NO. 101999-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ALEXANDER-SCHMIDT,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Timothy Alexander-Schmidt ("Alexander")[1] seeks review of the Court of Appeals' unpublished opinion affirming his convictions for felony violation of a court order and fourth-degree assault. State v. Alexander-Schmidt, Unpublished, No. 83057-1-I (Wash. Ct. App. Apr. 10, 2023). The Court of appeals held, in relevant part, that pursuant to State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022), Alexander waived any challenge to the seating of Juror 47 when he affirmatively accepted the jury, with Juror 47 on it, despite having a peremptory challenge to spare.

Alexander seeks review of one issue the Court of Appeals did not reach and a second issue that he raises for the first time in his petition for review: (1) whether Alexander established a manifest constitutional error warranting review

[1] The State follows the petitioner's lead in referring to him as "Alexander." See Petition for Review at 1; Amend. Br. of Appellant at 1.

under RAP 2.5(a), and whether that entitles him to review of his juror bias claim despite Talbott's waiver rule, and (2) whether his counsel's failure to use an available peremptory challenge to remove Juror 47 from the panel constituted ineffective assistance of counsel. Neither issue meets the criteria for review, and the second issue is not properly before this Court. This Court should therefore deny the petition for review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

1. THE TRIAL COURT DOES NOT REMOVE JUROR 47 FOR CAUSE SUA SPONTE.

The State charged Alexander with assault in the fourth degree and felony violation of a court order based on two prior convictions, with special allegations that the crimes were committed against an intimate partner. CP 62-63. The substantive facts of Alexander's crimes can be found in the State's brief to the Court of Appeals. Br. of Respondent at 3-7.

Juror 47 was part of the second panel of potential jurors to go through the voir dire process. She was a longtime paralegal who had served as a juror before and had also sat through jury trials as part of a civil litigation team. RP 548. When asked at the very beginning of voir dire for her thoughts on being a juror in this case, Juror 47 primarily focused on her concerns about missing work, but stated that she believed the system was fair and that she enjoyed serving on a jury and "see[ing] justice work." RP 549.

Throughout voir dire, the trial court took an unusually active role in educating jurors and weeding out jurors who showed signs of possible bias. RP 562-628. The trial court repeatedly interjected to educate the panel about concepts such as the role of the jury, the burden of proof, the presumption of innocence, the idea that some jurors might not be a good fit for this particular case due to an inability to be impartial, and how an innocent defendant might come to be unjustly charged with a crime. E.g., RP 562-64, 574, 576-79, 581-82, 590, 594-96, 598, 600, 603, 607-08, 611.

The trial court actively questioned numerous potential jurors about possible bias, and excused six potential jurors sua sponte after ensuring that neither party objected. RP 581-82 (Juror 64), 595-96 (Juror 60), 597 (Juror 57), 622-23 (Juror 53), 625 (Juror 55), 628 (Juror 61). The trial court was so proactive in excusing jurors sua sponte that neither party brought a single challenge for cause against any juror in the panel. RP 502-629.

Juror 47 at no point indicated disagreement with any of the concepts laid out by the trial court and at no point indicated concern about her ability to be fair. At one point during voir dire, Alexander asked the panel whether anyone thought it was unfair that the State had to prove every element of the charges beyond a reasonable doubt, and no potential juror indicated that they found it unfair. RP 605. Alexander then called on Juror 47 and asked why that burden of proof did not bother her. RP 605. Juror 47 responded:

> Well, just generally speaking I feel that -- and I don't know that this will answer your question but it's just a general thought -- the prosecutor wouldn't have brought -- brought this to this point, to trial, unless he thought he had enough evidence to prove his case.
>
> And on the other hand, you apparently feel that you have enough evidence to defend this case or it wouldn't have gotten to this point. So, like, that probably doesn't answer your question but just a general thought.

RP 605-06. Alexander responded "Yeah," and called on another juror. RP 606. Neither the parties nor the court gave any sign that any of them interpreted Juror 47's response as

indicating that Juror 47 did not understand the burden of proof or that she was biased in some way. RP 606.

A short time later, Alexander raised the possibility that jurors might come into the process thinking "that we wouldn't be here if something hadn't happened and if there wasn't enough to go forward with [the] case . . . on both sides." RP 606. Counsel characterized this as "something I think both 47 and Juror 63 touched on," but Juror 47 had only expressed that both sides must think the evidence favored them, not that the filing of charges meant that the defendant must have done something. RP 605-06.

