NO. 46593-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

GREYCLOUD LAWLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00336-6

BRIEF OF RESPONDENT

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II. The trial court did not violate Appellant's right to confrontation when it properly limited his cross-examination.

III. The prosecutor did not commit misconduct during closing argument.

B. STATEMENT OF THE CASE

1. *Procedural History*

The State adopts Mr. Lawler's Procedural History. Br. of App. at 2-3.

2. *Statement of Facts*

MDJ met the defendant, Greycloud Lawler, in November of 2012. RP 459. The relationship soon became romantic as they began dating in March of 2013 and at some point afterwards MDJ considered Lawler her boyfriend. RP 460. The couple made plans for Valentine's Day, February 14, 2014. RP 460. That plan was to get a hotel room at the Value Motel in Hazel Dell. RP 460.

The couple met up on the bus on the way to the motel. RP 461. They began bickering about a number of things on the bus and on the walk

from the bus stop to the hotel, so by the time they got to the hotel the couple was not very happy. RP 461-62. MDJ testified that Lawler told her that he was jealous of something he had seen on her Facebook page. RP 462. Nonetheless, the couple checked into the hotel and then left for Burger King to get dinner. RP 462. At Burger King, Lawler thought MDJ was looking at another male so he confronted her about that, which led to more arguing. RP 463.

After dinner, they returned to the motel room and Lawler took a shower while MDJ watched TV and ate snacks. RP 463-64. MDJ testified that Lawler was in the shower for approximately two hours and that she thought he was in there doing drugs. RP 464. When Mr. Lawler finally exited the bathroom he had a towel around his waist and began aggressively asking her about the Facebook incident and about the man she was allegedly looking at while at Burger King. RP 464-65.

The argument between the two escalated and when MDJ told Lawler she wanted to leave, he became even angrier and told her that she was not going to leave. RP 465-66. The argument continued to escalate. MDJ screamed, and Lawler began getting physical with her as he tried covering her mouth to get her to be quiet. RP 466-67. She tried to push Lawler away but this just made him angrier and he pressed his hand harder against her mouth and began trying to cover her nose as well. RP 467-68.

She unsuccessfully continued to try to get Lawler's hands off her mouth and she soon began seeing white spots before passing out. RP 468.

MDJ regained consciousness and found Lawler on top of her, his face red, hot, and sweating with his eyes bulging. RP 468-69. She was scared. Id. She attempted to push Lawler off of her. RP 469. In response, Lawler covered her mouth with his hand, then moved it to her neck with his thumb underneath her chin and began strangling her until she lost consciousness again. RP 469-70. MDJ testified that her jaw felt like it was broken, that she could not breathe and that she saw spots again. RP 470. She testified that this happened three or four more times before Lawler finally got off of her. RP 471.

At this point, MDJ was feeling neck and back pain and her mouth hurt. RP 472. She tried to plead with Lawler that they needed to stop fighting, and he would respond with compassion at times but also called her a liar and said that she did not love him. RP 471-72. Additionally, sometime during the arguments about MDJ leaving the room, Lawler broke MDJ's phone and ripped the motel phone cord out of the wall.[1] RP 472. During this lull in the violence, the couple slept next to each other, alhtough Lawler slept with his knife at his side. RP 473.

[1] When officers inspected the room they found the telephone cable plugged into the jack. RP 323.

At around 4:00 a.m., MDJ woke up and went to the bathroom. RP 473. Lawler noticed and got upset, telling MDJ he would not allow her to go home because of what her face looked like and that she would not be able to see her children again. RP 473. The latter remark made her feel as though she was going to die. RP 473. After that, Lawler took some bedding and his knife and slept by the door to prevent MDJ's escape. RP 473-74.

