No. 100764-7
Court of Appeals No. 54132-7

THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TINA EVESKCIGE,
Petitioner.

PETITION FOR REVIEW

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A. Identity of the Petitioner

Tina Eveskcige asks this Court to accept review of the opinion of the Court of Appeals in *State v. Eveskcige*, 54132-7-II.

B. Opinion Below

During jury selection prior to Ms. Eveskcige's trial, a potential juror made clear they could not fair to Ms. Eveskcige. That potential juror served on the jury that convicted Ms. Eveskcige. The Court of Appeals refused to grant Ms. Eveskcige a new trial.

C. Issue Presented

The trial court denied Ms. Eveskcige her right to a fair trial by an impartial jury when it failed to remove a juror who said she could not be fair to Ms. Eveskcige.

D. Statement of Case

The State charged Ms. Eveskcige with two counts of assault following an incident with her ex-husband and his girlfriend. CP 3-4.

During jury selection, Juror 24 stated her daughter was the victim in an assault case. 10/30/19 RP 38-39. She admitted her daughter's ordeal would affect her ability to sit on Ms. Eveskcige's case. *Id*. at 39. Defense counsel later asked, "If you were Tina Eveskcige and you were charged with Assault 3 and two counts of Domestic Violence Assault 4; would you want someone like you on this jury?" Id. at 114. Juror 24 responded, "No." *Id*. at 116. Juror 24 was later sworn in as a juror for trial. *Id*. at 124.

E. Argument.

Ms. Eveskcige was denied a fair trial by impartial jury when a juror served despite declaring her inability to be fair.

People accused of a crime have a 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); *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018). "The bias or prejudice of even a

single juror is enough to violate that guarantee." *Kechedzian*, 902 F.3d 1027.

A juror who cannot try the issue impartially and without prejudice to the substantial rights of a party is actually biased. *Irby*, 187 Wn. App. at 194; *see* RCW 4.44.170(2); CrR 6.4(c) "A trial judge has an independent obligation to protect" the accused's right to remove a biased juror, "regardless of inaction by counsel or the defendant." *Id*. at 193.

To protect this right, the trial court should excuse a prospective juror for cause if the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Pena Salvador*, 17 Wn. App. 2d 769, 784, 487 P.3d 923 (internal citations omitted), *review denied*, 198 Wn.2d 1016 (2021). "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." *Irby*, 187 Wn. App. at 193.

In *Irby*, a prospective juror said she was "more inclined towards the prosecution" because she had worked for Child Protective Services. 187 Wn. App. at 190. When asked whether that experience would affect her ability to be fair and impartial, she responded, "I would like to say he's guilty." *Id*. Neither the court nor the prosecutor asked any follow-up questions about the juror's ability to be impartial. *Id*. This Court held the juror's response was akin to an "unqualified statement that she did not think she could be fair" and the court committed reversible error by failing to excuse the juror, even in the absence of any party's for-cause challenge. *Id.* at 196.

A juror should be excused if it appears the juror "cannot disregard a preconceived opinion and try the issue impartially." *Pena Salvador*, 17 Wn. App. at 785; *see* RCW 4.44.190. "The trial court should always presume juror bias if it hears "a statement of partiality without a subsequent assurance of impartiality." *Id*. (quoting *inter alia State v. Guevara Diaz*, 11

Wn. App. 2d 843, 855, 456 P.3d 869, 875, *review denied*, 195 Wn.2d 1025 (2020)).

Juror 24 revealed that here daughter had been the victim of an assault. She candidly admitted that experience would affect here ability to be juror in this case. 10/30/19 RP 38. Ms. Eveskcige, who was charged with assault, asked Juror 24 if she were in Ms. Eveskcige's place charged with a domestic violaence offense would she want someone like Juror 24 sitting on her jury. 10/30/2019 RP 114. Juror 24 candidly stated "No." Id at 116.

