SUPREME COURT NO. 91702-7

NO. 45532-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MANUS,

Petitioner.

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

The Honorable James Orlando, Judge

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# PETITION FOR REVIEW

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FILED IN COA ON MAY 14, 2015

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RULES, STATUES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

William Manus requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Manus, No. 45532-3-II, filed April 14, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

During jury selection, the parties exercised peremptory challenges silently by writing them on a sheet of paper which was filed for the record that day. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of jury selection in such a way that it was closed to public view, did the court violate petitioner's constitutional right to a public trial?[2]

C. STATEMENT OF THE CASE

The Pierce County prosecutor charged appellant William Manus with failure to register as a sex offender. CP 1, 4.

Before jury selection began, the court announced that challenges for cause should be brought to the court's attention at sidebar and peremptory

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This Court granted review on this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4). Oral argument was held March 10, 2015. Petitions for review are pending in State v. Marks, 184 Wn. App. 782, 339 P.3d 196 (2014), as well as several unpublished cases.

challenges would occur in writing. 2RP[3] 18-19. While potential jurors were out of the courtroom, the court made a record of the for-cause challenges that had been exercised at sidebar. RP 30. After the court and attorneys finished questioning potential jurors, the court announced, "The attorneys are going to be doing their final selection here in writing," and permitted jurors to stretch or use the restroom while that occurred. 2RP 66-67. The transcript next records "(Attorneys doing their peremptory challenges.)" followed by "(Sidebar held, but not reported.)." 2RP 67. Then the selected jurors were directed to their seats and sworn. 2RP 67-68.

The minutes provide little insight into the peremptory challenges. CP 45-46. After the second round of voir dire, they state simply, "3:05 PM Sidebar Attorneys conduct peremptory challenges 3:35 PM Sidebar. Jury is seated and sworn by the court." Id. The page showing the peremptory challenges was filed the same day in open court. CP 43. It lists the name and juror numbers of the potential jurors excused by each side on peremptory challenges. The State excused eight of the venire; the defense excused seven. Id.

After a guilty verdict, the court denied Manus' new trial motion and imposed sentence at the high end of the standard range. CP 8, 31-32; 1RP 421-22, 427-29. On appeal, Manus argued the written peremptory challenge

[3] There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 21-24, Nov. 13, 2013; 2RP – Oct. 21, 2013 (Excerpt).

process used during voir dire violated his constitutional right to a public trial. The Court of Appeals rejected this challenge, citing State v. Marks, 184 Wn. App. 782, 339 P. 3d 196 (2014). Manus asks this Court to grant review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF THE PUBLIC TRIAL ISSUE BECAUSE DIVISION II'S DECISION CONFLICTS WITH STATE V. SLERT AND STATE V. WISE AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

"The public trial right applies to jury selection." State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012) (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 725, 175 L. Ed. 2d 675 (2010) and State v. Brightman, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005)). While the precise issue in Wise was private questioning of potential jurors, there is no reason its holding should be limited purely to questioning. On the contrary, jury selection necessarily includes rejecting some jurors via for-cause and peremptory challenges. Excusing jurors based on those challenges is closer to a literal understanding of "selecting" the jury than the questioning that was held to be a crucial part of jury selection in Wise.

Nevertheless, relying on Marks, the Court of Appeals held that silent, on-paper exercise of peremptory challenges did not violate Manus' public trial right. Manus asks this Court to grant review because that decision

conflicts with this Court's decisions in Slert and Wise as well as Division II's decisions in State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013) and State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013). RAP 13.4(b)(1), (2). Additionally, application of the public trial right in this instance raises significant constitutional questions of substantial public interest. RAP 13.4(b)(3), (4).

a. The Public Trial Right Applies to Peremptory Challenges Under *Wise* and *Slert*.

Manus respectfully argues that the Marks decision, as well the Court of Appeals' decision in this case relying on it, are error under Wise and State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014). The Marks court began by acknowledging that the first step in the analysis is to determine whether the proceeding at issue is one this Court has already acknowledged implicates the public trial right. 184 Wn. App. at 786. Noting that none of this Court's cases have actually considered peremptory or for-cause challenges, as opposed to questioning of potential jurors, the court decided that the two are separate. Id. at 787-88. The court concluded the process of actually selecting the jury by dismissing some potential jurors is not part of the voir dire to which the public trial right extends. Id. at 788.