MDJ was unable to fall asleep again, but at some point later that morning Lawler woke up and was just as angry as before. RP 474. The two began arguing again when Lawler grabbed MDJ, dragged her into the bathroom, ripped off the toilet seat, and threatened to drown her in the toilet. RP 475. She grabbed at the shower curtain to get leverage to try to make an escape, which ripped the curtain but also allowed her to crawl out of the bathroom. RP 475. She heard a maid knock on the door and attempted to pull off the front blinds so that the maid could see and help her. RP 475-76. The maid did not notice, however, and Lawler dragged MDJ back into the bed and slammed her head into the headboard and got on top of her. RP 476. Lawler then got off of MDJ and left her laying in the fetal position crying. RP 477.

As the couple was finally getting ready to leave the room, Lawler told MDJ that he had wasted his money by paying for the room, that he

had come to the room to have sex, and that they were not going to leave until that happened. RP 477. She did not fight him because she was afraid of him based on what had happened that morning as well as the previous night. RP 477-78. Lawler grabbed MDJ by the ankles and pulled her toward him. He then pulled off her pants and underwear. RP 478-79. MDJ said to Lawler, "[h]ow could you want to do this after everything that's happened?" RP 479-80. She made it clear that she did not want to have sex, but that did not stop Lawler from putting on a condom and raping MDJ as she cried. RP 479-80. After about ten minutes, Lawler stopped and said something like "[s]crew this; I'm not going to do this to you." RP 480.

Following the rape, Lawler began getting his things together and MDJ ran out of the room and down the stairs to the lobby. RP 480-81. MDJ asked the motel clerk to call 911 for her because she had been assaulted, but the clerk said she could not and directed her to the lobby phone saying "[t]he phone's right there you can call 911." RP 272-73, 481. MDJ called 911, and as she was on the phone with 911 Lawler opened the lobby door and said he loved her, closed the door, and walked away. RP 481.

The police and medical personnel responded to MDJ's call. RP 254, 395. Deputy Bryce Smith of the Clark County Sheriff's Department

found MDJ in the lobby and noticed bruising on her face and a scratch on her forehead. RP 252, 255. Deputy Smith took MDJ's statement and took photographs of some of the injuries he observed. RP 255-59. Smith saw bruises on her arm that looked like fingerprints. RP 258. He saw that she had a split lip that had been bleeding. RP 258. Deputy Smith described MDJ's appearance as that of a distressed woman who looked like she just got beat up. RP 265. When he arrived, she looked afraid and was looking at the ground. RP 255. The motel clerk who refused to help MDJ, however, claimed to not have seen any injuries on her. RP 273.

MDJ was transferred to the hospital where she was examined by a doctor and a sexual assault nurse examiner (SANE). RP 358, 396-97, 424. As part of her medical treatment, MDJ reported that she had been held against her will, choked and smothered, had blunt trauma to various portions of her body, was sexually assaulted by way of a vaginal rape, had her head slammed into the bed and the toilet, and was hit in the face. RP 359, 364. Based on MDJ's complaints of pain and nausea, and evidence of contusions and trauma, the treating doctor prescribed anti-nausea medication and pain medications. RP 360-61, 372, 374, 377.

The SANE described MDJ as afraid and tremulous at the time of the examination and after speaking with MDJ about the role of a SANE, asked MDJ to tell her what happened. RP 424-425. MDJ gave her an

accounting of the events the previous night and early in the morning. RP 425-32. The SANE testified to that accounting, and though some of the details were different, e.g., the amount of times Lawler strangled MDJ and whether she was chased with the knife, the story was generally consistent with MDJ's trial testimony in both content and chronology. RP 425-32.

Next, the SANE assessed and examined MDJ. RP 428. She had already noted an abrasion on MDJ's head, that she was shaking and crying, and that her voice was hoarse. RP 428, 440. During the examination, the SANE observed abrasions, bruising or swelling on MDJ's head, both shoulders, both calves, both feet, both thighs, on her lips and teeth line, finger, jaw, and left ear, in addition to her complaints of pain in areas that lacked visible injury. RP 424, 429-32, 435-36, 440, 445-48, 454-55.

