to distinguish between a defendant's trial rights under the Sixth Amendment and those under Washington's Article 1 section 22. This changed after *States v. Martinez-*

Salazar, 528 U.S. 304, 780-82, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), where the Supreme Court ruled there was no constitutional violation unless a biased juror sat in deliberation on the jury. The fact that a party must use his last preemptory on a juror that should have been stricken for cause did not rise to the level of a constitutional violation. *Id.*

The following year, five justices in *State v. Fire* rejected the *Parnell* rule and accepted the holding in *Martinez-Salazar.* The lead opinion in *Fire* reasoned the *Parnell* rule flowed from similar constitutional principles, so *Martinez-Salazar* controlled. *Fire,* 145 Wn.2d at 163

Of great significance, the Court explained that no *Gunwall* analysis had been presented and therefore the Court would not consider an independent state right:

> Fire neither argues that the Washington State Constitution provides more protection than the federal constitution nor addresses the criteria identified in *State v. Gunwall, [citation omitted]*. This court will not consider a claim that the Washington Constitution guarantees more protection than the federal constitution unless the party making the claim

> adequately briefs and argues the *Gunwall* factors. *State v. Davis,* 141 Wash.2d 798, 834, 10 P.3d 977 (2000). If the party has not engaged in a *Gunwall* analysis, this court will consider his claim only under federal constitutional law. *[cases omitted]*. On this basis as well, *Martinez–Salazar* controls, and Fire's claim that he suffered prejudice fails.

State v. Fire, 145 Wn.2d at 163–64.

Here, Petitioner did present a *Gunwall* analysis involving all six factors to the court of appeals and argued that the *Parnell* rule should apply under the state constitution. See Brief of Appellant at 33-41. The court, however, refused to apply the *Gunwall* factors. Instead, the Division One ruled this Court already decided the issue in *Fire*. Slip Op. at 10. As noted from the block quote above, this is simply incorrect.

The court made other erroneous statements as well, such as "in nearly 100 years, our state has yet to recognize any state or local concern with respect to a defendant's right to an impartial jury that would justify interpreting article I, section 22 differently than how federal courts have interpreted the Sixth

Amendment." Slip Op. at 10-11, quoting, *State v. Munzanreder,* 199 Wn. App. 162, 174, 398 P.3d 1160 (2017). This is inaccurate.

In recent years, this Court has taken steps to help ensure juries are free of bias and prejudice. It has done so by relying upon the trial rights contained within the state constitution. For instance in *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) this Court specifically recognized the state constitution provided greater protection:

> The increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group.

Id. *See also, State v. Saintcalle,* 178 Wn.2d 34, 51, 309 P.3d 326 (2013), ("We can also extend greater-than-federal *Batson* protections to defendants under the greater protection afforded under our state jury trial right, a fact we recognized in *Hicks")*.

Respectfully, this Court should accept review and apply the *Gunwall* factors to this issue. Alternatively, this Court could

remand the case back to Division One to apply the *Gunwall* factors. Either way, this is an issue that needs to be resolved. Because the lower court's interpretation of *Fire* is wrong, review is appropriate under RAP 13.4(b)(1). And because the ruling results in a violation of Petitioner's state constitutional rights, review is appropriate under RAP 13.4(b)(3).

2. Petitioner's constitutional rights were violated by the court's use of an inadequate and misleading verdict form and by the trial court's erroneous application of the invited error doctrine

Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This is because facts which are necessary to impose a greater sentence are "the functional equivalent of an element of a greater offense." *State v. Mills,* 154 Wn.2d 1, 9, 109 P.3d 415 (2005). Thus, failure to instruct on an element of a sentencing enhancement denies the

accused the right to a fair trial. *State v. Williams-Walker,* 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Here, the special verdict form failed to inform the jury that the State must prove Cindy's great bodily injury was caused by the defendant.

a. Cindy Lindahl's injuries and the misleading special verdict form.