When Alexander asked if any of the potential jurors would have trouble setting aside any thought that "something must have happened to get us here" Juror 53 responded but Juror 47 did not.[2] RP 607. The trial court interjected to lay out

[2] The State includes details of Juror 53's answers here because Alexander argued below that Juror 47 demonstrated the same bias as Juror 53 and should have been questioned similarly. Amend. Br. of Appellant at 15.

several scenarios in which an innocent person might be charged with a crime and to reiterate the importance of presuming the defendant innocent and holding the State to its burden to prove the charge beyond a reasonable doubt. RP 607-08.

When Juror 53 continued to express reservations, the trial court referred to Juror 47's earlier answer as correctly expressing that "[p]resumably the State thinks that they can prove their case . . . and presumably [] the defense doesn't think so . . . ." RP 608. When Juror 53 interpreted this as the court saying that "there has to be evidence on both sides," the court educated the panel that this was not true, and that the burden was solely on the State to provide proof beyond reasonable doubt. RP 608-09. The court explained that what it had meant was that "the defense may be looking at this case saying, [']They can never prove this,[']" and reiterated that the jurors could not draw any conclusions until they had heard all the evidence. RP 609.

Unlike Juror 47, Juror 53 expressed uncertainty after this explanation about whether they could apply the presumption of innocence, saying "I think I can" but that "the one thing that I'm struggling with is getting between, like, facts and emotion." RP 609. The trial court indicated that it would talk to Juror 53 individually about their concerns later in the process, and did so. RP 609, 621. After Juror 53 indicated that they "really want[ed] to be impartial" but thought they might not be able to do so, the trial court sua sponte excused Juror 53 after confirming that neither party objected. RP 622-23.

At one point in voir dire, Alexander posed a hypothetical that asked the jurors to think about what verdict they would return if they were asked to deliberate after being given no evidence. RP 610. Although Juror 47 was one of three jurors who raised their hands to indicate that they would not be able to reach a verdict, when the trial court called on Juror 47 individually and repeated the question, Juror 47 clarified that her verdict would be "not guilty." RP 611-12.

At the end of voir dire, Juror 47 was questioned individually to address her concerns about missing work. RP 565, 616-16. After the court explained that she would not be excused from jury duty based on it being a hardship for her employer, the following exchange occurred:

> JUROR 47: I do -- I do have one other concern that --
> COURT: Sure.
> JUROR 47: -- I may have -- should have brought up in the -- in the main session, but my concern is if one of the charges is that the defendant violated the terms of a previous, you know, that's kind of in the back of my head, there --
> COURT: I -- I --
> JUROR 47: -- might --
> COURT: -- we're not going to get any kind of criminal charge where you're going to be okay with the alleged behavior.
> JUROR 47: Right. Right.
> COURT: It's just never going to happen, okay?
> JUROR 47: Right.
> COURT: Now, I understand as a paralegal it might particularly offend you to think about somebody being charged with violation of a court order, but it's just a charge. We'll have to see if the State --
> JUROR 47: Right.
> COURT: -- can prove this one up, okay?

JUROR 47: But I guess what I'm saying is that there must have been something prior that happened for that order to be in place.
COURT: Allegedly there was an order in place, we don't know. The State's going to have to prove that.
JUROR 47: Okay. Prove that. Got it.
COURT: Okay. Allegedly it was violated; the State's going to have to prove that. Allegedly, you know, this and that.
JUROR 47: Yeah.
COURT: It's all on the State to prove it.
JUROR 47: Yeah, got it. Got it. Got it.
COURT: All right. We're going to let you go.
JUROR 47: Okay.
COURT: Thanks for being here --
JUROR 47: Okay.
COURT: -- and we'll let you know this afternoon, okay?
JUROR 47: Okay. Thank you.
COURT: Thank you.

RP 619-20.

At no point did Juror 47 suggest that any musings about why a no-contact order might be in place would influence her evaluation of the evidence in this case or that she would be unable to set such musings aside, and neither the parties nor the

court appear to have interpreted her remarks as raising any question as to her impartiality. RP 620.

Although the trial court excused sua sponte many of the jurors who were questioned individually, neither the court nor the parties indicated that they had any concerns about Juror 47's ability to be impartial. RP 620, 623, 625, 628. When the time came to exercise peremptory challenges, the State and Alexander each explicitly stated that they "accept[ed] the panel," with Juror 47 on it, after each had exercised only five of their six allotted peremptory challenges. RP 642-43.

The jury found Alexander guilty as charged of felony violation of a court order and fourth-degree assault, but did not find the intimate partner special allegations proven. CP 96-99.