Hotel staff and the police searched the room in which MDJ and Lawler had stayed to assess the damage and document its condition. RP 274, 317. Each party noticed damage to the front curtains, the broken toilet seat lid, "stab holes" in a blanket, and blood on the sheets. RP 274-77, 324-331. The police also found a used condom, a condom wrapper, and a condom still in its wrapper. RP 267, 329. The police gathered some of these items from the motel room and also took a number of photographs. RP 266-67, RP 317-31.

Lawler was contacted and arrested a short distance from the Value Motel in a wooded area. RP 286, 312. On his person at the time of his arrest was an eight-inch knife in a leather sheath and methamphetamine. RP 287-89, 315. The substance on Lawler's person was confirmed to be methamphetamine by the Washington State Patrol Crime Laboratory. RP 296-309. Lawler also had a 12-inch blade with no handle in the backpack he had at the time of his arrest. RP 292-93. Officers noticed that Mr. Lawler had injuries to his face. RP 328. Lawler did not testify at trial. *See* RP.

C. ARGUMENT

I. Mr. Lawler was tried by an impartial jury, and thus, the trial court did not err when it did not *sua sponte* dismiss any of the seated jurors, and his attorney did not provide ineffective assistance when he chose not to challenge any of the seated jurors.

a. None of the seated jurors demonstrated actual bias.

The State and criminal defendants both have the right to trial before an impartial jury. Wash. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986) (citing *Hayes v. Missouri*, 120 U.S. 68, 70–71, 7 S.Ct. 350, 30 L.Ed. 578 (1887)). Thus, the jury must be "free [ ] from . . . bias against the accused and for the prosecution, but [also] free [ ] from . . . bias for the accused and against

the prosecution." *Hughes*, 106 Wn.2d at 185. Accordingly, seating a biased juror violates the right to trial before an impartial jury. *State v. Irby*, 187 Wn.App. 183, 193, 347 P.3d 1103 (2015) (*Irby* II). A trial judge has an independent duty to dismiss biased jurors in order to protect the right to an impartial jury. *Id.*

Actual bias, under the law, 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). "Prejudice" is defined as "[a] forejudgment; bias; partiality preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice." *State v. Alires*, 92 Wn.App. 931, 937, 966 P.2d 935 (1998) (citing BLACK'S LAW DICTIONARY 1061 (6th ed.1990)).

Even if a juror has expressed or formed an opinion, however, "such opinion shall not of itself be sufficient to sustain [a] challenge [for cause], but 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. Furthermore, a party must show that there is a probability of actual bias to successfully challenge a juror for-cause; the *possibility* of actual bias does not suffice to warrant the dismissal of a juror. *State v.*

Noltie, 116 Wn.2d 831, 838-840, 809 P.2d 190 (1991). As a result, equivocal answers alone cannot rise to level of actual bias. *Id.* at 838 (citing cases). Jurors properly dismissed for being biased, or that should have been dismissed, generally pair an opinion antithetical to our justice system with an inability to set that opinion aside and decide the case on the evidence. *Irby* II, 187 Wn.App. at 190, 196-197 (juror was unable to abide by the presumption of innocence); *State v. Gonzales*, 111 Wn.App. 276, 278-282, 45 P.3d 205 (2002) (same); *see State v. Jackson*, 75 Wn.App. 537, 879 P.2d 307 (1994) (racial bias of juror); *State v. Witherspoon*, 82 Wn.App. 634, 637-38, 919 P.2d 99 (1996) (same); *State v. Elmore*, 139 Wn.2d 250, 278-79, 985 P.2d 289 (1999) (juror's religious convictions prevented her from following the law).