Nonetheless the Court of Appeals finds this answer vague. Opinion at 5. The court never explains how. The juror made clear that her daughter's experience of would affect ability to be fair, and she candidly admitted if the roles were reversed she would not want herself on the jury. The bias was clear. The court had a duty to act.

Next the Court of Appeals concludes that because there is a "plausibly strategic" reason for Ms. Eveskcige to keep the

juror it was not error for the trial court to allow biased juror to sit at trial. Opinion at 6. At bottom, this is just a reimagination of an issue that is settled; a party's failure to exercise all peremptory challenges does not affect their ability to challenge the seating of a biased jury on appeal. *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 120 S. Ct. 774 145 L. Ed. 2d 792 (2000); *Pena Salvador*, 17 Wn. App. at 783.

The opinion makes clear that the Court of Appeals found it significant that Ms. Eveskcige's did not exercise a challenge to juror 24. The court highlights that Ms. Eveskcige did not challenge the juror, used only 4 of 6 peremptoriness, and accepted the jury. Opinion at 2. The court then begins its legal analysis by citing cases requiring an objection in order to raise a claim on appeal. Opinion at 3. Only then does the opinion begrudgingly acknowledge that no such objection is required where a juror is actual biased. *Id*. But, before applying these legal principles, the opinion once takes pains to again remind

the reader Ms. Eveskcige did not challenge the jury and had two peremptory challenges remaining. Opinion at 5.

The response to all of that is "so what." A challenge to a juror in the trial court is not required to address the error on appeal. *Martinez-Salazar*, 528 U.S. at 307; *Pena Salvador*, 17 Wn. App. at 783. The court's unease with that is what leads it to imagine whether there was a "reasonably plausible" basis not to object.

Whether there is a "reasonably plausible" explanation is irrelevant unless it is the actual reason. But even then a "reasonably plausible" explanation for failing to object is irrelevant since a failure to object is irrelevant to an appellate court's ability and duty to correct the issue on appeal. The court may be troubled by the absence of a challenge to the juror. But that does not matter. All that matters is whether a juror was biased. Juror 24 admitted she was.

The opinion of the Court of Appeals is contrary to settled case law from the United States Supreme Court. The opinion is

contrary to opinions from other divisions of the Court of Appeals. Review is appropriate under RAP 13.4.

F. Conclusion

This Court should accept review under RAP 13.4 and order a new trial due to the juror's bias.

I certify this document contains 1455 words and complies with RAP 18.17.

Respectfully submitted this 24th day of March 2022.

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Filed
Washington State
Court of Appeals
Division Two

February 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TINA MARIE EVESKCIGE, Appellant.	No. 54132-7-II UNPUBLISHED OPINION

PRICE, J. — Tina Eveskcige appeals from multiple assault convictions. She argues that the trial court erred in failing to sua sponte strike a juror for cause and that the interest accrual provision contained in her judgment and sentence was erroneous. We affirm her conviction but remand for the trial court to correct the interest accrual provision.

FACTS

Eveskcige was charged with one count of third degree assault against a police officer and two counts of fourth degree assault, one domestic violence related.

During voir dire, the trial court questioned potential jurors. In response to the question about whether anyone had a close relative who had experience with a similar case as a victim, juror 24 raised her hand. Juror 24 said that her daughter had been a victim of assault two years prior. The trial court asked her, "Anything about that experience that she shared with you that you think might affect your ability to sit on this case?" Verbatim Report of Proceedings (VRP) at 39 (Oct. 30, 2019). Juror 24 answered, "Yes." *Id.* The trial court did not pursue the line of

questioning further, stating "I'm going to allow the lawyers to be able to ask you some more questions about that." *Id.*

The trial court also asked potential jurors, "Would any one of you be unable to assure the [trial court] that you will follow the instructions of the law regardless of what you think the law is or ought to be?" VRP at 32 (Oct. 30, 2019). Juror 24 did not raise her hand in response to this question, indicating a negative response.