2. ALEXANDER DOES NOT RAISE INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS BRIEFING BELOW.

Alexander raised two claims on direct appeal: that the trial court violated his right to a fair and impartial jury failing to sua sponte excuse Juror 47 for cause, and that insufficient

evidence supported his conviction for felony violation of a court order.[3] Amended Br. of Appellant at 1, 5-30. He did not raise a claim of ineffective assistance of counsel. Amend. Br. of Appellant 1-31.[4] Alexander argued that his juror bias claim was reviewable for the first time on appeal under RAP 2.5. Amend. Br. of Appellant at 8-10. The State responded to Alexander's arguments, explaining why the record did not establish a manifest constitutional violation of Alexander's right to an unbiased jury and arguing that Alexander was therefore not entitled to have his claim considered for the first time on appeal. Br. of Respondent at 16-25.

After briefing was complete, this Court issued its decision in Talbott, reaffirming its longstanding holding that a defendant who accepts the jury panel without exhausting his peremptory challenges may not "appeal on the basis that a

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[3] Alexander does not seek review of the Court of Appeals' rejection of his sufficiency claim.

[4] Alexander did not file a Reply brief.

seated juror should have been dismissed for cause." 200 Wn.2d at 737. Because Talbott accepted the jury despite having peremptory challenges to spare, this Court held, it was error for the Court of Appeals to reach the merits of Talbott's claim that the trial court erred in denying his challenge for cause against a particular juror. Id. Because Talbott conceded that manifest constitutional error was not at issue, this Court did not address whether the waiver rule applied even to manifest constitutional errors normally entitled to review under RAP 2.5(a). Id. at 742. The State submitted a statement of additional authorities in this case arguing that Talbott provided an additional reason why Alexander was not entitled to consideration of his juror bias claim for the first time on appeal.

The Court of Appeals decided this case without oral argument. It issued an unpublished opinion rejecting Alexander's sufficiency claim and applying Talbott to hold that Alexander's affirmative acceptance of the jury panel without exhausting his peremptory challenges barred consideration of

his juror bias claim. Alexander, slip op. at 1-2. The Court of Appeals did not explicitly address whether Alexander was nevertheless entitled to review of his claim under RAP 2.5.

Alexander did not move for reconsideration. He now petitions for review of the Court of Appeals' application of Talbott to bar consideration of his juror bias claim, arguing that Talbott's waiver rule does not apply in his case because RAP 2.5(a)'s manifest constitutional error standard is satisfied. Petition for Review at 13-22. He also asserts, for the very first time, that his trial counsel was constitutionally ineffective in affirmatively accepting Juror 47's presence on the jury rather than using an available peremptory challenge to remove her. Petition at 22-26.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Alexander asserts that review of the Court of Appeals' opinion is warranted under RAP 13.4(b)(3) because this case "presents an important constitutional issue." Petition for Review at 13. He does not identify any other criteria for review

that he believes applies in this case. Petition for Review at 13. However, the question of whether RAP 2.5(a) supersedes the waiver rule set out in Talbott is not of constitutional magnitude. Moreover, because the application of well-settled law regarding manifest constitutional error and juror bias indicates that Alexander fails to establish a manifest constitutional error, this case does not require resolution of the question of whether RAP 2.5(a) supersedes Talbott's waiver rule.

Although Alexander's ineffective assistance of counsel claim is an indisputably constitutional issue, it is not one that is properly before this Court. Because Alexander did not raise that issue below, it does not provide a basis to reverse the Court of Appeals' decision in this case.

This case does not present a significant question of constitutional law that needs to be addressed by this Court, as required for review under RAP 13.4(b)(3). The petition for review should therefore be denied.

1. RAP 2.5(a) DOES NOT ENTITLE ALEXANDER TO REVIEW OF HIS CLAIM THAT A JUROR HE AFFIRMATIVELY ACCEPTED SHOULD NOT HAVE BEEN SEATED.

Alexander asserts that the Court of Appeals should have reached the merits of his challenge to the seating of Juror 47 under the "manifest constitutional error" exception in RAP 2.5(a) because this Court did not address the interplay between Talbott's waiver rule and RAP 2.5(a). This argument fails and does not warrant review.

The rule reaffirmed in Talbott—that a defendant may not appeal the seating of a juror he affirmatively and voluntarily accepted—is essentially a manifestation of the invited error doctrine. Both are rooted in the idea that the appellate courts will not review an asserted error to which the defendant agreed or contributed below. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) ("Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. This court will deem an error waived if the party asserting such error materially contributed thereto.");

State v. Talbott, 521 P.3d at 949, 952 ("[A] party who accepts the jury panel without exhausting their peremptory challenges cannot appeal based on the jury's composition. . . . [W]e have consistently held that if a defendant does not exercise all peremptory challenges[,] it is presumed that [they are] satisfied with the jury." (final alteration in original; internal quotation marks omitted)).

The invited error doctrine applies even to manifest constitutional errors that would otherwise be reviewable for the first time on appeal under RAP 2.5(a). State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999); State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). Courts apply the doctrine strictly, despite the sometimes harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding invited error doctrine prohibited review of legally erroneous jury instruction because defendant proposed it, even though it was standard WPIC at the time).