One of the primary purposes "of the voir dire process is to determine whether prospective jurors harbor 'actual bias' and are thus unqualified to serve in the case." *State v. Saintcalle*, 178 Wn.2d 34, 77, 309 P.3d 326 (2013) (Gonzalez, J., concurring) (citing *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953)). In addition to for-cause challenges that seek to excuse jurors who have displayed actual bias, courts "have consistently recognized peremptory challenges as integral to 'assuring the selection of a qualified and unbiased jury.'" *Saintcalle*, 178 Wn.2d at 67 (Stephens, J., concurring) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91,

106 S.Ct. 1712 (1986). Essentially, "[i]t is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury." *State v. Vreen*, 99 Wn.App. 662, 666-68, 994 P.2d 905 (2000).

Our courts have consistently held that the trial judge is in the best position to determine "whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like." *Irby*, 187 Wn.App. at 194 (citing *State v. Gonzales*, 111 Wn.App. 276, 278, 45 P.3d 205 (2002); *Noltie*, 116 Wn.2d at 839 (noting that "[c]ase law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror's ability to be fair and impartial"). This holding is unsurprising since:

> [a] judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror.

Noltie, 116 Wn.2d at 839. These observations by the trial judge, and, of course, trial attorneys, that are not reflected in the transcribed record take on additional importance with the recognition that "[p]rospective jurors represent a cross section of the community, and their education and

experience vary widely." *State v. Davis*, 175 Wn.2d 287, 314 FN 9, 290 P.3d 43 (2012). Naturally then, "[j]urors . . . cannot be expected invariably to express themselves carefully or even consistently." *Id.* As a result, "[w]e must recognize that it is difficult if not impossible to detect juror bias except in clear cases. . . ." *Saintcalle*, 178 Wn.2d at 105 (Gonzalez, J., concurring). Part and parcel of this recognition is the acknowledgment that "most biases do not render jurors unqualified, and that the solemnity of the proceedings and substance of deliberations will help to ensure just verdicts from our juries." *Id.* (citations omitted). Bearing in mind these notions, and the role of the trial court in the voir dire process, it is incumbent that "if there is sufficient evidence that a juror is unqualified, that evidence should be presented to the trial court and ruled upon. Otherwise, the juror should be allowed to serve." *Id.*

A juror who has not been challenged for-cause and against whom the parties did not exercise a peremptory challenge shall be seated on jury following recital of the jury oath. At this point, "[t]he law presumes that each juror sworn in a case is impartial and above legal exception, otherwise he would have been challenged for 'cause.'" *State v. Persinger*, 62 Wn.2d 362, 366, 382 P.2d 497 (1963) (citing *U.S. v. Marchant & Colson*, 12 Wheat. 480, 25 U.S. 480, 6 L.Ed. 700 (1827). Moreover, once seated "[t]here is a presumption that [the juror] will be faithful to his oath

and follow the court's instructions." *State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960); *State v. Eggers*, 55 Wn.2d 711, 713, 349 P.2d 734 (1960) (noting that jurors are "assumed to be fair and reasonable"); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) ("The jury is presumed to follow the instructions of the court."). As *State v. Pepoon* held, and, as our courts have repeatedly quoted with approval:

> [w]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepoon, 62 Wn. 635, 644, 114 P. 449 (1911); *Grisby*, 97 Wn.2d at 509; *Moe*, 56 Wn.2d at 115.

Here, Mr. Lawler claims that juror #23, Mr. Shipman, demonstrated actual bias. Br. of App. at 13-17. Mr. Shipman relayed three incidents that happened to his family that he felt were similar to charges Mr. Lawler was facing. Voir Dire (VD) RP 30-32. One involved Mr. Shipman's mother being removed from the custody of her "natural father" at the age of five, and the second occurred when Mr. Shipman was about seven or eight and involved his sister being sexually abused by her stepfather. VD RP 30-32. Mr. Shipman's family told him about the two aforementioned incidents, i.e., he had no firsthand personal knowledge of,

or involvement in either incident and both occurred well into the past. VD RP 30-32.

