

FILED
SUPREME COURT
STATE OF WASHINGTON als
3/27/2024
BY ERIN L. LENNON gton
CLERK 'M

Supreme Court No. _____ Case #: 1029039
(COA No. 84653-1-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TREVOR DICKEY,

Petitioner.

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

PETITION FOR REVIEW

BEVERLY K. TSAI
Attorney for the Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE 2

 1. *Mr. Dickey gets into a physical altercation with a friend. After he is arrested, law enforcement beat him, but Mr. Dickey is charged with assault because an officer alleges Mr. Dickey kicked him. 2*

 2. *During voir dire, a potential juror says he cannot be fair. That juror serves on the jury that convicts Mr. Dickey... 6*

E. ARGUMENT 7

The Court of Appeals decision affirming Mr. Dickey’s conviction after the trial court allowed a biased juror to serve on the jury that convicted him undermines the constitutional right to a fair trial and conflicts with holdings by this Court and the Court of Appeals..... 7

 1. *Where a juror unequivocally expresses actual bias, the trial court has an independent obligation to take action to ensure the accused’s constitutional right to a trial by a fair and impartial jury. 7*

 2. *Juror No. 16 expressed actual bias when he unequivocally said he cannot be fair. The trial court erred when it failed to question or remove Juror No. 16, thereby allowing a biased juror to sit on the jury that convicted Mr. Dickey.10*

 3. *The Court of Appeals’s reliance on Talbott is misplaced because that case did not involve an actually biased juror*

*or the trial court's independent duty to ensure a person's
right to a fair trial.....*13

F. CONCLUSION17

TABLE OF AUTHORITIES

Washington Supreme Court Cases

State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019)..... 7

State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987)15

State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022)..7, 13, 14

Washington Court of Appeals Cases

State v. Guevara Diaz, 11 Wn. App. 2d 843, 456 P.3d 869
(2020)passim

State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015)...passim

United States Supreme Court Cases

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d
69 (1986) 7

Federal Cases

Hughes v. United States, 258 F.3d 453 (6th Cir. 2001) ..8, 9, 11,
12

United States v. Kechedzian, 902 F.3d 1023 (9th Cir. 2018) 8

Constitutional Provisions

Const. art. I § 21 7

Const. art. I § 22 7

U.S. Const. amend. VI 7

U.S. Const. amend. XIV 7

Statutes

RCW 2.36.110passim
RCW 4.44.170 8

Rules

CrR 6.47, 9, 11
RAP 13.412, 16

A. IDENTITY OF PETITIONER

Trevor Dickey asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Dickey appealed his judgment and sentence for third-degree assault. The Court of Appeals affirmed. *State v. Dickey*, No. 84653-1-I, 2024 WL 914938 (Wash. Ct. App. Mar. 4, 2024).

C. ISSUE PRESENTED FOR REVIEW

The United States and Washington State Constitutions protect a person's right to trial by a fair and impartial jury. Where a potential juror demonstrates actual bias by unequivocally stating they cannot be fair, the trial court has an independent duty to inquire further or remove the unfit juror. Here, a juror expressly stated he could not be fair, but the trial court did not question the juror or take any action to remove the juror. The trial court violated Mr. Dickey's constitutional right to be tried by a fair and impartial jury. The Court of Appeals

decision affirming his conviction conflicts with published decisions and undermines the constitutional right to a fair trial, warranting this Court’s review. RAP 13.4(b).

D. STATEMENT OF THE CASE

- 1. Mr. Dickey gets into a physical altercation with a friend. After he is arrested, law enforcement beat him, but Mr. Dickey is charged with assault because an officer alleges Mr. Dickey kicked him.*

Mr. Dickey is 50 years old and disabled. 4/17/20 RP 13, 10/6/22 RP 394. He suffers from Ankylosing Spondylitis, an incurable autoimmune disease which impacts his joints and bones.¹ 4/17/20 RP 13. He takes medication and often relies on a walker. 3/21/22 RP 172. His pain and strength “comes and goes”; sometimes he is able to walk without assistance, but sometimes his legs shake. 3/21/22 RP 181. As Mr. Dickey explained, “I can walk. It just hurts.” 3/21/22 RP 180.