By amended information, the State added a count of Assault in the Second Degree. The new charge also included an aggravator that the injuries of the victim substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime. *CP 12-13; RCW 9.94A.535(3)(y).* The State submitted the following instruction for this aggravating factor:

> If you find the defendant guilty of Assault in the Second Degree as charged in Count II, then you must determine if the following aggravating circumstance exists:
>
> Whether the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm, as defined in these instructions.
>
> In order to prove the victim's injuries substantially exceeded substantial bodily harm the State must

> prove the victim suffered great bodily harm, as defined in these instructions.

CP 113; WPIC 300.02. The defense objected to this instruction based on the unusual fact pattern of the case.

Defense counsel reminded the court that the jury heard substantial evidence that at least some of Cindy's injuries were self-inflicted. Based on the evidence, a jury could find that Ron had inflicted substantial injuries upon Cindy, making him guilty of Assault in the Second Degree, but that the more serious injuries were self-inflicted. *CP 967-68.* The problem, argued defense counsel, was that WPIC 300.02 did not differentiate between injuries caused by the defendant and those that were self-inflicted. This meant a jury could find that the State had proven the aggravating factor based on injuries Ron did not cause.

The judge agreed with the defense (*RP 1139-40)* and modified the second paragraph of Court's Instruction 19 to read:

> Whether the victim's injuries *caused by the defendant* substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm, as defined in these instructions.

CP 189 (emphasis added). Unfortunately, the court neglected to similarly modify the special verdict form. As such, the question asked of the jury stated: "Did the victim's injuries substantially exceed the level of bodily harm necessary to constitute substantial bodily harm, as defined in these instructions for Count II." *CP 195*.

The jury returned verdicts of not guilty on first-degree assault and guilty on second-degree assault. The jury also found that the victim's injuries substantially exceeded the level of harm necessary for assault in the second degree. Once defense counsel discovered the mistake, he brought a motion for a new trial under CrR 7.5. The court denied that motion, reasoning that the instructions were a correct statement of the law and that as a whole adequately informed the jury of that law. *RP 1291-1292.* The court imposed an exceptional sentence. *CP 248-256*.

b. The court erred in concluding the issue was waived under the invited error doctrine.

In ruling that the issue was not properly preserved for appeal, the court of appeals conflates the failure to object with the invited error doctrine. Slip Op. at 12.

"The invited-error doctrine as applied to jury instructions precludes a defendant from arguing that an instruction he proposed was erroneous." *State v. Schaler*, 169 Wn.2d 274, 292, 236 P.3d 858 (2010). In the present case, defense counsel did not propose the verdict form. He objected to Instruction 19, and the court incorporated his change. But the judge did not make a corresponding change to the verdict form. Defense counsel's only mistake was in failing to notice the judge had not made the necessary change to the verdict form. He preserved that objection, however, by filing a motion for a new trial. Ideally the objection "will be done during the course of trial, but the error may be raised in a motion for a new trial." *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979), *see Petition of Lee*, 95 Wn.2d 357, 363, 623 P.2d 687 (1980), *overruled on other grounds by Hews v. Evans*, 99 Wn.2d 80, 660 P.2d 263 (1983) ("[I]f a challenge is

raised as late as in a motion for a new trial, it gives the trial court an opportunity to act upon it and preserves the issue on appeal.") The verdict form issue is preserved.

c. The verdict form was fatally defective.

The court of appeals allotted a total of one sentence to its analysis of the jury instruction given in this case. The court stated:

> Even if he had preserved this issue on appeal, the special verdict form correctly states the law because it incorporates the defense instruction specifying that only those injuries caused by the defendant could be considered in determining whether they substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm.

Slip Op at 12.

This is incorrect. The verdict form as submitted only specifically incorporated the definition of substantial bodily injury.

> Did the victim's injuries substantially exceed the level of bodily harm necessary to constitute substantial bodily harm, as defined in these instructions for Count II?