The State and defense counsel also questioned the potential jurors. The State asked the potential jurors if anyone would not be able to follow the law if they thought it was "ridiculous or stupid," and juror 24 did not respond. In response to a question from defense counsel asking for reasons why a police officer would lie, juror 24 said that an officer might lie to protect an individual because of a connection to the individual. Finally, defense counsel asked each juror: "If you were Tina Eveskcige and you were charged with Assault 3 and two counts of Domestic Violence Assault 4, would you want someone like you on this jury?" VRP at 114 (Oct. 30, 2019). Juror 24 responded, "No." VRP at 116 (Oct. 30, 2019). Defense counsel did not follow up.

There were no additional significant interactions with juror 24 during voir dire.

As the jury was being selected, Eveskcige did not challenge juror 24 for cause and did not strike her with a peremptory challenge. In fact, Eveskcige used only four of her six peremptory challenges. Eveskcige twice stated that she accepted the jury as it was seated, including juror 24.

During the for-cause dismissals, the trial court actively participated with the process, engaging both the State and defense counsel. The trial court referred to notes taken during voir dire and addressed specific statements potential jurors had made, demonstrating that it had been paying close attention during voir dire.

The jury found Eveskcige guilty of one count of domestic violence assault in the fourth degree, acquitted her of the other count of fourth degree assault, and failed to reach a verdict regarding the third degree assault. Eveskcige subsequently pled guilty to an amended charge of assault in the fourth degree.

The trial court sentenced Eveskcige to 364 days in custody conditionally suspended and imposed fees. The conditions on the suspended sentence forms for both convictions contained provisions stating that all of Eveskcige's legal financial obligations imposed in the judgments would accrue interest.

Eveskcige appeals.

ANALYSIS

I. JURY SELECTION

Eveskcige argues that the trial court erred in failing to sua sponte strike juror 24 from the jury as biased. We disagree.

A. LEGAL PRINCIPLES

Typically, by failing to raise an objection to a juror at the trial court level, a defendant waives the issue on appeal. *State v. Tharp*, 42 Wn.2d 494, 501, 256 P.2d 482 (1953). Additionally, a defendant generally may not raise issues on appeal regarding certain jurors where the defendant did not exercise all of their peremptory challenges during jury selection. *State v. Elmore*, 139 Wn.2d 250, 277-78, 985 P.2d 289 (1999). However, a challenge based on a claim of actual bias of a juror is an issue of manifest constitutional error that has not been waived even if a defendant fails to use all of their peremptory challenges at trial. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854, 456 P.3d 869, *review denied* (2020). A trial court's decision on whether to dismiss a juror

for cause is reviewed for a manifest abuse of discretion. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012) (abrogated on other grounds by *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)).

A criminal defendant has a right to a fair and impartial jury under both the federal and state constitutions. *Taylor v. Louisiana*, 419 U.S. 522, 526-27, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). "To ensure this constitutional 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).

During jury selection, parties may challenge prospective jurors for cause, including for actual bias. RCW 4.44.170(2). Actual bias 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 [trial] court that the challenged person cannot try the issue impartially and without prejudice." *Id.*

"[A] mere possibility of bias is not sufficient to prove actual bias; rather, the record must demonstrate 'that there was a probability of actual bias.' " *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 809, 425 P.3d 807 (2018) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). A trial court is not required to remove a juror for cause based on equivocal answers alone. *State v. Peña Salvador*, 17 Wn. App. 2d 769, 785, 487 P.3d 923 (2021). However, a juror should be dismissed for cause where it appears "from all the circumstances" that the juror is unable to disregard a preconceived opinion and try the case impartially. *Id.*; RCW 4.44.190.