The third incident involved Mr. Shipman's niece. VD RP 30. She was living at Mr. Shipman's house with a boyfriend who was allegedly physically and mentally abusive. VD RP 30-31. According to Mr. Shipman, the police were called on this boyfriend on numerous occasions; Mr. Shipman himself attempted to file a restraining order, which was denied by a judge, and the boyfriend was finally ejected from the house when Mr. Shipman filed an official eviction. VD RP 30-31.[2] Following these disclosures the following colloquy ensued:

> [STATE]: Oh. So anything about, you know, those experiences that would cause you difficulty, given the nature of the charges, being fair and impartial.
>
> JUROR: I don't see how I could be objective with all that past experience.
>
> [STATE]: All right. So if the Court asked you to, you know, try to set aside your personal experiences and judge the case just on its merits, do you think you could do that?
>
> JUROR: Honestly, I think that would be a pain in the neck, you know. I don't think I would be able to do that with all these experiences.

VD RP 32-33.

[2] Mr. Shipman also alleged that his niece's boyfriend pulled a gun on him on one occasion. RP 30-32.

The State did not ask Mr. Shipman any additional questions and neither Mr. Lawler nor the court questioned Mr. Shipman. Instead, Mr. Lawler asked the venire "[i]s there any person here that feels uncomfortable serving on this jury" and Mr. Shipman, along with six other jurors, raised their number. RP 78. Mr. Lawler questioned some, but not all of the jurors who raised their numbers. VD RP 78-81. After the attorneys completed their questioning of the panel, Mr. Lawler successfully challenged two jurors for cause. VD RP 83-84. Mr. Lawler also utilized five of six of his peremptory challenges. VD RP 85-88. Mr. Lawler did not challenge Mr. Shipman for cause nor did he exclude him from the jury by way of a peremptory challenge. Thus, the trial court read the following oath to the 12 jurors selected, including Mr. Shipman: "Do you solemnly swear or affirm that you will well and truly try this case, this issue between the State of Washington and this defendant, and render a true verdict according to the evidence and the instructions of the Court? If so, please say, "I will."" RP 238. All twelve jurors assented. RP238.[3] Consequently, Mr. Shipman sat on the jury that tried Mr. Lawler.

[3] The jurors were also instructed at the close of the case that it "is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case. . . . You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all

Additionally, during a recess between the State's questioning of the venire and Mr. Lawler's, three jurors were dismissed for cause on motion of the trial court or Mr. Lawler. RP 53-59. While one of those jurors appeared to have scheduling issues, all three of the jurors expressed concerns about the type of the case presented and two appeared obviously biased against Mr. Lawler. RP 53-59. Thus, by the time the jury was finally selected, the trial court had "excused a number of jurors for cause and demonstrated careful attention to the selection of an impartial jury." *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). Mr. Lawler had done the same through comprehensive questioning and the exercise of for cause and peremptory challenges. *See* VD RP.

In regards to Mr. Shipman, while his answers excerpted above were not the model of impartiality, neither did they evince actual bias. VD RP 32-33. Admittedly, Mr. Shipman doubted his ability to be objective[4] and to set aside his personal experiences, but he did not indicate an inability to (1) follow the court's instructions; (2) presume Mr. Lawler innocent; or (3) hold the State to its burden of proof. VD RP 30-33. Mr. Shipman also did not express any bias or prejudice against Mr. Lawler in

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parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict. CP 28-30; RP 528-531.

[4] There is no requirement that a juror be objective about the crimes at issue, and it's not clear what it would even mean to be objective about the crimes of Rape in the First Degree and Kidnapping. Most, if not all, jurors will have strong negative feelings about such serious crimes.

particular or in general against people charged with the crimes at issue. VD RP 30-33. Thus, Mr. Shipman's answers were not similar to those of jurors in other cases in which our courts have held that jurors in question expressed actual bias. *Irby* II, supra; *Gonzales*, supra; *Jackson,* supra; *Witherspoon*, supra; *Elmore*, supra.