¹ Ankylosing Spondylitis, National Institute of Arthritis and Musculoskeletal and Skin Disease, <https://www.niams.nih.gov/health-topics/ankylosing-spondylitis> (last accessed Mar. 26, 2023).

Mr. Dickey got into a physical altercation with a friend whom he struck in self-defense. CP 110, 167-73. As Mr. Dickey left, his truck collided with the garage door of his friend's house. CP 97, 167-73.

The Snohomish County Sheriff's Office asked the Lynnwood Police to arrest Mr. Dickey at his mother's house. CP 168; 3/21/22 RP 162. Mr. Dickey calmly walked out of the house to speak with the officers, and they arrested him. 3/21/22 RP 162, 178-79.

The police took Mr. Dickey to the police station to wait for a county deputy to take him to the county jail. 3/21/22 RP 164-65. They made Mr. Dickey sit handcuffed in a chair outside the police station. 3/21/22 RP 165.

By the time Deputy Gabriel Cimino showed up, Mr. Dickey had been sitting outside in handcuffs for an hour. 3/21/22 RP 173. Deputy Cimino put his handcuffs on Mr. Dickey to allow the Lynnwood police officers to remove theirs, and Mr. Dickey complained they were too tight. 3/21/22 RP

174. Deputy Cimino ignored Mr. Dickey's complaints and ordered him to stand. 3/21/22 RP 174. Mr. Dickey was in pain; he needed help standing and requested a walker, but the officers ignored his requests. 3/21/22 RP 142, 147, 174.

Deputy Cimino grabbed Mr. Dickey by the handcuffs and jerked his arms behind his back to pull him to a standing position. 3/21/22 RP 174. Mr. Dickey's legs began to shake. 3/21/22 RP 137. He lost his balance and stepped backwards. 3/21/22 RP 174. Mr. Dickey believed he accidentally stepped on Detective Cimino's foot. 3/21/22 RP 174. Deputy Cimino felt something hit his shin but did not see what it was. 3/21/22 RP 148.

Deputy Cimino immediately flung Mr. Dickey face down onto the concrete and pinned Mr. Dickey's head to the ground with his knees. 3/21/22 RP 141, 149. Deputy Cimino held Mr. Dickey to the ground while Lynnwood police officers switched the handcuffs. 3/21/22 RP 141.

Mr. Dickey's face was battered and bloody, and his shoulders and wrists were injured. 3/21/22 RP 176; Ex. 3. Deputy Cimino took him to the county jail, but they refused to book him because of his injuries. 3/21/22 RP 144. Instead, Mr. Dickey was transported to the hospital for evaluation and a CAT scan to examine his shoulders. 3/21/22 RP 144, 192. At the hospital, Mr. Dickey was handcuffed to the bed with his arms behind him. 3/21/22 RP 181. The hospital released him later that day and he was booked into the county jail. 3/21/22 RP 176. His shoulders never fully healed. 3/21/22 RP 181.

Mr. Dickey later pleaded guilty to third-degree assault and attempted second-degree malicious mischief for the incident involving his friend. CP 90-119.

As for the incident with Deputy Cimino, the State charged Mr. Dicky with third-degree assault, and the case proceeded to trial. CP 123-24.

2. *During voir dire, a potential juror says he cannot be fair. That juror serves on the jury that convicts Mr. Dickey.*

During voir dire, the trial court asked the potential jurors if they or someone close to them have been involved in a case with similar allegations. 3/21/22 RP 35. Prospective Juror No. 16 answered yes and explained his friend was charged after an altercation with a law enforcement officer. 3/21/22 RP 38. He said he felt the case was handled inappropriately and was not fair. 3/21/22 RP 38. The court asked Juror No. 16 about his ability to be fair in this case:

The court: Based on that experience and your relationship with him, would you be able to be fair and impartial to both sides in this case?

