Supreme Court No. 100419-2
(COA No. 54129-7-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK PERRY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mark Perry asks this Court to review the opinion of the Court of Appeals in *State v. Perry*, No. 54129-7-II (issued on October 26, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by failing to sua sponte excuse a juror who expressed an inability to be fair and impartial.

2. Whether the trial court improperly excluded evidence bearing on a witness's credibility, thereby restricting Mr. Perry's right to cross-examine the witnesses against him.

3. Whether improper opinion evidence that Mr. Perry did not need to defend himself violated his right to a fair trial.

C. STATEMENT OF THE CASE

Mr. Perry and his former girlfriend, Cheyanne Kaady, lived on a campground near Blue Lake. RP 198. The couple's campsite was up a small hill from that of Tammy Baker, a

friend of Mr. Perry's. RP 198. The day of the incident, Ms. Baker and Ms. Kaady got into an argument by Ms. Baker's campsite. RP 200-01. Worried about the way Ms. Baker was speaking to Ms. Kaady, Mr. Perry intervened. RP 288. He began arguing with Ms. Baker but did not feel angry or mad. RP 288. He did not expect things to escalate. RP 289.

As Mr. Perry approached Ms. Baker, she reached down and picked up a large, "lava type" rock. RP 290. Ms. Baker swung the rock at Mr. Perry, trying to hit him with it. RP 290. She did not make contact with him. RP 291. In response, Mr. Perry grabbed Ms. Baker from the side and placed his arm around her neck. RP 291. He held her until she let go of the rock, releasing her once she did. RP 292. The entire incident lasted only seconds. RP 292. Ms. Baker and Ms. Kaady recounted the events differently from Mr. Perry and from each other. RP 194-239; 241-263.

At trial, the prosecutor moved to exclude any cross-examination regarding Skamania County Sheriff's Sergeant

Ryan Taylor's termination from the Clark County Sheriff's Office for misusing work equipment and lying during the internal investigation. CP 28-34; RP 48-54. Sergeant Taylor was the lead investigator in Mr. Perry's case, and the State's sole law enforcement witness. CP 29. Sergeant Taylor interviewed the complainant, took photos of injuries, attempted to locate Mr. Perry, and at trial testified Ms. Baker's injuries were consistent with being strangled. CP 29; RP 274.d

Over Mr. Perry's objection, the court granted the motion, finding the probative value of the evidence was substantially outweighed by its prejudicial effect. RP 53. The court further found the evidence would confuse the jury and create a "mini-trial" on the issue of whether or not the acts leading to Sergeant Taylor's firing had actually occurred. RP 54.

During jury selection, Juror 18, who ultimately sat on Mr. Perry's jury, stated his wife had previously worked with defense counsel, Christopher Lanz, and that he knew Mr. Lanz "[j]ust in the community." RP 89; Supp. CP __ (Sub 52). The

court asked Juror 18, "Do you think that's gonna impact your ability to be fair and impartial?" Juror 18 responded, "Yes." The court did not ask any follow-up questions or attempt to rehabilitate Juror 18's expressed bias against defense counsel.

The prosecutor and the court similarly questioned Juror 18 about his wife's work for the sheriff's department and his general good opinion of law enforcement. RP 117, 174. When asked whether his wife's work with the sheriff's departmnet would "impact [his] ability to be fair and impartial," Juror 18 answered, "No, sir," even though he also stated his wife's work with Mr. Lanz *would* impact his ability to be fair and impartial. RP 117. When asked whether his good opinion of law enforcement would affect him, Juror 18 answered, "No." RP 175. No one questioned Juror 18 further about why his knowledge of Mr. Lanz or his wife's work with him would impact his ability to be fair and impartial, as opposed to his wife's work with the sheriff's department.

During testimony, the prosecutor asked Ms. Kaady about her memory of the incident. Specifically, the prosecutor asked, "And this, when he was strangling [Ms. Baker], did it appear to you he was defending himself?" RP 236. Mr. Perry objected to the question, stating that it called for Ms. Kaady to conclude whether Mr. Perry had been acting in self-defense. RP 236. The court overruled the objection. RP 236. The prosecutor again asked Ms. Kaady whether it appeared to her Mr. Perry was engaged in self-defense, and Ms. Kaady answered, "No." RP 237.