CP 195. And that instruction does not make any reference to the cause of the injuries. *CP 84*

Jury instructions are only proper when they permit the parties to argue their theories of the case ("[D]o not mislead the jury, and properly inform the jury of the applicable law.") *State v. Fahr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015*), quoting State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 219 (2005). This same standard applies to jury instructions and the special verdict form. *Fahr*, 185 Wn.2d at 514.

If instructions omit the necessary element, automatic reversal is required. *Id.* Where the instructions include the necessary elements, but nonetheless have the capacity to mislead, they are subject to a harmless error analysis. *See State v. Coristine,* 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The verdict form fails under either test.

At best, there were two different questions asked of the jury, one in Instruction 19 and the other in the special verdict form. The trial court assumed the jury would answer the correct

question in Instruction 19 rather than the incorrect one in the special verdict form. This is an untenable and unsupported assumption.

Even assuming that the verdict form was simply a poorly worded correct statement of the law, reversal would still be required. The missing language from the special verdict form went to the heart of the issue in the case—were the most serious injuries caused by the defendant or were they a result of Cindy's own intoxication and poor balance? *See Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 143, 955 P.2d 822, 825 (1998) ("Notwithstanding the legal sufficiency of the instructions, we must find these instructions insufficient if they are misleading or if the special verdict form clouds the jury's vantage point of the contested issues.")

This was a unique fact pattern. As the trial judge noted when he modified Instruction 19:

> Some of these injuries there's testimony that the jury may find were not caused by the assault. And for the aggravator, I think the injuries have to be those

> injuries that were caused by the defendant. I very rarely modify WPICs, but in this case, I felt like based on the testimony that we heard, it was justified to do so. I think it accurately reflects the law and I think it is supported by the facts in the case. So I made that change.

RP 1139-40 (emphasis added). The court correctly observed the problem, but the instruction change, without the verdict form, was a violation of Petitioner's constitutional rights. Review is appropriate under RAP 13.4(b)(1) and (3).

3. Petitioner's Sixth Amendment Rights were violated when the court excluded prior instances of Cindy Lindahl's self-harm.

There was no question that Cindy suffered serious injuries. The only question was whether they were self-inflicted or caused by Ron. Over the course of time, and because of her long-term alcohol abuse, Cindy has experienced many injuries. Many of these were accidents, falling over and bruising herself while intoxicated. On other occasions, they were purposeful self-injury. Some were done to get back at people, other times the reasoning was less clear.

Given the nature of her injuries in this incident, it would be difficult to understand or believe that any person could cause such self-harm. The jurors had some sense of this when they learned how Cindy had stabbed herself in the stomach when she was intoxicated and mad at Ron, but this could be seen as an isolated incident. The defense sought to introduce two other incidents of self-harm. It was the defense theory that these prior incidents were calls for attention, in the same way that Cindy was doing so in this current case. RP 77-78. The court excluded those two instances of self-harm in the absence of a greater showing of relevancy. RP 83.

Petitioner challenged this on appeal, pointing out that this was a violation of his Sixth Amendment right to present a defense. Brief of Appellant at 46-50, citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)[4]

[4] Those arguments are incorporated into this petition.

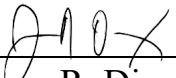
In rejecting this argument, Division One again asserted any error was not preserved, treating the judge's ruling as tentative. Slip Op. at 13-14. This is not correct. A full reading of the court's ruling indicates that the court issued a ruling, but would consider additional evidence if the defense had any more to submit. The defense did not, and was thus bound by the court's ruling. Review is appropriate under RAP 13.4(b)(3).

F. CONCLUSION

Petitioner respectfully asks this Court to accept review.

Respectfully submitted: September 1, 2021

I certify that there are 4906 words in his petition.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD JAMES LINDAHL, Appellant.	)	No. 80807-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Ronald Lindahl appeals his conviction for domestic violence assault in the second degree with aggravating circumstances. He contends that the court denied him of his right to an unbiased jury, that the court should not have enhanced his sentence, and that the court violated his right to present a defense when excluding evidence. We affirm.