Marks relies on language from CrR 6.4 as well as its decision in Wilson, for the proposition that only the voir dire/examination aspect of jury

selection implicates the public trial right. Marks, 184 Wn. App. at 787-88 (discussing Wilson, 174 Wn. App. at 328). But Wilson did not involve peremptory or for-cause challenges exercised to select the jury after voir dire examination. It involved "pre-voir dire jury selection process" that occurred "before the jury was called into the courtroom for voir dire." Wilson, 174 Wn. App. at 331-32. The bailiff excused two jurors who claimed to be ill. Id. at 332. The court concluded that the Wise court's use of voir dire and jury selection interchangeably was inadvertent and not indicative of an intent to treat the two as synonymous for precedential purposes. Wilson, 174 Wn. App. at 338-39. The court concluded that administrative excusals before voir dire began were not part of the voir dire or jury selection referred to in Wise and State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012). Wilson, 174 Wn. App. at 340.

The Marks court noted the distinction drawn in Wilson between the broader jury selection process (beginning with sending jury summons and ending with empanelling the jury) and voir dire examination was approved of by a plurality of this Court in Slert. Marks, 184 Wn. App. at 787.

Slert involved jury questionnaires. The court and counsel reviewed the questionnaires in chambers and, on the basis of the answers, agreed to excuse four jurors. Slert, 181 Wn.2d at 602. Justice Gonzalez' lead opinion concluded the label of "jury selection" was not determinative and this

process was not substantially similar to the voir dire considered in Wise. 181 Wn.2d at 604-05. The lead opinion also noted that, based on the record, it did not appear voir dire had begun at the time of the excusals and it was not clear whether jurors had been sworn in before filling out the questionnaire. 181 Wn.2d at 602, 605-06.

However, Justice Wiggins, concurring in result, concluded that, "It appears that this is a voir dire case that easily could have been decided under *Paumier* and *Wise*." Slert, 181 Wn.2d at 610 (Wiggins, J., concurring in result). Justice Wiggins rejected Slert's alleged public trial violation only on the grounds that Slert did not preserve the issue by objecting to the closure. Id. at 612. Justice Wiggins concluded that "every stage of judicial proceedings," presumably to include the review of the questionnaires in Slert, "must be presumptively open" and may be closed only after application of the Bone-Club factors. Id.

The four dissenters concluded that the dismissal of jurors for cause behind closed doors after review of the questionnaires was voir dire, which this Court has repeatedly held implicates the public trial right. 181 Wn.2d at 612-13 (Stephens, J., dissenting). Thus, five members of this Court appear to agree that jury questionnaires and four-cause dismissals are an integral part of voir dire that must be open under Wise and Paumier.

This Court has not expressly considered peremptory challenges. But they occurred not before voir dire, but on the basis of voir dire. They occurred after the venire was sworn, after the jurors were examined in open court, and they strongly implicate the fairness of the overall proceedings. Like the for-cause excusals in Slert, they are a substantial part of the jury selection held to be integral in Wise.

Because peremptory challenges are an integral part of the jury selection process that Wise deemed critical to the public trial right, the court's decision in this case to the contrary is in conflict, and review should be granted under RAP 13.4(b)(1).

b. The Public Trial Right Applies to Peremptory Challenges Under the Experience and Logic Test as Applied in *Wilson* and *Jones*.

Even if it were not already clear that the public trial right prohibits closed jury selection proceedings, such proceedings also violate the public trial right under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The Court of Appeals' opinion in this case also conflicts with Division II's case law supporting the conclusion that the public trial right attaches to peremptory challenges.

In Wilson the court applied Sublett's experience and logic test to find that the administrative excusal of two jurors for sickness did not violate the defendant's public trial right. Wilson, 174 Wn. App. at 347. The court

noted that historically, the public trial right has not extended to administrative hardship excusals granted by the court before voir dire begins. Id. at 342. But in doing so, the court expressly differentiated between the administrative excusal at issue and a jury selection proceeding involving the exercise of for-cause and peremptory challenges, which the court said historically, occur in open court. Id. Thus, under Wilson's application of the experience prong of the experience and logic test, for-cause and peremptory challenges historically are done in open court.