The rule that a defendant may not appeal the seating of a juror he affirmatively accepted despite having peremptories to spare has repeatedly been articulated in similarly stark terms, without any suggestion that there is an exception to the rule for manifest constitutional errors. Talbott, 521 P.3d at 952 ("Cases in the Clark line hold that if a party 'accepted the jury as ultimately empaneled and did not exercise all of [their] peremptory challenges,' then *they do not have the right to appeal 'based on the jury's composition*.'" (quoting State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001) (emphasis added)). Indeed, such an exception would swallow the rule, as *every* appeal based on a meritorious allegation of juror bias would qualify. Both the logic and history of the Talbott rule indicate that it bars consideration of even errors that would normally be reviewable for the first time on appeal under RAP 2.5(a).

No Washington appellate decision offers a principled basis to conclude that RAP 2.5(a) entitles Alexander to

consideration of the merits of his juror bias claim. State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015), on which Alexander relies in his petition, presented a very different set of facts in which the pro se defendant chose to be entirely absent for jury selection. 187 Wn. App. at 189; Petition at 14-15. Because Irby was not present when his jury was chosen, he never affirmatively accepted the juror he later challenged on appeal. The principles underlying the Talbott rule and the invited error doctrine have no application in such a scenario. Irby therefore provides no basis to conclude that the Talbott rule does not apply in this case, where Alexander *did* affirmatively accept the juror he later challenged on appeal.

The other cases on which Alexander relies are similarly unpersuasive. State v. Guevara Diaz has no bearing on this case, because Guevara Diaz exhausted his peremptory challenges. 11 Wn. App. 2d 843, 853, 456 P.3d 869 (2020). The waiver rule reaffirmed in Talbott thus did not apply in his case.

In State v. Ramsey, Division Two of this Court applied Guevara Diaz's RAP 2.5 holding to a defendant who had *not* exhausted his peremptories without any analysis of why Guevara Diaz would apply in such different circumstances. State v. Ramsey, No. 54638-8-II, 21 Wn. App. 2d 1034, 2022 WL 842605, at *7-8 (Mar. 22, 2022) (unpublished), review denied, 199 Wn.2d 1028 (2022). Although this Court in Talbott declined to address the validity of Ramsey—because Talbott conceded that manifest constitutional error was not at issue in his case—the fact remains that Ramsey is wrongly decided and provides no basis to grant review in this case.

Finally, as explained in the Brief of Respondent, the record does not establish that Juror 47 was actually biased. Br. of Respondent at 16-25. Alexander therefore fails to establish a manifest violation of his right to an unbiased jury, and resolution of this case does not require this Court to reach the question of whether Talbott's waiver rule is inapplicable where RAP 2.5(a) is satisfied. Even if this Court decided to reach that

issue and agreed with Alexander that RAP 2.5 supersedes Talbott, that holding would not entitle Alexander to relief in this case.

2. ALEXANDER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS UNTIMELY RAISED AND FAILS ON ITS MERITS.

Alexander asserts for the first time in his petition that his convictions should be reversed because his trial counsel was constitutionally ineffective in choosing not to use an available peremptory challenge to remove Juror 47 from the panel. This claim is untimely raised and fails on its merits.

This Court reviews decisions made by the Court of Appeals; it does not review the merits of issues the Court of Appeals did not reach. E.g., State v. Slert, 181 Wn.2d 598, 609, 334 P.3d 1088 (2014) (remanding for Court of Appeals to consider issue it did not originally reach); State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."); cf. RAP 13.1 (addressing review "of decisions of the

Court of Appeals"). Because Alexander did not raise his ineffective assistance of counsel claim in the Court of Appeals, this Court should deny the petition for review on this issue.

This Court should also deny review because Alexander's untimely raised claim fails on its merits. In order to prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001). To establish that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Grier, 171 Wn.2d 17, 35, 246 P.3d 1260 (2011). Performance is not

deficient if it represents a legitimate trial strategy or tactic. Id. at 33.

In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229.

Alexander's claim of ineffective assistance is based on his assertion that his counsel's failure to use a peremptory challenge against Juror 47 resulted in the seating of a biased juror. But as explained in the Brief of Respondent, the record does not establish that Juror 47 was actually biased. Amend. Br. of Appellant at 16-25. Alexander therefore cannot show that his counsel's decision to leave Juror 47 on the jury was an unreasonable tactical choice, and cannot establish a reasonable probability that the verdict would have been different had Juror 47 not deliberated. Review by this Court is not warranted.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 4,025 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of June, 2023.

Respectfully submitted,

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