Juror No. 16: No, I would not.

3/21/22 RP 38. The court did not follow up on Juror No. 16's statement that he would not be fair.

Juror No. 16 sat on the jury that found Mr. Dickey guilty of third-degree assault. 3/21/22 RP 112; CP 133. Then, the Court of Appeals affirmed his conviction, concluding Mr. Dickey could not challenge the seating of a biased juror on

appeal because he did not use a peremptory challenge to remove Juror No. 16, relying on *State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022). *Dickey*, 2024 WL 914938 at *2.

E. ARGUMENT

The Court of Appeals decision affirming Mr. Dickey's conviction after the trial court allowed a biased juror to serve on the jury that convicted him undermines the constitutional right to a fair trial and conflicts with holdings by this Court and the Court of Appeals.

1. Where a juror unequivocally expresses actual bias, the trial court has an independent obligation to take action to ensure the accused's constitutional right to a trial by a fair and impartial jury.

All persons accused of a crime have a constitutional right to trial by a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I §§ 21, 22. Courts have a duty to zealously protect this important right. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020); RCW 2.36.110; CrR 6.4(c). Selection of qualified jurors is the cornerstone of a fair trial. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019).

A juror has actual bias when they express “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). This makes them an unfit juror. RCW 2.36.110.

A juror demonstrates actual bias where they openly declare their inability to be fair. *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001); *Guevara Diaz*, 11 Wn. App. 2d at 854. Where a juror makes an explicit statement of bias and never subsequently assures the court they can render a fair and impartial verdict, actual bias is presumed. *Guevara Diaz*, 11 Wn. App. 2d at 855. General group questioning is insufficient to rehabilitate a juror who has expressed actual bias. *State v. Irby*, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015).

The presence of even one biased juror violates a person’s constitutional right to a fair trial. *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018). To protect this important

right, the court has a mandatory and independent duty to remove a juror who demonstrates actual bias. RCW 2.36.110; CrR 6.4(c); *Guevara Diaz*, 11 Wn. App. 2d at 855. Where a juror exhibits actual bias, the court is obligated to individually question them. *Id.* at 856. The court has a mandatory duty to dismiss an unfit juror, even in the absence of a challenge from counsel: “The trial judge has an obligation to excuse a juror where grounds for a challenge for cause exist, *even if neither party challenges that juror.*” *Id.* at 855 (emphasis added); *see* RCW 2.36.110 (“It *shall* be the duty of a judge to excuse from further jury service any juror . . . [who] has manifested unfitness[.]” (emphasis added)); CrR 6.4(c)(1) (the judge “*shall* excuse” an unfit juror for cause (emphasis added)).

The court fails its duty to ensure the defendant’s right to a fair trial where it allows a biased juror to serve on the jury that convicts the defendant. *Hughes*, 258 F.3d at 464. The presence of a biased juror “is a structural defect in the constitution of the trial mechanism that defies the harmless error analysis.” *Id.* at

463 (citations omitted). The seating of a biased juror is manifest constitutional error. *Irby*, 187 Wn. App. at 193.

2. *Juror No. 16 expressed actual bias when he unequivocally said he cannot be fair. The trial court erred when it failed to question or remove Juror No. 16, thereby allowing a biased juror to sit on the jury that convicted Mr. Dickey.*

In this case, Juror No. 16 demonstrated actual bias. When the court asked if he would be able to be fair and impartial to both sides, Juror No. 16 answered: “No, I would not.” 3/21/22 RP 38. Nobody individually questioned Juror No. 16, and he never stated he would render a fair and impartial verdict.

The facts here are similar to the facts in *Guevara Diaz*, where the court asked a potential juror: “Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?” 11 Wn. App. 2d at 846. The potential juror answered: “no.” *Id.* Later individual and group questioning did not rehabilitate the juror. *Id.* at 857-58. The Court of Appeals held the juror exhibited actual bias, and the trial court “should have addressed this actual bias by questioning [the] juror.” *Id.* at 858.