In Jones, Division II held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. 175 Wn. App. at 91. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. Like Wilson, the Jones decision refers to the exercise of peremptory challenges as a part of jury selection that must be public. Id.

In addition to the historical experience referenced in Wilson and Jones, logic dictates that public exercise of peremptory challenges serves the values of the public trial right. The right to a public trial includes circumstances where "the public's mere presence *passively* contributes to the fairness of the proceedings, such as deterring deviations from established

procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing Brightman, 155 Wn.2d at 514, and State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010)).

The peremptory challenge process, an integral part of jury selection,[4] is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Because of these crucial constitutional limitations, designed to prevent and remedy discrimination in jury selection, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013), cert. denied, 134 S. Ct. 831 (2013). Therefore, "It is crucial that we have meaningful and effective procedures for identifying racially

[4] People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

motivated juror challenges." Id. at 41. An open peremptory process is part of that procedure. The Peremptory Challenges document lists names; it does not reveal race. CP 43. Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Public trials are a check on the judicial system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Open exercise of peremptory challenges safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged. The exercise of peremptory challenges directly impacts the fairness of a trial. Both experience and logic indicate it is inappropriate to shield that process from public scrutiny.

c. Review Should Also Be Granted Because Application of the Public Trial Right to Peremptory Challenges Is a Constitutional Issue in Which the Public Has a Substantial Interest.

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[5] Presley, 558 U.S. at 211-12; Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

All Washingtonians have a strong interest in ensuring that criminal justice proceedings occur in a fair and open manner. The public trial right "was designed to deter and expose corruption and manipulation in the

[5] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

justice system." Slert, 181 Wn.2d at 611 (Wiggins, J., concurring). Public scrutiny enhances the public trust, while hiding any portion of the proceedings "'breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.'" Id. (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring)). In addition to the precedential conflicts discussed above, the constitutional goal of and public interest in fostering public trust and respect for the rule of law via open court proceedings warrants this Court's review. RAP 13.4(b)(3), (4).

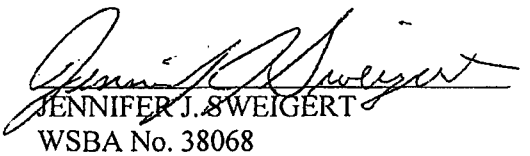
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of constitutional law and public interest. Manus requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 14th day of ~~April~~ May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | SUPREME COURT NO. _____ |
| v. | ) | COA NO. 45532-3-II |
| | ) | |
| WILLIAM MANUS, | ) | |
| | ) | |
| Petitioner. | ) | |

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MAY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM MANUS
DOC NO. 984776
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2015.

x Patrick Mayovsky

## NIELSEN, BROMAN & KOCH, PLLC

## May 14, 2015 - 2:19 PM

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Court of Appeals Case Number: 45532-3

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>WILLIAM ALEXANDER MANUS,<br><br>Appellant. | No. 45532-3-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

WORSWICK, J. — A jury returned a verdict finding William Manus guilty of failure to register as a sex offender. Manus appeals his conviction, asserting that (1) the trial court violated his public trial right by employing a procedure by which the State and defense counsel exercised peremptory challenges in writing, and (2) the trial court erred by failing to excuse a juror for cause after the juror told the trial court that he had recognized a State's witness as someone the juror knew from his gym. We affirm Manus's conviction.

## FACTS

On October 21, 2013, the State charged Manus with failure to register as a sex offender. Before the start of jury selection, the trial court told counsel that challenges for cause should be brought to its attention at sidebar and that peremptory challenges would be done in writing. After the trial court and counsel questioned potential jurors at voir dire, the trial court stated that the attorneys would be "doing their final selection here in writing." Report of Proceedings (RP) (Oct. 21, 2013) (Jury Voir Dire) at 66. The trial transcripts then state, "(Attorneys doing their peremptory challenges)" followed by "(Sidebar held, but not reported)." RP (Jury Voir Dire) at

67. The trial court swore in the selected jurors. After the jury was excused from the courtroom, the following discussion took place:

> [Trial court]: I just want to make a quick record regarding our discussion at sidebar regarding excusing jurors for cause. It was agreed to excuse Juror No. 6 and 29. It's also agreed to excuse Juror No. 23 because of a scheduling issue, and also we agreed to excuse Juror No. 19 due to some health issues that she had indicated on her green form that she had that would hurt her ability to be a juror.
>
> Counsel, do you wish to supplement the record at all regarding those?
>
> [State]: No, Your Honor. Each of those issues was brought to our attention and the state had no objection to excusing those individual jurors for cause.
>
> [Defense counsel]: Neither did the defense, Your Honor. Thank you.