Moreover, based on the information provided by Mr. Shipman, it does not appear that the facts relating to the incident he discussed in which he had first-hand experience were even remotely similar to the facts of Mr. Lawler's case. VD RP 30-33. Based on his disclosures, it's not conclusive that any bias Mr. Shipman harbored would be to the detriment of Mr. Lawler, as he seemed to portray a justice system that was slow and/or ineffective in resolving his problems and he appeared to remain puzzled that a judge denied the restraining order he sought. VD RP 30-33.

At most, when looking only at Mr. Shipman's words on the page, Mr. Lawler can establish *possible* bias; he cannot establish *probable* bias as the law requires. *Noltie*, 116 Wn.2d at 838-840. We know, however, that the meaning of answers is not best determined by just looking at the words on a page. Instead, the trial court, the attorneys, and Mr. Lawler himself were best able to assess Mr. Shipman's answers since they were all able to observe Mr. Shipman's "mannerisms, demeanor, and the like." *Irby* II, 187 Wn.App. at 19. None of those parties elected to challenge Mr.

Shipman's inclusion on the jury. When combined with the fact that (1) Mr. Shipman raised his hand and assented to "render a true verdict according to the evidence and the instructions of the Court;" (2) Mr. Shipman was later instructed by the court to "act impartially with an earnest desire to reach a proper verdict;" (3) the trial court acted assiduously during the voir dire process to help select on unbiased jury; and (4) there is a lack of proof of actual bias; it must be presumed that Mr. Shipman was not, in fact, biased. CP 28-30, RP 238, 528-531.

Furthermore, the law requires this court to presume, absent proof to the contrary, that once Mr. Shipman was seated he was "impartial and above legal exception." *Persinger*, 62 Wn.2d at 366 (citation omitted); *Moe*, 56 Wn.2d at 115 (holding once seated "[t]here is a presumption that [the juror] will be faithful to his oath and follow the court's instructions"). In sum, the record does not establish that Mr. Shipman demonstrated actual bias. Thus, the trial court did not err by not *sua sponte* dismissing Mr. Shipman. Mr. Lawler was convicted by an impartial jury.

b. The trial court may have erred had *it sua sponte dismissed Mr. Shipman.*

While the trial court has an independent duty to insure the right to try before an impartial jury, where it *sua sponte* (1) dismisses jurors who have not demonstrated bias or (2) dismisses jurors that a defendant

specifically chose not to challenge for tactical reasons, it runs the risk of unlawfully interfering with the defendant's fundamental right to make decisions about the course of his defense. The Sixth Amendment provides a defendant with the right to present a defense. *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013). This right arises from the respect of the "individual dignity and autonomy" of the defendant, and, [c]onsistent with this right, the Sixth Amendment requires *deference to the defendant's strategic decisions*." *Id.* (emphasis added). Because the defendant enjoys the fundamental right to control important strategic decisions, a trial court errs where it interferes with those decisions. *Id.* at 375-77; *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (holding a "defendant has a constitutional right to at least broadly control his own defense").

This right extends to the jury selection process as our courts have held, in discussing the right of the defendant to be present during voir dire, that "a defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *State v. Irby*, 160 Wn.2d 874, 883, 246 P.3d 796 (2011) (*Irby* I) (quoting *Snyder v. Mass.*, 291 U.S. 97, 106, 54 S.Ct. 330 (1934). In fact, the ABA Standards provide that strategic decisions to be made by defense counsel after consultations

with the defendant include which jurors to accept or strike. ABA Standard 4-5.2(b). Consequently, given the strategic importance of voir dire and the wide room for strategic decisions a defendant can make concerning which jurors to strike or accept, a court must not wade into the jury selection process *sua sponte* dismissing jurors absent an unmistakable demonstration of bias lest it interfere with a defendant's right to control his defense. In contrast, in *Irby* II the trial court was faulted for neglecting its independent duty to assure the defendant a fair trial by allowing a biased juror to be seated. *Irby II*, 187 Wn. App. 183. But the factual differences between *Irby* II and this case could not be more stark. There, not only was the defendant pro se, but he was absent during the entire voir dire process and had no opportunity to question jurors, excuse jurors by way of for cause or premptory challenges, or exercise any strategy or tactics to get a jury free of bias. *Irby* II, 187 Wn. App. 183. Thus, *Irby* II does not change the proper role of judge in the voir process when a defendant is present and represented by competent counsel.