FACTS

Lindahl was charged by amended information with assault in the first degree—domestic violence and assault in the second degree—domestic violence against his

wife, Cynthia Lindahl.[1] The second degree assault charge included the aggravating circumstances of injuries substantially exceeding the level of bodily harm necessary to satisfy the elements of the crime. Testimony at trial established the following.

Lindahl and Cynthia married in 2002. Both Lindahl and Cynthia suffered from alcohol addiction. Lindahl had a history of being physically violent to Cynthia when drunk. In 2013, Cynthia called the police after Lindahl hit her in the face. Lindahl was convicted of assault in the fourth degree and the court ordered him to undergo alcohol treatment and anger management.

In 2012, Cynthia attempted to commit suicide and stabbed herself in the stomach with a butcher knife. Lindahl sought help from their neighbor, a former nurse named Virginia Thorsvig. "Ashamed," Cynthia initially told Thorsvig that Lindahl stabbed her. However, Cynthia later told police her wound was self-inflicted and Lindahl was not arrested.

On January 6, 2018, Cynthia called Thorsvig, and left her a message, stating that she had a head injury, and requested Thorsvig call 911, which she did. Police conducted a welfare check on the Lindahl residence, and noticed that Cynthia had redness and bruising under her left eye, and bruising on her left arm. When questioned by police, Lindahl told officers that Cynthia was always falling and had fallen in the bedroom the previous week. Cynthia declined medical attention and the officers left.

On January 9, 2018, Cynthia came to Thorsvig's door and asked her to call her daughter. Cynthia was bruised and barefoot. Police arrived at the Lindahl residence,

[1] Because the parties share the same surname, this opinion refers to Cynthia by her first name. No disrespect is intended.

finding the house in disarray. Cynthia had a bruised, swollen face, and additional bruising on her body. Cynthia had significantly more injuries than she had on January 6. Medics treated Cynthia and she told them she was too scared to say something to the medics on January 6.

Cynthia then went to the hospital and told hospital staff that her husband assaulted her. Cynthia said Lindahl kicked the back of her head and punched her in the face. Doctors determined that Cynthia had two black eyes and bruising across her nose. After a computed tomography (CT) scan, doctors determined that she had a subdural hematoma, bleeding under the skull, which can be life threatening. The bleeding had moved her brain 8 millimeters, which can result in brain damage or death. Cynthia also had a dislocated, fractured shoulder, and bruising on her arms and legs.

After suffering a seizure, Cynthia was transferred to Harborview Medical Center (Harborview) where she underwent a craniotomy, and doctors discovered two subdural hematomas, caused from a combination of acute and chronic bleeding. At Harborview, Cynthia also underwent facial surgery to repair her nose which had been crushed in five places.

While Cynthia initially told police that she fell and hurt herself, she later reported and testified at trial that over the course of several days, Lindahl brutally assaulted her. Lindahl began assaulting Cynthia after she jokingly told Lindahl she was having an affair with a celebrity. He slammed her head into the kitchen cupboards about 10 times, pushing her head into the drawer handle. Lindahl then kicked her into the door, and then kicked her down two stairs onto a cement floor. Cynthia said she did trip and fall in the bedroom during the course of the assault. After Cynthia fell, Lindahl proceeded to

pound her head into the dresser until she fell onto the floor. Lindahl tried to drag Cynthia up, giving her a bad carpet burn. Frustrated that Cynthia was unable to get up, Lindahl stomped and kicked her as she lay on the floor for days. She was unable to move and soiled herself. Finally, Cynthia mustered the strength to run to Thorsvig's house for help.