RP at 30. That same day, the sheet of paper showing the attorneys' written peremptory challenges was filed with the court and made part of the trial record. This sheet shows that the State and defense counsel each exercised seven peremptory challenges by writing the names and numbers of potential jurors they wanted excused from the jury.

Toward the end of trial, the trial court told counsel that there was a potential issue with a juror that had recognized one of the State's witnesses, Tacoma Police Officer Tyler Meeds, stating:

> All right. So we have an issue with one juror, Juror No. 11. Last night after we excused them, he indicated to [a judicial assistant] that he knows Officer Meeds from where they work out together. He didn't know him by name, but he recognized him when he testified.

RP at 263. The trial court and counsel then questioned Juror No. 11 about his disclosure:

> [Trial court]: . . . My Judicial Assistant . . . brought it to my attention yesterday afternoon after we broke that you recognized Officer Meeds from the place that you work out?
>
> [Juror]: Yes.
>
> [Trial court]: Is he somebody that you're a social acquaintance with? Or explain to me how you know him.

> [Juror]: I think I met him maybe five years ago, and our relationship is not like a friend type of relationship. It's just, you know, when I see him, we talk about sports. I was interested in home protection, and he spoke to me about that. So that's really about it. We see each other. We do talk on occasion. So I just wanted to let you guys know that I did recognize him.
>
> [Trial court]: You haven't talked to him obviously about this particular case?
>
> [Juror]: No, I have not.
>
> [Trial court]: Any reason why your knowledge of him or your relationship with him would affect your ability to be a fair juror in this case?
>
> [Juror]: No, it would not.
>
> [Trial court]: Does the state have any questions?
>
> [State]: I guess I would ask that when you see him, is it primarily at the gym?
>
> [Juror]: Yes.
>
> [State]: So you don't get together with him outside the gym?
>
> [Juror]: No, I do not.
>
> [State]: These conversations that you have, generally you have them in the gym when you guys are working out?
>
> [Juror]: Exactly.
>
> [State]: I don't have any further questions. Thank you.
>
> [Trial court]: [Defense counsel], any questions?
>
> [Defense counsel]: No questions, Your Honor.

RP at 264-65. Defense counsel requested the trial court to excuse the juror, which request the trial court denied, stating:

> I don't think that there is a degree of potential prejudice with this juror that would cause him to be excused for cause. He didn't even know the officer's name. I don't think that that's the kind of affinity with a witness and a juror that would justify excusing him at this point in the trial. So I'll not excuse him. I think he can maintain an open mind and participate and make his decision based on the facts presented and on the law given to him.
>
> I also agree with the state somewhat that the arrest of Mr. Manus was based upon an outstanding warrant. It wasn't based upon the allegations of failure to register, and the officer's testimony only was at the very end of this case. It didn't have anything to do with, I guess, the underlying significant issues in the case.

RP at 268-69. The jury returned a verdict finding Manus guilty of failure to register as a sex offender. Manus appeals his conviction.

## ANALYSIS

### I. PUBLIC TRIAL RIGHT

Manus first contends that the trial court violated his public trial right by directing the State and defense counsel to exercise their peremptory challenges in writing without first considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). We recently rejected this same contention in *State v. Marks*, 184 Wn. App. 782, 339 P.3d 196 (2014). Following *Marks*, we hold that Manus's public trial right was not violated by the trial court's procedure directing counsel to exercise their peremptory challenges in writing.

### II. DENIAL OF FOR CAUSE CHALLENGE

Next, Manus contends that the trial court erred when it refused to dismiss a juror for cause after the juror told the trial court that he had recognized Officer Meeds as someone he knew from his gym. We disagree.