“[I]t is hard to imagine a clearer statement of unfairness than a juror answering that she could ‘not be fair.’” *Id.* at 859. This Court cannot overlook the literal meaning of Juror No. 16’s statement that he could not be fair. *Id.* Like the juror in *Guevara Diaz*, Juror No. 16 unequivocally demonstrated actual bias, and he was never rehabilitated. Even though the court addressed the group and asked if anybody felt they could not be fair and impartial and nobody responded, this was not sufficient to rehabilitate Juror No. 16. *Id.* at 857-58. This “express admission of bias, with no subsequent assurance of impartiality and no rehabilitation by counsel or the court,” is actual bias. *Hughes*, 258 F.3d at 460.

Juror No. 16’s unequivocal admission of bias triggered the court’s independent obligation to remove an unfit juror in order to preserve the accused’s constitutional right to a fair trial. RCW 2.36.110; CrR 6.4(c)(1); *Guevara Diaz*, 11 Wn. App. 2d at 860 (“[T]he court ha[s] an independent responsibility not to seat a biased juror.”).

But the trial court here failed this obligation. Despite Juror No. 16's express statement of actual bias and his unfitness to serve, the court did nothing. It therefore permitted an unfit juror to sit on the jury that convicted Mr. Dickey. The seating of an actually biased juror demonstrates "'a complete lapse' by the trial court in carrying out its obligation on voir dire." *Irby*, 187 Wn. App. at 194 (quoting *Hughes*, 258 F.3d at 464). The trial court did not address Juror No. 16's bias by individually questioning him or removing him. Therefore, the trial court failed its duty to ensure Mr. Dickey's constitutional right to a fair trial by an impartial jury. *Guevara Diaz*, 11 Wn. App. 2d at 845; *Irby*, 187 Wn. App. at 193. Because of "[t]he presence of a biased juror," Mr. Dickey is entitled to a new trial. *Irby*, 187 Wn. App. at 193.

The Court of Appeals decision conflicts with decisions by the Court of Appeals and undermines the constitutional right to a fair trial. This Court should grant review. RAP 13.4(b).

3. *The Court of Appeals's reliance on Talbott is misplaced because that case did not involve an actually biased juror or the trial court's independent duty to ensure a person's right to a fair trial.*

The Court of Appeals affirmed Mr. Dickey's conviction without acknowledging the holdings in *Guevara Diaz* or *Irby*. *Dickey*, 2024 WL 914938 at *2-3. Instead, it concluded it was bound by this Court's decision in *State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022), and affirmed Mr. Dickey's conviction because he did not use a peremptory strike to remove Juror No. 16. *Id.* But *Talbott* did not involve an actually biased juror or the court's independent obligation to ensure the accused's right to a fair trial, and it does not apply here.

The trial in *Talbott* involved allegations of sexual assault, and a potential juror explained her mother was a victim of domestic abuse. 200 Wn.2d at 734. When the court asked if her experience would affect her ability to be fair and impartial in this case, she said "she 'wouldn't know until the time came.'" *Id.* at 734. Counsel questioned her about whether she thought could put any biases aside, and she said "I could try. . . ."

there's always multiple sides to a story, and I'm a fact-based person, so I could tell you that I will give it my very best, should I end up being on the jury, to do that.'" *Id.* at 735.

Defense counsel moved to excuse the juror for cause. *Id.* at 735. The trial court denied the motion. *Id.* Defense counsel did not use a peremptory strike to remove her, and she sat on the jury that convicted the defendant. *Id.* at 736.

This Court addressed "the narrow question presented" of "whether a party who does not use all of their peremptory challenges and accepts the jury panel as presented" may appeal the trial court's denial to strike a juror for cause. *Id.* at 737. Under the circumstances presented in that case, this Court affirmed the conviction because the defendant did not use a peremptory strike to remove the juror. *Id.* This Court was clear that its holding in *Talbott* "[was] limited to the facts of [that] case." *Id.* at 733. This Court also expressly stated its opinion made no ruling "on the proper application of the manifest constitutional standard." *Id.* at 742.