The jury convicted Mr. Perry of second degree assault. CP 63.

On review, the Court of Appeals found no error in the trial court's failure to excuse Juror 18 or in its exclusion of evidence that Sergeant Taylor had previously been fired for misusing work equipment and lying during the internal investigation. Slip Op. at 6-10. While the court assumed Ms.

Kaady's opinion evidence was improper, it found the error was harmless beyond a reasonable doubt. Slip Op. at 10-11.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the trial court's failure to excuse a biased juror presents a significant question of law under both the United States and Washington Constitutions, and presents an issue of substantial public interest.

"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)).

Here, Juror 18 manifested actual bias when he stated he could not be fair and impartial based on his and his wife's experiences with Mr. Lanz. 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).

Juror 18 answered, "Yes," when asked directly whether his knowledge of Mr. Lanz through his wife and through the community would impact his ability to be fair and impartial. He expressed a "state of mind" indicating he "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). In contrast, when asked whether his good opinion of law enforcement or his wife's

work with the sheriff's department would impact his ability to be fair and impartial, Juror 18 answered, "No."

The Court of Appeals found the trial court did not abuse its discretion by not excusing Juror 18 based on five "factors": (1) that the juror's answer was "at least slightly equivocal" because he only indicated his ability to be fair and impartial would be "impacted," (2) that there must have been something about Juror 18's facial expressions or body language or the nature of his knowledge of defense counsel that led the trial court not to dismiss him, (3) that Juror 18 did not explicitly state he would be biased *against* defense counsel, (4) that the defense did not exhaust its peremptory challenges, leading to a presumption Juror 18 was a desirable juror, and (5) that Juror 18 did not respond when the venire was asked generally whether they had concerns about being fair and impartial. Slip Op. at 7-8.

First, the Court of Appeals cites no authority for applying these factors to the question of whether the trial court should

have excused a specific juror. This five factor "test" does not appear to be based in any case law or statute, and do not have any bearing on whether the trial court should have dismissed Juror 18. Rather, the question the Court of Appeals should have addressed is whether Juror 18 harbored "a state of mind … in reference to the action, *or to either party*, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2) (emphasis added).

Even assuming these factors were properly applied, they weigh in favor finding the trial court erred by maintaining Juror 18 on jury. Juror 18's answer was not equivocal. The question posed was whether his ability to be fair and impartial would be impacted by his knowledge of defense counsel; by answering "yes" to this question, Juror 18 indicated he *could not* be fair and impartial. To read this response as equivocal is to assume Juror 18 might have meant he would be *more* fair and impartial, which is nonsensical in light of the questioning at the time.

Moreover, in the context of Juror 18's other answers, it is clear he was indicating a bias against defense counsel. He expressed a positive opinion of law enforcement and said his wife had worked with the sheriff's office. He responded that neither of these experiences would impact his ability to be fair, whereas his knowledge of Mr. Lanz *would* have such an impact. The only plausible reading of these answers clearly indicates Juror 18 was expressing a negative opinion of defense counsel, thus prejudicing Mr. Perry's right to a fair and impartial jury.

The Court of Appeals' analysis of the remaining "factors" are based purely on conjecture and are not supported by the record. Assumptions about defense counsel's strategy, or Juror 18's facial expressions, body language, or forthrightness, do little to assuage the concerns presented by Juror 18 actual, stated bias against defense counsel.

Under these circumstances, no court could be satisfied under any circumstances that Juror 18 could disregard his initial

expression or opinion of unfairness as no one ever questioned him about his expressed bias towards defense counsel. In sum, Juror 18 expressed he could not be fair towards the defense specifically. No one inquired further or otherwise confirmed the juror's opinion about Mr. Lanz would not affect his ability to be fair. In light of his actual expressed bias, it was error to allow Juror 18 to sit on Mr. Perry's jury.