Police arrested Lindahl on January 9, 2018. After being read his Miranda[2] rights, Lindahl provided police with a written statement saying that after Cynthia told him she cheated on him, they were drinking, and she fell four times onto the kitchen stove and table. During the course of the interview with the officer, Lindahl said both "I didn't do anything," and "I'm guilty." He said he did not seek medical help for Cynthia because he was afraid of being arrested. Police photographed bruising and scrapes on Lindahl's chest, bruising on his elbow, and a scrape on his nose.

On January 10, 2018, Detective John Free interviewed Lindahl. Lindahl said that both he and Cynthia were drinking, she said she had an affair, and it "just got ugly." Lindahl alternated between denying hitting Cynthia and saying she fell and hit her head, to admitting he "must have done something." He did admit he hit Cynthia, but he characterized it as "shoving and pushing." Lindahl wrote a letter to Cynthia at Detective Free's suggestion, where he said: "So sorry for what happened. I should have never hit or kicked you. I love you so much. Please forgive me. I do love you and you do deserve much better."

[2] Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

From late February to early March, Lindahl left repeated voicemails on Cynthia's phone, which she gave to police. Lindahl alternated between professing his love for Cynthia, begging her to call him, and threatening her and cursing at her.

Pretrial, the defense moved to introduce three instances of Cynthia's self-harm: two instances of Cynthia shooting herself in 1984 and 1996 before she met Lindahl, and the 2012 stabbing incident. After a lengthy ER 404(b) analysis on the record, the court allowed the defense to introduce evidence of the 2012 stabbing, but tentatively excluded evidence of the shooting incidents, based on the remoteness in time and minimal probative value.[3]

At trial, Cynthia testified about the assault in detail and the lasting brain damage she suffered as a result. Lindahl denied hitting Cynthia, instead claiming she fell repeatedly and ran into items while drunk, and she kicked him. A defense hired pathologist testified that subdural hematomas are more common in elderly people and alcoholics, and concluded that Cynthia's injuries could have been caused either by someone accidentally falling and striking their head, or having their head intentionally slammed into a fixed object.

The court played Lindahl's recorded interview with Detective Free for the jury. The court admitted over 20 voicemails that Lindahl left for Cynthia between February 23, 2018 and March 5, 2018.

[3] At the conclusion of the ER 404(b) hearing, the trial court concluded: "given the remoteness in time and the lack of information I have about it, . . . I think it's got minimal probative value to the defense—that I would not allow it in. But I'm going to let you get more information about this if you want. And if you want, we can actually hear testimony outside the presence of the jury about these incidents so that I can have more information about it to make that decision. But . . . my inclination at this point is to exclude that evidence based on a 404(b) analysis."

The jury found Lindahl not guilty of assault in the first degree, but guilty of assault in the second degree. The court imposed an upward exceptional sentence of 48 months based on the jury's special verdict finding that Cynthia's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm.

Lindahl appeals.

ANALYSIS

A. Biased Juror

Lindahl argues that the trial court denied him his right to a fair trial by denying his motion to remove a juror for cause. We disagree.

We review the trial court's voir dire decisions for an abuse of discretion. State v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). "Therefore, absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court's ruling on the scope and content of voir dire will not be disturbed on appeal." Davis, 141 Wn.2d at 826.

Potential jurors answered a questionnaire to expose any issues with their ability to serve on the jury. Juror 9 noted that she had experience working with domestic violence, and that she might slightly favor the accuser. She answered "yes," to the following question: "Is there a reason that you would be unable to be fair and impartial to both sides in a case involving an accusation of domestic violence," explaining "Having worked in Emergency Room settings with DV victims my experience may bias me in favor of the accuser."

During individual questioning, juror 9 elaborated:

> My experience has pretty much entirely been in the domestic violence area, anyway, entirely done working with people who are accusers,

> victims. And so that's been all of my experience in this area. And so my bias is that a person is coming forward to report domestic violence, I think that it's more likely than not that there's something there. So that's just the truth of my bias as I (inaudible) to my—to be as honest as possible in my reaction to that question.