Here, the trial court understood its proper role and, instead of acting *sua sponte*, suggested jurors on which Mr. Lawler may have wanted to use a for cause challenge. VD RP 54-59, 82-85. Mr. Lawler agreed on those the trial court mentioned, suggested his own, and properly exercised

five of his peremptory challenges[5] in order to secure the jury he desired. VD RP 54-59, 82-89. Because these decisions were a part of Mr. Lawler's right to control his defense, had the trial court dismissed Mr. Shipman, it may have erred.

c. *Mr. Lawler received the effective assistance of counsel because his trial attorney's decisions not to use a for cause or peremptory challenge on Mr. Shipman were tactical.*

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

[5] Leaving a challenge unused strongly suggests a strategic motive to select a particular jury or to avoid a particular juror. *See infra.*

perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.") (quotation and citation omitted). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or to trial tactics." (internal quotation omitted)). On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To establish ineffective assistance of counsel based on trial counsel's performance during voir dire, a defendant generally must demonstrate the absence of a legitimate strategic or tactical reason for counsel's performance. *State v. Johnston*, 143 Wn.App. 1, 17, 177 P.3d 1127 (2007). The failure of trial counsel to challenge a juror is not deficient performance if there is a legitimate tactical or strategic decision not to do so or if the challenge would not have been successful. *Alires*, 92 Wn.App. at 939; *Johnston*, 143 Wn.App. at 17.

Here, Mr. Lawler cannot demonstrate the absence of a legitimate strategic or tactical reason for his trial counsel's decision to not exercise a for-cause or peremptory challenge against Mr. Shipman. Mr. Lawler's trial counsel successfully questioned a number of potential jurors to expose bias and opinion, successfully challenged multiple potential jurors for cause, and he exercised five of six peremptory challenges before reviewing the composition of the jury, the potential jurors that could still be seated if he used his final peremptory, and said "Defense accepts as is. Pass on final. No. 6." VD RP 87-88. That Mr. Lawler's trial counsel's decision not to dismiss Mr. Shipman by way of peremptory challenge was a tactical decision is even more evident when considering that he did exercise a challenge to dismiss the first alternate juror. VD RP 88. That is, Mr. Lawler's trial counsel unmistakably decided that he would rather have

Mr. Shipman on the jury than juror #27, Kimberly Wier, the next juror in line to sit on the jury had Mr. Shipman been dismissed. VD RP 10, 88.

Mr. Lawler's trial counsel, in addition to the trial judge, was in the best position to observe Mr. Shipman and determine whether he was or was not biased and whether he may have been a favorable juror for the defense. Perhaps Mr. Shipman's mannerisms or the way in which he answered the questions revealed something; perhaps the answers Mr. Shipman provided in his questionnaire suggested he would be a good juror for the defense, perhaps Mr. Lawler's trial counsel postulated that because of Mr. Shipman's experiences that he would doubt the veracity of the victim in this case. There are a number of tactical reasons that Mr. Lawler's trial counsel could have had in electing not to dismiss Mr. Shipman. Consequently, Mr. Lawler cannot demonstrate deficient performance, and accordingly, that he received ineffective assistance.

II. The trial court did not deny Mr. Lawler his right to confront witnesses because it properly limited the scope of his cross-examination and impeachment of MDJ.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* (quotation and citation omitted). Likewise, "a court's limitation of the

scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion." *Id.* (citing *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984)).