The Sixth Circuit's decision in *Hughes*, on which the *Irby* court heavily relied, is instructive. *See Irby*, 187 Wn. App. at 194-95 (discussing *Hughes*). In *Hughes*, a juror 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. As here, the trial court failed to follow 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), a juror indicated bias in favor of police witnesses that "would likely affect her deliberation. The juror 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*. The *Gonzales* court reversed and remanded for a new trial: "At no time did [the juror] express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence. [The juror] demonstrated actual bias, and the trial court erred in rejecting Gonzales' cause challenge." *Id* at 282.

Gonzales, *Hughes*, and *Irby* all require reversal of Mr. Perry's conviction and remand for a new trial. Juror 18 expressed actual bias, and no one followed up to ensure the juror's impartiality. The biased juror sat on Mr. Perry's jury and deliberated. "[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.'" *Hughes*, 258 F.3d at 463 (quoting

Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992)). The presence of Juror 18 on Mr. Perry's jury denied him a fair trial by an impartial jury. This Court should accept review. RAP 13.4(b)(3), (4).

2. This Court should accept review because the trial court's exclusion of evidence bearing on the sole law enforcement witness's credibility violated Mr. Perry's Sixth Amendment right to confront and cross-examine the witnesses against him.

a. The primary purpose of the fundamental right to confront and cross-examine witnesses is to ensure the accuracy of the fact-finding process and test the witnesses' memory and credibility.

The right to confront and cross-examine adverse witnesses is guaranteed by the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L Ed. 2d 347 (1974); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "The primary and most important component" of confrontation "is the right to conduct a meaningful cross-

examination of adverse witnesses." *Darden*, 145 Wn.2d at 620 (citing *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998)).

The purpose of cross-examination is to test the perception, memory, and credibility of witnesses. *Darden*, 145 Wn.2d at 620 (citing *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)). Rigorous cross-examination as a means of confrontation helps assure the accuracy of the fact-finding process. *Id*. (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). If the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. *Chambers*, 410 U.S. at 295.

Denial of the right to cross-examination, particularly where it would expose untrustworthiness or inaccuracy, is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U.S. at

318 (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956 (1968)).

To determine whether the trial court violated a defendant's right to confront by limiting the scope of cross-examination, courts apply a three-part test:

> First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

State v. Lee, 188 Wn.2d 473, 488, 396 P.3d 316, 324 (2017) (citing *Darden*, 145 Wn.2d at 622). The remedy for denial of the right to confront and cross-examine witnesses is reversal of the conviction. *Davis*, 415 U.S. at 320-21.

b. The trial court denied Mr. Perry his right to confront Sergeant Taylor by improperly limiting the scope of cross-examination and prohibiting the defense from asking any questions regarding

Sergeant Taylor's dismissal from the Clark County Sheriff's Department.

Here, the Court of Appeals found the trial court properly excluded evidence of Sergeant Taylor's dismissal from the Clark County Sheriff's Department under ER 403 because the prejudicial effect of the evidence outweighed its probative value, and the evidence would confuse the jury. Slip Op. at 9. The court also found the evidence was minimally relevant. *Id*. at 9-10. The Court of Appeals' analysis misapplies the rules of evidence, and failed to apply the three-part to determine whether the trial court improperly restricted Mr. Perry's right to cross-examine witnesses.

Applying the three-part test here, the trial court's exclusion of all evidence regarding Sergeant Taylor's firing from Clark County violated Mr. Perry's right to confrontation and cross-examination.

First, the circumstances of Sergeant Taylor's dismissal – that is, his misuse of work equipment and his lying during the

internal investigation of this misuse – were relevant and highly probative of the officer's credibility. Sergeant Taylor was the lead investigator and the sole law enforcement witness in Mr. Perry's case. He photographed Ms. Baker's injuries allegedly caused by Mr. Perry, interviewed the witnesses, and testified Ms. Baker's injuries were consistent with strangulation, an issue at the very heart of the State's case. CP 28-34; RP 274. Sergeant Taylor's credibility was central to the prosecution's case, and as such, Mr. Perry should have been given "more latitude" "to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden* 145 Wn.2d at 619.