After the trial court explained the role of a juror to juror 9, and explained that she needed to consider only the evidence brought to her in the courtroom without letting her biases interfere, juror 9 said "I would hope that I could do that." The court pressed her further and she answered "Well, I think I can, but I also want to be honest about what I think my leanings might be coming into this. So yes, certainly I do think I have the capacity to do that, Your Honor." After being questioned by defense counsel, and acknowledging her own biases, juror 9 said she could still serve on the case, stating "I also know that coming here as a juror, that I need to listen to the facts as they would be presented to me in the case and make a decision based on that. And I believe that I could do that."

The trial court denied defense counsel's motion to strike juror 9 for cause. Defense counsel then used one of its peremptory challenges[4] to excuse juror 9. Defense counsel used all eight peremptory challenges.

A defendant is guaranteed the right to a trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. Davis, 141 Wn.2d at 824. In Washington, this includes the accused's right to an unbiased and unprejudiced jury. Davis, 141 Wn.2d at 824. Seating an actually biased juror is a manifest constitutional error requiring reversal. State v. Irby, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015).

[4] The court gave each side eight peremptory challenges.

Actual bias provides a basis to challenge a juror for cause. State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020) (quoting RCW 4.44.170(2)). A juror's "equivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

Lindahl contends that because the court denied the for-cause challenge, he was forced to use a peremptory challenge, requiring reversal under the Washington Constitution. Lindahl urges us to follow State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969) abrogated by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). In Parnell, our Supreme Court held that if a trial court erroneously denies a challenge for cause, thus forcing the defendant to exercise a peremptory challenge to remove the juror, the error is presumptively prejudicial and requires reversal if the defendant subsequently exhausts his or her peremptory challenges. 77 Wn.2d at 508.

Subsequent to Parnell, in United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 777-80, 145 L. Ed. 2d 792 (2000), the United States Supreme Court held that peremptory challenges "are not of federal constitutional dimension" and the federal constitutional right to an impartial jury is not violated when a trial court denies a challenge for cause and the defendant then uses a peremptory challenge to strike the challenged juror. Later the same year, Washington explicitly adopted the holding of Martinez-Salazar in State v. Roberts, 142 Wn.2d 471, 517, 14 P.3d 713 (2000). The court held that "[i]t is well established that an erroneous denial of a challenge for cause may be cured when the challenged juror is removed by peremptory" and that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory

challenge to achieve that result does not mean the Sixth Amendment was violated." Roberts, 142 Wn.2d at 518.

In Fire, our Supreme Court explicitly abrogated Parnell.[5] A five-justice majority, relying on Martinez-Salazar, held that the erroneous denial of a challenge for cause is not a due process violation under the federal constitution. The majority also addressed the implication that while the defendant "may not have had any grounds for relief under the United States Constitution and federal case law, he does under the Washington Constitution and Washington case law." Fire, 145 Wn.2d at 159. The majority held that there is no difference between the right to an impartial jury guaranteed under the federal constitution and that guaranteed under the Washington constitution, and thus no reason to analyze whether the defendant's state constitutional rights were violated.

> No Washington case has thus far recognized a difference between the right to an impartial jury guaranteed under the federal constitution and that guaranteed under the Washington constitution . . . Thus, Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution. Hence, Martinez-Salazar defines the scope of a defendant's right to an impartial jury in this situation.

Fire, 145 Wn.2d at 163.[6]

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[5] Justice Alexander concurred with the result in Fire. He wrote a separate concurring opinion to state his belief that Parnell had not been tacitly abandoned, as the majority suggested, but instead remained good law up until Fire.