Talbott does not apply to this case. Unlike the juror in this case, the juror in *Talbott* did not unequivocally express actual bias. Where a juror says they could be fair, even if their answers are equivocal, this alone does not indicate actual bias. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); *see Irby*, 187 Wn. App. at 196-97 (comparing one juror’s statements “as an adequate assurance of impartiality,” which was within the court’s discretion to conclude did not render them unfit, with another juror’s “unqualified statement” of bias, which demonstrates actual bias and triggers the court’s duty). This is because the trial court has broad discretion to consider all the circumstances in determining whether the juror has demonstrated bias. *Irby*, 187 Wn. App. at 193-94.

On the other hand, where a juror unequivocally says they cannot be fair, an appellate court cannot overlook the juror’s literal words and defer to the trial court’s decision to not excuse the juror. *Guevara Diaz*, 11 Wn. App. 2d at 859; *Irby*, 187 Wn. App. at 196-97. With such an explicit statement of actual bias,

there is no tone or demeanor on behalf of the juror that could possibly excuse the court's failure to take any action. *Guevara Diaz*, 11 Wn. App. 2d at 859; *Irby*, 187 Wn. App. at 197.

The Constitution does not permit the trial court to ignore a juror's unequivocal expression of actual bias and deprive the accused of their right to an impartial jury. A biased juror is unfit, and the trial court is required to remove an unfit juror, notwithstanding any action or inaction by counsel. *Guevara Diaz*, 11 Wn. App. 2d at 855; RCW 2.36.110. This Court's holding in *Talbott* was limited to the specific facts of that case, which did not involve actual bias. The Court of Appeals was wrong to apply *Talbott* to this case.

The Court of Appeals decision affirming Mr. Dickey's conviction by a biased jury conflicts with decisions by the Court of Appeals and undermines the constitutional right to a fair trial. This Court should grant review. RAP 13.4(b).

F. CONCLUSION

Based on the preceding, Mr. Dickey respectfully requests this Court grant review pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 2,907 words, and complies with RAP 18.17.

Respectfully submitted this 27th day of March 2024.



BEVERLY K. TSAI (WSBA 56426)
Washington Appellate Project (91052)
Attorneys for the Petitioner

APPENDIX

Table of Contents

Court of Appeals Opinion APP 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TREVOR JAMES DICKEY,

Appellant.

No. 84653-1-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Trevor James Dickey appeals a conviction for one count of assault in the third degree after a jury trial. He avers that his constitutional right to a fair and impartial jury was violated by the seating of a juror with actual bias and seeks reversal of his conviction. Because Dickey accepted the jury panel with three peremptory challenges remaining and chose not to excuse the juror that he now claims was biased, we do not reach the merits of this claim. Accordingly, Dickey’s conviction is affirmed, but we remand for the trial court to strike the victim penalty assessment and to correct the various scrivener’s errors as to the conditions of probation in the judgment and sentence.

FACTS

On April 16, 2020, the State charged Trevor Dickey with one count of both assault in the second degree with a deadly weapon against Scott Claggett and assault in the third degree against one of the arresting officers, Snohomish County Sherriff’s Deputy Gabriel Cimino, based on a series of events from the morning of April 5, 2020. On a motion from the defense, the trial court severed those counts

for trial. Dickey exercised his right to a jury trial on the charge of assault in the third degree, wherein the State alleged he had intentionally assaulted Cimino.

Jury selection began on March 21, 2022. The trial court explained to the potential jurors that the State was charging Dickey with assaulting a law enforcement officer who was performing his official duties at the time of the alleged assault. The court then asked jurors to raise their hands if any of them had been personally involved, or had family members or close friends who were “involved in a similar type of allegation or situation.” Multiple jurors raised their hands, including juror 16.¹ The court questioned the juror as follows:

THE COURT: Thanks. Juror 16, who was it and what was it?