In addition to the challenges by parties, "[a] trial judge has an independent obligation to protect [the right to a fair and impartial jury], regardless of inaction by counsel or the defendant." *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). A trial court has the duty to excuse any juror who, in the trial court's opinion, is unfit to serve as a juror because of bias. RCW 2.36.110. However, a trial court should be cautious of interfering in the jury selection process because of the wide variety of strategic reasons a defendant may have for not challenging certain jurors. *Lawler*, 194 Wn. App. at 284-85. A trial court's decision to sua sponte interfere with the jury selection process may have implications on a defendant's Sixth Amendment right to " 'control important strategic decisions.' " *Id.* at 285 (quoting *State v. Coristine*, 177 Wn.2d 370, 374, 300 P.3d 400 (2013)).

B. APPLICATION

Eveskcige argues that the trial court erred in failing to sua sponte dismiss juror 24 for cause violating her right to a fair and impartial jury. We disagree.

At the outset, we note that Eveskcige did not request the trial court dismiss juror 24 below and did not use any of her peremptory challenges to dismiss juror 24 although she had two remaining. However, because Eveskcige argues that juror 24 exhibited actual bias, we review the merits of her argument.

For several reasons, we find that the trial court did not commit a manifest constitutional error in failing to dismiss juror 24 for cause.

First, juror 24's statements were equivocal. Her answers demonstrated uncertainty as to the extent she could be impartial and did not establish a firm bias. She stated that her past experience with her daughter would affect her "ability to sit in this case." VRP at 39 (Oct. 30,

2019). This line of questioning was not pursued further by defense counsel, and this statement alone was vague and did not show actual bias. Although she also indicated that if she were the defendant, she would not want someone like her on the jury, this statement was also vague and the reasoning behind it was not explored by defense counsel. Moreover, juror 24 twice confirmed that she would follow the trial court's instructions as to the law regardless of her personal opinions as to what the law should be. This indicated a willingness to disregard any opinions she had and judge the case impartially.

Second, the record demonstrates that Eveskcige's decision to keep juror 24 on the jury was plausibly strategic. Considering Eveskcige had unused peremptory challenges, she had a clear opportunity to remove juror 24 and chose not to do so. This decision to leave juror 24 on the jury was not unreasonable given some of juror 24's statements. Because the victim of one of Eveskcige's assault charges was a police officer, the credibility of the police officer's testimony was an important part of Eveskcige's case. In voir dire, juror 24 agreed that there were circumstances in which a police officer might lie. This statement may have persuaded Eveskcige that juror 24 would be a good member of the jury. We emphasize that trial courts must exercise caution at moments when the parties are making apparently viable strategic decisions. And, here, the record substantiates the likelihood that Eveskcige's decision-making during jury selection was strategic.

Third, the trial court's participation during voir dire supports the conclusion that the trial court also viewed the inclusion of juror 24 by Eveskcige as a strategic decision. The trial court was actively engaged with the State and defense counsel during the for-cause dismissals. During the discussion, the trial court, referring to its notes, addressed specific statements potential jurors

had made during the voir dire, demonstrating that it had been paying attention during that process. This attentive involvement tends to show that the absence of a sua sponte dismissal by the trial court was the result of a deliberate decision to not intervene in the strategic decisions of Eveskcige, rather than inattention.

In viewing the circumstances as a whole, there was not a probability that juror 24 was actually biased. The trial court, therefore, did not err by failing to remove her for cause, especially when Eveskcige did not challenge juror 24 for cause or strike her with an available peremptory challenge. Because the trial court did not err, we find that Eveskcige has failed to demonstrate a manifest error affecting a constitutional right.

II. INTEREST ACCRUAL

Eveskcige argues, and the State agrees, that we should remand to strike the interest accrual provisions in the judgments and sentences. Under Washington law, "no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). The conditions on the suspended sentence forms both contained provisions stating that interest would accrue on all financial obligations imposed in the judgment. Because the judgments and sentences contained provisions that erroneously applied interest to all of Eveskcige's legal financial obligations, we remand to the trial court for the purpose of correcting the provisions.

CONCLUSION

We affirm Eveskcige's conviction and remand to the trial court for correction of the interest provisions in the judgments and sentences.

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.

PRICE, J.

We concur:

GLASGOW, A.C.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. 54132-7-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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