Second, the State cannot show the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. The prosecution primarily argued the evidence of Sergeant Taylor's firing would confuse the jury and create a trial-within-a-trial because Sergeant Taylor disputed Clark County's findings about his malfeasance. RP 50.

But, Sergeant Taylor's testimony was central to the State's case and helped establish Ms. Baker's injuries were caused by strangulation. Sergeant Taylor also testified he had investigated dozens of strangulation cases. Given the importance of Sergeant Taylor's credibility, any resulting prejudice would not have outweighed the probative value of this evidence. That Sergeant Taylor disputed the reasons for termination is irrelevant.

Finally, the State's interest in excluding the evidence does not outweigh Mr. Perry's need for the information. Again, Mr. Perry's right to confront the witnesses against him included the right to challenge Sergeant Taylor's credibility. The officer's misuse of government equipment and lying during an internal investigation speak directly to his credibility.

The trial court could have tried to craft limits on the cross-examination about the evidence of Sergeant Taylor's dishonesty in performing his job rather than exclude it entirely. For example in *State v. Lee*, the trial court permitted the defendant to ask whether the complainant had made false

accusations to police about another person, but prevented any questioning about the specific nature of the false accusations. 188 Wn.2d at 486. This limitation permitted the defendant to challenge the witness's credibility without running afoul of any evidence rules. The court could have tried to create a compromise that may not have violated the right to explore the credibility of witnesses against the accused, but it did not do this. By not doing so, the trial court denied Mr. Perry his right to full and thorough confrontation and cross-examination of the witnesses against him.

Because the Court of Appeals failed to apply the three-part test set forth in *Darden* and misapplied the rules of evidence, this Court should accept review. RAP 13.4(b)(1), (3), (4).

3. This Court should accept review and hold that an eyewitness's opinion of whether an accused needed to defend himself is not harmless error.

Opinions on guilt are improper whether made directly or by inference. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d

213 (2014) (citing *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008)). Personal opinions as to a defendant's guilt or the intent of the accused are always inappropriate in criminal trials. *Id*. at 200.

In *Quaale*, a Washington State Patrol trooper testified in a DUI trial that in his opinion, Quaale's failure on one field sobriety test alone was sufficient to show he was under the influence of alcohol. *Id*. at 200. Because the sole issue in dispute was whether Quaale was affected by intoxicating liquor while driving, the trooper's opinion, by inference, "went to the core issue" and "amounted to an improper opinion" on the defendant's guilt. *Id*. at 200.

Similarly here, the sole issue before the jury was whether Mr. Perry acted in reasonable self-defense when he stopped Ms. Baker from trying to hit him with a large rock. On direct, the prosecutor specifically asked Ms. Kaady twice for her opinion of whether Mr. Perry was defending himself. The court allowed the testimony over Mr. Perry's objection. RP 236. In doing so,

the court permitted Ms. Kaady to offer an opinion on an ultimate issue: whether Mr. Perry was acting in lawful self-defense. By inference, Ms. Kaady's opinion that Mr, Perry was *not* acting in self-defense amounted to an opinion that he committed an assault against Ms. Baker. RP 237; *See Quaale*, 182 Wn.2d at 200.

This improper opinion on guilt violated Mr. Perry's constitutional right to have a fact critical to his guilt determined by a jury. *Id*. at 201-02. Nevertheless, the Court of Appeals found this error was harmless because the jury "could evaluate the credibility of the witnesses and determine for themselves whether Perry was acting in self-defense…" Slip Op. at 11. Thus, the court concluded, Ms. Kaady's "perception regarding whether Perry needed to act in self-defense was of minor significance compared to the eyewitness testimony about what actually happened." *Id*. This conclusion is incorrect.

The Court of Appeals' analysis neglects the fact that Ms. Kaady *was* one of the eyewitnesses whose testimony the court

deemed more significant than Ms. Kaady's "perception" of Mr. Perry's need to defend himself. *See* Slip Op. at 11. Indeed, Ms. Kaady was only able to testify about her perception *because* she was an eyewitness. It is illogical to differentiate between Ms. Kaady's "testimony about what actually happened" and her "perception regarding whether Perry needed to act in self-defense;" the two are one and the same.

Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Quaale*, 182 Wn.2d at 202. Ms. Kaady testified, and the State argued, Mr. Perry did not act in self-defense when he grabbed Ms. Baker. This assertion, improperly admitted, was offered by an eyewitness who appeared to be without motive to lie, significantly increasing the weight the jury likely attached to it. Under these circumstances, the Court of Appeals incorrectly concluded that admitting the testimony was harmless beyond a

reasonable doubt. This Court should accept review. RAP 13.4(b)(1), (3), (4).

E. CONCLUSION

Based on the foregoing, Mr. Perry respectfully requests that review be granted. RAP 13.4(b)(1), (3), (4).

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 3050 words (word count by Microsoft Word)

DATED this 29th day of November, 2021.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK VIRGIL PERRY, JR. II, Appellant.	No. 54129-7-II UNPUBLISHED OPINION

MAXA, J. – Mark Perry, Jr. appeals his second degree assault conviction. The conviction arose out of an altercation Perry had with a female friend during which he put his forearm around her neck until she went limp. The State charged Perry with assault by strangulation, and Perry claimed self-defense.

We hold that (1) the trial court did not err in failing to sua sponte dismiss a juror who stated during voir dire that the fact his wife had worked with defense counsel would affect his ability to be fair and impartial, (2) the trial court did not deny Perry's constitutional right to confront witnesses when the court granted the State's request to limit his cross-examination of the investigating officer, (3) any error in allowing a witness to testify that it did not appear to her that Perry needed to defend himself was harmless, (4) Perry was not denied a fair trial based on cumulative error, (5) we cannot consider Perry's statement of additional grounds (SAG) claims because they are based on evidence outside the record; and (6) the trial court erred by including a

provision in the judgment and sentence stating that legal financial obligations (LFOs) would accrue interest.

Accordingly, we affirm Perry's conviction, but we remand for the trial court to strike the interest accrual provision for LFOs from the judgment and sentence.

FACTS

Background

In July 2019, Perry was living with Cheyanne Kaady at a campground in Skamania County. Perry's friend Tamera Baker lived at a nearby campground. On July 22, Kaady and Baker got into an argument. Baker began yelling at Kaady. Perry did not like the way Baker was talking to Kaady, and he confronted Baker. The two then got into an altercation that resulted in Perry putting his forearm around Baker's neck until she went limp.

Skamania County Sergeant Ryan Taylor investigated the incident. He talked to Baker after the incident and later obtained a written statement from her. Taylor obtained a written statement from Kaady over three months later. The State charged Perry with second degree assault by strangulation or suffocation.

Motion in Limine re Sergeant Taylor

Before trial, the State filed a motion in limine to preclude inquiry concerning Taylor's 2011 termination from the Clark County Sheriff's Office (CCSO). The CCSO had alleged that Taylor violated office policy by using the county's mobile phone, vehicle, and data base for personal use. Taylor disputed the CCSO's allegations.

The trial court granted the State's motion, concluding that "any probative value that would be offered in this case is substantially outweighed by any prejudicial effect by having that

issue come up and . . . confuse the jury, essentially turning this into sort of a mini-trial on the issues of whether or not this really occurred." Report of Proceedings (RP) at 53.

Jury Selection

During voir dire, 11 potential jurors indicated that they knew Perry's defense counsel. The trial court questioned each one concerning whether this fact would impact their ability to be fair and impartial. Juror 18 stated that his wife worked with defense counsel about 30 years ago for the county and he knew of him in the community. The court then stated, "[S]o your wife's work with him and knowing him through the community. Do you think that's gonna impact your ability to be fair and impartial?" RP at 90. Juror 18 answered, "Yes." RP at 90. Neither the court nor either party followed up on this answer.

The trial court did promptly dismiss two other jurors who stated that their ability to be fair and impartial would be affected because of their knowledge of defense counsel.

Juror 18 later stated that his wife had worked for the sheriff's department in Skamania County. The trial court asked juror 18 whether his wife's work for the sheriff's department would impact his ability to be fair and impartial, and he said that it would not.