JUROR NO. 16: It was my friend. He got in a fight with a cop in Arizona.

THE COURT: How long ago?

JUROR NO. 16: About two years ago.

THE COURT: Were there charges filed?

JUROR NO. 16: Yeah.

THE COURT: Did you think that the case was handled appropriately or inappropriately based on the limited information you may have had?

JUROR NO. 16: Inappropriately.

THE COURT: What were the concerns?

JUROR NO. 16: It wasn't a fair trial for my friend.

THE COURT: Based on that experience and your relationship with him, would you be able to be fair and impartial to both sides in this case?

¹ Once seated, juror 16 became juror 3 on the panel. Because the issue presented centers on jury selection, we refer to the juror in question by his venire number, 16.

JUROR NO. 16: No, I would not.

Neither party challenged juror 16 for cause and the court did not ask the juror any further questions. This statement of bias was never rehabilitated. Later on, defense counsel asked juror 16: "What if [Dickey] chooses not to testify? Would you hold that against him even when the [c]ourt told you you could not?" Juror 16 answered, "No."

When the trial court asked whether the attorneys had any additional challenges for cause, both said no. The parties were allotted seven peremptory challenges each. After defense counsel exercised his first two peremptory challenges, juror 16 was presumptively seated. Defense counsel then used two more peremptory challenges on other jurors and ultimately accepted the panel as comprised, including juror 16, with three peremptory challenges remaining. Juror 16 was seated on the jury and deliberated.

The State called Cimino and Officer Tyler Gaskin of the Lynnwood Police Department to testify as to their contact with Dickey on April 5, 2020. According to Cimino, once officers had Dickey in handcuffs, Dickey kicked him in the shin and Gaskin testified that he watched Dickey kick Cimino. After the State's case in chief, Dickey took the stand and testified to his version of events where he denied kicking Cimino "intentionally" and asserted that the officers were "lying." The jury found Dickey guilty as charged.

On May 23, 2022, the State filed an amended information adding one count of malicious mischief in the second degree concerning damage to Claggett's property. Dickey elected to proceed to trial on the two counts relating to Claggett,

assault in the second degree with a deadly weapon and malicious mischief in the second degree, which resulted in a mistrial the following day. The State then filed a second amended information that reduced those charges involving Claggett to one count each of assault in the third degree (count 1) and attempted malicious mischief in the second degree (count 2). Even though it had already been resolved at trial, the charge of assault in the third degree against Cimino was included as well (count 3). Dickey entered guilty pleas to counts 1 and 2.

On October 6, 2022, the trial court sentenced Dickey on all three counts and imposed a period of confinement of eight months for assault in the third degree on count 1, 200 days for attempted malicious mischief in the second degree on count 2, and five months for assault in the third degree against Cimino on count 3, all to run concurrently. The court also imposed a victim penalty assessment (VPA) in the judgment and sentence (J&S) for counts 1 and 3, and the J&S for count 2 contained a number of conditions of probation set out in preprinted check boxes that were not included in the court's oral imposition of sentence.

Dickey timely appealed.

ANALYSIS

I. Right to a Fair and Impartial Jury

Dickey avers that his constitutional right to a fair and impartial jury was violated by the seating of a biased juror.

Criminal defendants have a state and federal constitutional right to a fair and impartial jury. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020). Parties may challenge a juror for cause on the basis of actual bias as a

means of protecting that right. *Id.* at 855. Trial courts also have an independent duty to excuse jurors who have exhibited bias or prejudice and are unfit to serve. RCW 2.36.110. But, our Supreme Court has held that, despite the established independent statutory duty of the trial court, “the burden of preventing trial errors rests squarely upon counsel for both sides.” *State v. Talbott*, 200 Wn.2d 731, 737, 521 P.3d 948 (2022) (quoting *State v. Farley*, 48 Wn.2d 11, 15, 290 P.2d 987 (1955)). Accordingly, in criminal cases, counsel “must attempt to correct errors at trial, rather than saving them for appeal ‘in case the verdict goes against them.’” *Id.*