We review a trial court's decision whether to remove a juror for cause for an abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768, 123 P.3d 72 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to trial by an impartial jury. *State v. Gonzales*, 111 Wn. App. 276, 277, 45 P.3d 205 (2002). Additionally, RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

And CrR 6.5 states, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 impose on the trial court a continuing obligation to excuse any juror who is unfit to serve on the jury. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). The key inquiry for the trial court in deciding whether to excuse a juror for cause is "whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." *Hough v. Stockbridge*, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009). Because the trial court is able to observe the challenged juror, it is in the best position to evaluate a juror's candor, and it may weigh the credibility of the juror based on its observations. *Elmore*, 155 Wn.2d at 769 n. 3; *Jorden*, 103 Wn. App. at 229. Thus, absent a manifest abuse of its discretion, we defer to the trial court's judgment as to whether a juror should be excused for cause. *State v. Noltie*, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991).

Manus argues that the juror's prior relationship with Meeds demonstrated an actual bias and an implied bias that rendered the juror unfit to serve on the jury. We disagree.

A. *Actual Bias*

"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 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); CrR 6.4(c)(2). A party challenging a juror for actual bias has the burden of demonstrating such bias by a preponderance of the evidence. *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). It is not sufficient that a party show

that the challenged juror "has formed or expressed an opinion upon what he or she may have heard or read," rather, "to sustain the challenge . . . the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; CrR 6.4(c)(2).

Manus does not cite any evidence in the record sufficient to prove actual bias justifying dismissal of the challenged juror. Instead Manus merely speculates that, because the challenged juror had known Meeds as an acquaintance at a shared gym for five years and had engaged in casual conversation with Meeds during that time, the juror "would naturally have felt additional pressure to supporting [sic] his friend from the gym and find Manus guilty." Br. of Appellant at 20. But, even if this speculative assertion was competent evidence of actual bias, the challenged juror told the trial court that his prior relationship with Meeds would not affect his "ability to be a fair juror in this case." RP at 264. The trial court found the juror to be credible in this regard, concluding that the juror could "maintain an open mind and participate and make his decision based on the facts presented and on the law given to him." RP at 268. We defer to the trial court's credibility determination, and we hold that Manus has failed to show that the trial court abused its discretion by failing to dismiss the juror for actual bias.

B. *Implied Bias*

Manus similarly fails to show that the trial court abused its discretion by failing to dismiss the challenged juror for implied bias. RCW 4.44.180 provides four bases by which a

juror may be challenged for an implied bias.[1] Manus admits that the challenged juror's relationship with Meeds does not fall within "one of the listed statutory bases for implied bias," but argues that we should interpret RCW 4.44.180 broadly under the rule of lenity. Br. of Appellant at 20. However, Manus fails to provide any argument as to how the juror's prior relationship with Meeds would fall within RCW 4.44.180 even under a broad interpretation of the statute. Accordingly, we do not further consider Manus's claim that the trial court erred by failing to dismiss the challenged juror under RCW 4.44.180. *See State v. Davis*, 174 Wn. App. 623, 641, 300 P.3d 465, *review denied*, 178 Wn.2d 1012 (2013) ("Passing treatment of an issue is insufficient to warrant appellate consideration.").

Although we decline to address Manus's claim under RCW 4.44.180 for lack of adequate argument, we must still address whether the trial court abused its discretion by failing to excuse the challenged juror for implied bias under RCW 2.36.110 and CrR 6.5. *Jorden*, 103 Wn. App.

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[1] RCW 4.44.180 states:

> A challenge for implied bias may be taken for any or all of the following causes, *and not otherwise*:
>
> (1) Consanguinity or affinity within the fourth degree to either party.
>
> (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
>
> (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
>
> (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.
>
> (Emphasis added).

at 227; *State v. Boiko*, 138 Wn. App. 256, 265, 156 P.3d 934 (2007). But Manus's implied bias claim under RCW 2.36.110 and CrR 6.5 suffers from the same infirmity as his actual bias claim in that the trial court found credible the challenged juror's statement that his prior relationship with Meeds would not affect his "ability to be a fair juror in this case." RP at 264. Again, we defer to the trial court's credibility determination in this regard and thus hold that Manus fails to show that the trial court abused its discretion by declining to dismiss the challenged juror based on an implied bias. Accordingly, we affirm Manus's conviction.

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.

Worswick, J.

We concur:

Johanson, C.J.

Melnick, J.