The trial court asked all the potential jurors, "Anybody here be unable to assure the court that you will follow the instructions on the law . . . anybody here believe that they would not be able to follow the law. . . anybody here believe they'd be unable to follow the law?" RP at 120. Juror 18 did not respond. The court then asked, "All right, anybody have anything else they would like to add? Anyone else have any other feelings or concerns either one way or another that you think is important to let us know why you may not be able to serve impartially?" RP at 123. Again juror 18 did not respond.

Following this colloquy, several jurors were excused for cause. Juror 18 was not one of them. Perry exercised only five of his seven peremptory challenges, and did not use a peremptory challenge on juror 18. The State also did not use an available peremptory challenge on juror 18. Juror 18 was selected to sit on Perry's jury.

Trial Testimony

At trial, Kaady, Baker and Perry all testified about the incident. Taylor testified about his investigation.

Kaady testified that she and Baker were talking when Baker became upset and began yelling at Kaady. Perry did not like the way that Baker was talking to Kaady, and he confronted Baker. Baker picked up a rock. Perry then punched Baker in the face, and Baker dropped the rock. Perry hit Baker in the face a few more times and Baker fought back. Perry then grabbed Baker from behind and started strangling her with his forearm. Baker lost consciousness and went limp twice, and Perry revived her by slapping her in the face.

On redirect, the prosecutor asked Kaady whether it appeared to her that Perry was defending himself. The trial court overruled defense counsel's objection. The prosecutor and Kaady then had the following exchange:

> Q Did it appear to you the defendant needed to [defend] himself when he was strangling her?
> A No.
> . . . .
> Q The second time the defendant was strangling her, did it appear the defendant was afraid of Ms. Baker at that point?
> A Not at all.
> Q Did it appear to you he needed to [defend] himself?
> A. Not at all.

RP at 237.

Baker testified that she and Perry were yelling at each other. She denied picking up a rock. She stated that Perry suddenly came up behind her and started choking her. Her body went limp. The next thing she remembered she was on the ground and crawling to her tent. Afterwards, she had bruising on her neck and chin and she had difficulty talking.

Taylor testified about his investigation of the incident and obtaining written statements from Baker and Kaady. He stated that he observed an injury to Baker's chin, which was consistent with strangulation.

Perry testified that he heard Baker and Kaady arguing, and then he started arguing with Baker. When he approached Baker, she grabbed a big rock and tried to hit him with it. In response, Perry grabbed Baker around her neck and throat with his arm. Baker went limp and dropped the rock, and Perry let her go. Perry believed that Baker would have injured him with the rock if he did not take action to disarm her.

The trial court instructed the jury on self-defense. The jury found Perry guilty of second degree assault. The court imposed a $500 crime victim penalty assessment as an LFO. The judgment and sentence contained boiler-plate language that the LFOs imposed would bear interest from the date of the judgment until full payment.

Perry appeals his conviction and the LFO interest accrual provision in the judgment and sentence.

ANALYSIS

A. TRIAL COURT'S FAILURE TO DISMISS JUROR

Perry argues that his right to a fair and impartial jury was violated because the trial court did not dismiss juror 18 after he stated in voir dire that his familiarity with defense counsel would impact his ability to be fair and impartial. We disagree.

1. Legal Principles

Article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant the right to trial by an impartial jury. *State v. Phillips*, 6 Wn. App. 2d 651, 661, 431 P.3d 1056 (2018). To protect this right, "the trial court will excuse a juror for cause if the juror's views would preclude or substantially hinder the juror in the performance of his or her duties in accordance with the trial court's instructions and the jurors' oath." *State v. Lawler*, 194 Wn. App. 275, 281, 374 P.3d 278 (2016).

At trial, either party may challenge a prospective juror for cause. RCW 4.44.130. Actual bias is a ground for challenging a juror for cause. RCW 4.44.170(2). Actual bias occurs when there is "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). Allowing a biased juror to serve on a jury requires a new trial without the defendant having to show prejudice. *Lawler*, 194 Wn. App. at 282.