[6] Subsequent cases addressing the issue have followed the reasoning in Fire. See, e.g., Hill v. Cox, 110 Wn. App. 394, 410, 41 P.3d 495 (2002) ("[E]ven if a juror should have been excused for cause, once a peremptory challenge is exercised, some showing that a biased juror actually sat on the case is required."); State v. Yates, 161 Wn.2d 714, 746, 168 P.3d 359 (2007) abrogated by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018) ("[W]here a defendant exercises a peremptory challenge after the court denies a defense motion to excuse the juror for cause, any potential violation of the defendant's Sixth Amendment right to an impartial jury is cured."); In re Pers. Restraint of Stockwell, 160 Wn. App. 172, 181, 248 P.3d 576 (2011) ("As long as the selected jury is impartial, the fact that Stockwell had to use a peremptory challenge to ensure that result does not violate his right to an impartial jury."); State v. Clark, 170 Wn. App. 166, 194, 283 P.3d 1116 (2012) ("A defendant must demonstrate prejudice as a result of the court's failure to strike a juror for cause . . . If the challenged juror did not ultimately sit on the jury, the defendant cannot show prejudice."); State v. Schierman, 192 Wn.2d 577, 632, 438 P.3d 1063 (2018) ("Where a trial court erroneously denies a defendant's for-cause challenge and the defendant is

Lindahl argues that Fire was based on federal constitutional law and therefore did not consider that the Washington Constitution guarantees greater protection. But the majority in Fire was clear that there is no difference between the right to an impartial jury guaranteed under the federal constitution and that guaranteed under the Washington constitution.[7] Fire, 145 Wn.2d at 163. And Lindahl cites no cases in support of the proposition that the state constitutional right to a fair and impartial jury in article I, section 21 and 22 is greater than that afforded under the Sixth Amendment. See, e.g., State v. Munzanreder, 199 Wn. App. 162, 174, 398 P.3d 1160 (2017) ("In nearly 100 years, our state has yet to recognize any state or local concern with respect to a defendant's right to an impartial jury that would justify

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forced to use a peremptory challenge to cure the trial court's error, his rights are not violated so long as he is subsequently convicted by a jury on which no biased juror sat.").

[7] Justice Alexander joined in this result, and also separately wrote that the state constitutional right to a fair and impartial jury was co-extensive with the federal right:

> The Court's decision in Martinez-Salazar makes perfect sense to me and is a far better rule than that which we enunciated in Parnell. More importantly, the rule does not trample on any constitutional rights guaranteed by the Sixth Amendment to the United States Constitution or Washington Constitution article I, sections 21, 22 . . .
>
> The language of article I, section 22 of our state constitution is similar to that of the Sixth Amendment and has been construed to ensure and protect one's right to a fair and impartial jury. State v. Davis, 141 Wn.2d 798, 855, 10 P.3d 977 (2000). In addition, Washington Constitution article I, section 21 states that a defendant has a right to be tried by an impartial 12 person jury. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995) (applying Wash. Const. art. I, § 21). Neither provision provides that a person has a right to a jury containing a particular juror or jurors. I subscribe to the view that these constitutional rights are not infringed when a defendant exercises a peremptory challenge to cure an erroneously denied for cause challenge. Like the United States Supreme Court, I would hold that unless a defendant can show prejudice, the mere fact that one uses his or her peremptory challenge to cure a wrongfully denied for-cause challenge does not establish a constitutional violation.

Fire, 145 Wn.2d at 167.

interpreting article I, section 22 differently than how federal courts have interpreted the Sixth Amendment.").

Fire is binding authority. Because juror 9 did not sit on the jury, Lindahl cannot show that the jury was biased. Further, Lindahl is unable to demonstrate that the trial court abused its discretion in denying the for-cause challenge. While juror 9 did indicate that she had some biases that she was aware of, she clearly told the court that she would be able to set aside those biases and focus on the evidence offered. Ultimately, Lindahl cannot show any prejudice with his jury warranting reversal.

B. Enhanced Sentence

Lindahl next argues that the trial court erred in enhancing his sentence because the verdict form does not properly instruct the jury on the aggravating circumstances. We disagree.