While Dickey’s argument is compelling, as an intermediate appellate court, we must follow the controlling holding of our Supreme Court in *Talbott*: “The question is whether a party who does not use all of their peremptory challenges and accepts the jury panel as presented may nevertheless appeal on the basis that a seated juror should have been dismissed for cause. *The answer is no.*” 200 Wn.2d at 737 (emphasis added). Here, defense counsel had five peremptory challenges remaining when juror 16 moved onto the presumptive panel. Rather than using one of those peremptory challenges on juror 16, defense counsel chose to exercise two additional peremptory challenges on other potential jurors. At the time defense counsel accepted the panel with juror 16 seated, Dickey still had three peremptory challenges available. Under *Talbott*, he has not preserved the error for review.

Further, the record establishes that Dickey’s decision to accept juror 16 without challenge was plainly strategic; the context of the initial exchange with the

judge demonstrates that juror 16's bias was in favor of the defense, not the State. Juror 16 explained that his *friend* was charged with an offense after getting into a fight with a police officer, and, immediately before he definitively stated that he could not be fair in the instant trial, juror 16 expressed that, in his estimation, "[i]t wasn't a fair trial for *my friend*." (emphasis added.) There is a delicate balance to be reached between calculated defense strategy in jury selection and protecting an accused person's right to a fair and impartial jury. While Dickey makes compelling arguments against courts weighing the "kind of bias" and insists that reversal is required based on structural error, again, we are an intermediate appellate court bound by the holding in *Talbott*.

II. Terms and Conditions of the Judgment and Sentence

Dickey's final challenges go to errors in the J&S for the felonies in counts 1 and 3 and the separate J&S for the misdemeanor in count 2; the trial court's imposition of the VPA and probation conditions that are inconsistent with the crimes of conviction. He seeks remand for the trial court to strike these from each J&S. The State concedes both errors and agrees that remand is appropriate to strike the VPA and the improper probation conditions.

Although the VPA was mandatory at the time of Dickey's sentencing, the legislature subsequently amended the statute and trial courts are now prohibited from imposing the VPA on indigent defendants. LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). While the court failed to make an express finding of indigency at sentencing, the State does not contest Dickey's assertion that he is indigent and was at the time of sentencing. Because this case is on direct appeal, the amended

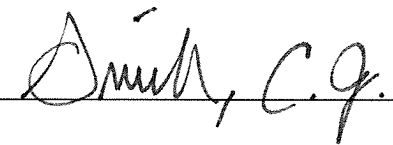
statute applies to Dickey and we remand for the trial court to strike the VPA from his felony J&S as to count 1. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

The J&S for Dickey's misdemeanor conviction of attempted malicious mischief in count 2 also requires correction. Though he was not convicted of a DUI offense, the J&S, which appears to have been prepared and presented by the prosecutor's office, contains numerous pre-checked boxes imposing seven separate conditions relating to "DUI/Physical Control." We accept the State's concession on this matter and remand for the trial court to strike the erroneous probation conditions.

 _____

WE CONCUR:

 _____

 _____

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. 84653-1-I**, 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 or residence address as listed on ACORDS:

respondent Matthew Pittman
[matthew.pittman@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: March 27, 2024

WASHINGTON APPELLATE PROJECT

March 27, 2024 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 84653-1
Appellate Court Case Title: State of Washington, Res. v. Trevor James Dickey, App.
Superior Court Case Number: 20-1-00462-1

The following documents have been uploaded:

- 846531_Petition_for_Review_20240327164057D1092522_7449.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.032724-08.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- greg@washapp.org
- matthew.pittman@co.snohomish.wa.us
- wapofficemail@washapp.org
- willa@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Beverly Kaiwen Tsai - Email: beverly@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20240327164057D1092522