Both RCW 2.36.110 and CrR 6.4(c)(1) require a trial court to dismiss a biased juror sua sponte, even without a challenge from a party. *Lawler*, 194 Wn. App. at 282, 284. However, we review for an abuse of discretion a trial court's decision not to dismiss a juror. *Id.* at 282. And the "trial court is in the best position to evaluate whether a juror must be dismissed" because unlike an appellate court, a trial court can assess the juror's "tone of voice, facial expressions, body language, or other forms of nonverbal communication." *Id.* at 287.

2. Analysis

Five factors support our conclusion that the trial court did not abuse its discretion in failing to sua sponte dismiss juror 18.

First, juror 18's answer was at least slightly equivocal. He did not state that he could not be fair and impartial. He stated only that his wife working with defense counsel and his knowledge of defense counsel in the community would "impact" his ability to be fair and impartial. RP at 90.

Second, the trial court summarily dismissed two other jurors who indicated that they could not be fair and impartial because they knew defense counsel. Therefore, there must have been something about juror 18's facial expressions or body language or the nature of his knowledge of defense counsel that caused the trial court to believe that his answer did not warrant dismissal. And the trial court was in the best position to assess whether juror 18 could be fair and impartial.

Third, juror 18 did not state whether he would be biased in favor of defense counsel or against defense counsel. He stated only that his wife had worked with him. As a result, defense counsel may actually have wanted juror 18 to serve on the jury. In that situation, the trial court may have decided to defer to the parties' assessment of juror 18. As this court noted in *Lawler*, "the trial court must be careful not to interfere with a defendant's strategic decisions regarding jury selection." 194 Wn. App. at 288.

Fourth, both parties had peremptory challenges available that that they did not use on juror 18. This fact leads to the presumption that neither had an objection to juror 18 serving on the jury despite his indication that his ability to be fair and impartial would be impacted.

Finally, juror 18 did not respond when the trial court asked the entire venire whether anyone had any concerns about being able to serve impartially. This nonresponse provided at least some indication that juror 18 believed he could be impartial.

The standard of review here is abuse of discretion. *Lawler*, 194 Wn. App. at 282. We hold that the trial court did not abuse its discretion in not dismissing juror 18.

B. LIMITATION ON CROSS-EXAMINATION

Perry argues that the trial court violated his constitutional right to confront and cross-examine witnesses by precluding his questioning of Taylor regarding Taylor's 2011 termination from the CCSO. We disagree.

1. Legal Principles

The confrontation clauses of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to confront adverse witnesses through cross-examination. *State v. Lee*, 188 Wn.2d 473, 486-87, 396 P.3d 316 (2017). But the right to cross examine witnesses is not absolute. *Id.* at 487. Trial courts have wide latitude to impose reasonable limits on cross-examination if, among other things, the evidence is marginally relevant and would lead to confusion of issues. *Id.*

Perry wanted to introduce evidence regarding the circumstances of Taylor's termination from the CCSO to attack his credibility. Under ER 608(b), a party generally cannot present extrinsic evidence to prove specific instances of a witness's conduct to attack the witness's credibility. But a party may – at the trial court's discretion – cross-examine a witness regarding a specific instance of the witness's prior conduct if the conduct is probative of the witness's truthfulness or untruthfulness. ER 608(b). When exercising its discretion under ER 608(b),

" 'the trial court may consider whether the instance of misconduct is relevant to the witness' veracity on the stand and whether it is germane or relevant to the issues presented at trial.' " *State v. Lile*, 188 Wn.2d 766, 783, 398 P.3d 1052 (2017) (quoting *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005)). And prior instances of misconduct used to attack credibility may not be admissible if they are too remote in time. *State v. McSorley*, 128 Wn. App. 598, 613-14, 116 P.3d 431 (2005).

In addition, under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. A trial court properly excludes evidence that is remote, vague, or speculative because such evidence can greatly confuse the issues and delay the trial. *State v. Bass*, ___ Wn. App. 2d ___, 491 P.3d 988, 1009 (2021).