We review alleged instructional errors de novo. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). We review jury instructions and special verdict forms under the same standard. State v. Fehr, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions must inform the jury that the State bears the burden of proving every essential element of the crime charged. State v. Johnson, 180 Wn.2d 295, 306, 325 P.3d 135 (2014).

Lindahl objected to the State's proposed instruction for assault in the second degree, specifically challenging the language "Whether the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm."

The court agreed to modify the instructions, consistent with the defense theory that Cynthia had also injured herself over the days. The court instructed the jury to consider "whether the victim's injuries caused by the defendant substantially exceeded the level of bodily harm to constitute substantial bodily harm." (Emphasis added).

Lindahl did not object to the special verdict form, which states "Did the victim's injuries substantially exceed the level of bodily harm necessary to constitute substantial bodily harm, as defined in these instructions for Count II." Lindahl raised the issue for the first time in the motion for a new trial.

Lindahl has failed to preserve this error on appeal as the special verdict form incorporated the jury instruction that Lindahl requested. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Even if he had preserved this issue on appeal, the special verdict form correctly states the law because it incorporates the defense instruction specifying that only those injuries caused by the defendant could be considered in determining whether they substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm.

C. Exclusion of Evidence

Lindahl finally argues that the court violated his right to present a defense when it excluded evidence of Cynthia's acts of self-harm that predated their relationship. We disagree.

We review evidentiary decisions for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Evidence is relevant if it has "any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The trial court considers whether the probative value of prejudicial evidence is outweighed by its prejudicial effect under ER 403. Evidence of other acts are admissible to show an absence of mistake or an accident. ER 404(b). Evidence of an accident is admissible only when the defendant denies the crime, and affirmatively asserts that the victim's injuries occurred by happenstance or misfortune. State v. Roth, 75 Wn. App. 808, 819, 881 P.2d 268 (1994).

When Lindahl moved to admit three instances of Cynthia's self-harm to support his theory that she injured herself under ER 404(b), the court only allowed the defense to introduce evidence of the 2012 stabbing incident. The court reasoned that the shooting incidents were 23 and 35 years ago, they had nothing to do with Lindahl, and had minimal probative value to the defense. The court admitted the 2012 incident as it involved Lindahl, and was applicable to his theory that Cynthia's injuries were self-inflicted.

Lindahl cannot demonstrate that the court abused its discretion by tentatively excluding this evidence based on the limited details Lindahl presented regarding the 1984 accidental shooting incident or the 1996 possible suicide attempt. First, the court made clear that its ruling was only tentative and that Lindahl and his counsel could request an evidentiary hearing to present additional information if they wanted the court to consider admitting that evidence. A defendant waives a challenge to an alleged evidentiary error by failing to seek a final ruling on a tentative ruling on a motion in limine. State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994). Here, the court did not

definitively exclude this evidence. It stated "my inclination at this point is to exclude that evidence based on [an ER] 404(b) analysis."

Second, even if the error were not waived, Lindahl has not demonstrated an abuse of discretion. Both shooting incidents occurred long before Cynthia and Lindahl met, and had nothing to do with their relationship. Lindahl argues that the evidence was relevant because it would overcome a jury's reluctance to believe anyone could harm themselves so seriously and it demonstrated a pattern of self-harming behavior to gain attention. But defense counsel indicated below that the 1984 shooting was accidental and the 1996 shooting may have been a suicide attempt. There is simply insufficient evidence to demonstrate the two incidents proved that Cynthia had a pattern of inflicting injuries on herself to gain attention. And their remoteness in time and lack of connection to Lindahl, or the crime at issue, significantly reduced even further any potential probative value the evidence would have had. Lindahl was able to sufficiently argue his theory that Cynthia injured herself and blamed Lindahl for these self-inflicted injuries through his own testimony and with evidence of the 2012 stabbing incident.

Affirmed.

Mann, C.J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.

DIXON CANNON, LTD

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