We review for abuse of discretion a trial court's limitation of the scope of cross-examination. *Lee*, 188 Wn.2d at 486. An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds. *Id.*

2. Analysis

Here, the trial court excluded evidence that the CCSO had alleged that Taylor violated office policy by using the county's mobile phone, vehicle, and data base for personal use. However, Taylor disputed this allegation. The trial court concluded that any probative value that would be offered in this case was substantially outweighed by any prejudicial effect and that the evidence would confuse the jury by turning Perry's trial into a mini-trial about Taylor's termination. We agree that confusion of the issues was a legitimate concern.

In addition, the evidence had minimal relevance. Taylor was not an indispensable witness at trial. He was not present at the time of the incident like the three other persons who

testified. He merely discussed his investigation and the written statements he obtained. The only substantive testimony he provided was that Baker's chin injury was consistent with strangulation. But whether or not Taylor used public property for personal use had no bearing on that observation. As a result, the potential for confusion of the issues outweighed the evidence's minimal relevance.

Accordingly, we hold that the trial court did not abuse its discretion in limiting the scope of Perry's cross-examination of Taylor.

C. OPINION TESTIMONY REGARDING SELF-DEFENSE

Perry argues that the trial court erred in allowing Kaady to provide improper opinion testimony about whether Perry was acting in self-defense. We conclude that any error was harmless.

1. Legal Principles

In general, no witness may offer opinion testimony about the defendant's guilt. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to statements regarding guilt made both directly or by inference. *Id.* Such opinion testimony is unfairly prejudicial to the defendant because determining the defendant's guilt is the jury's exclusive province. *Id.* "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

However, lay witnesses may testify to opinions or inferences that are "rationally based on the perception of the witness." ER 701(a).

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Slater*, 197 Wn.2d 660, 667, 486 P.3d 873 (2021). An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

2. Harmless Error

Here, the prosecutor twice asked Kaady if it appeared to her that when Perry was strangling Baker he "needed to defend[ ] himself." RP at 237. Kaady responded in the negative. The State notes that these questions arguably were improper. We assume without deciding that Kaady provided improper opinion testimony.

Because impermissible opinion testimony violates the constitutional right to a fair trial, we apply the constitutional harmless error standard. *Quaale*, 182 Wn.2d at 201-02. For an error to be harmless, the State must establish "beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." *Id.* at 202.

Here, the jury heard testimony from all three participants in the incident. The jury could evaluate the credibility of the witnesses and determine for themselves whether Perry was acting in self-defense when he strangled Baker. As a result, Kaady's perception regarding whether Perry needed to act in self-defense was of minor significance compared to the eyewitness testimony about what actually happened.

We conclude that any reasonable jury would have reached the same result even without Kaady's testimony. Therefore, we hold that any error in allowing that testimony was harmless.

D. CUMULATIVE ERROR

Perry argues that cumulative error denied him a fair trial. Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). Here, Perry has not

demonstrated that any error denied him a fair trial. Therefore, we hold that the cumulative error doctrine is inapplicable.

E. SAG CLAIMS

In his SAG, Perry argues that (1) he was prevented from questioning Kaady about charges that were dropped in exchange for her testimony, (2) he wanted to fire defense counsel because communication between the two broke down, (3) counsel neglected to question Kaady about her mental disorder and that she had accused her former spouse of assault, and (4) he was stressed because of a sexual assault while he was in the county jail.

These claims rely on matters outside the record and the record is insufficient to evaluate them. As a result, we cannot consider these assertions in this direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Instead, they must be raised in a personal restraint petition. *Id.*

F. INTEREST ACCRUAL PROVISION

Perry argues that the interest accrual provision for nonrestitution LFOs must be stricken. RCW 10.82.090(1) states, "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." The trial court entered Perry's judgment and sentence in 2019. Therefore, we remand for the trial court to strike the interest accrual provision regarding nonrestitution LFOs.

CONCLUSION

We affirm Perry's conviction, but we remand for the trial court to strike the interest accrual provision for LFOs from his judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

, C.J.
LEE, C.J.

Veljacic, J.
VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54129-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Skamania County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 29, 2021
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