A defendant's right to confront and meaningfully cross-examine "adverse witnesses is guaranteed by both the federal and state constitutions." *Id* at 620 (citations omitted). Confrontation in the form of cross-examination assures "the accuracy of the fact-finding process" by testing the "perception, memory, [] credibility," and bias of witnesses. *Id.* (citations omitted). Thus, "the right to confront must be zealously guarded." *Id.* Indeed, "latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony." *State v. Knapp*, 14 Wn.App 101, 107, 540 P.2d 898 (1975).

The right to cross-examine adverse witnesses, however, is not absolute as the scope of the examination can be limited by the trial court. *Id.*; *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950) ("Where the right [to cross-examination] is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court."). As *State v. Jones*, has stated:

> Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption . . . the evidence sought to be elicited must be material and relevant to the matters

> sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced.

State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Consequently, where a defendant's "offer of proof refer[s] to no specific acts, conduct or statements on the part of the witness, but vaguely tending to show bias in the most indefinite and speculative way," it would be "too remote to meet the purpose for which it was offered, and [a] trial court [could] properly h[o]ld it to be immaterial and irrelevant." *Id.*[6] Simply put, "[t]here is no right, constitutional or otherwise, to have irrelevant evidence admitted." *Darden*, 145 Wn.2d at 624.

The *Hudlow* test is used to determine whether a court properly limited a defendant's cross-examination. *Darden*, 145 Wn.2d at 621; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Under the *Hudlow* test:

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

[6] When a trial court excludes evidence it is incumbent on the party who sought to admit the evidence to make an offer of proof regarding the substance of the evidence. ER 103(a)(2); *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978) (quotation omitted) (holding it is the duty of the party offering evidence "to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling").

> State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 622.[7] Consequently, if the evidence or offer of proof is of the type mentioned above in *Jones*, *i.e.*, speculative, vague, or irrelevant, the analysis ends as the trial court properly denied cross-examination into such matters. Otherwise, if the defendant is able to adduce relevant evidence, or present an offer of proof, that is not vague or speculative, the reviewing court can then apply the remaining two prongs of the *Hudlow* test. Importantly, case law has held that a compelling State interest "includes an assurance that witnesses who come forward with evidence of a crime will not be discouraged from testifying because a prior conviction or misconduct may be revealed." *State v. Barnes*, 54 Wn.App 536, 539, 774 P.2d 547 (1989); *State v. Martinez*, 38 Wn.App. 421, 424, 685 P.2d 650 (1984). (1984)).

Here, Mr. Lawler sought to impeach the credibility of MDJ's pain complaints at the hospital by asking her about her desire to take pain medication or if she had been seeking pain medication. Br. of App. at 20[8]; RP 47-48. But the offer of proof was insufficient, somewhat contradictory,

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[7] The *Hudlow* test, as articulated in *Darden,* is not actually applied by the Court in *Darden*. 145 Wn.2d at 623 ("For the same reason the *Hudlow* test should not have been applied in *Reed*, it does not apply here. Simply put, the situation at hand is different from the one for which the *Hudlow* test was crafted.")

[8] "Her complaints of pain at the hospital were offered to corroborate her reports of what happened in the motel room, but the jury never heard she had a motive to lie about those complaints."

speculative, and of minimal, if any, relevance. During the motions in limine at the first trial, Mr. Lawler indicated, seemingly based on text messages between MDJ and him, that MDJ "had been asking for pain medication, pills, right up until the day of their rendezvous at the Value Motel" and that her "complaints of pain that she was having was a method for her to receive high-powered pain medication at the emergency room. . . ." RP 47-48. It does not appear, however, that Mr. Lawler sought to admit these text messages or that he had provided them to the State or trial court to substantiate his claims. RP 47-48; 249-51; CP 20 (State's Motions in Limine G) ("There has been mention that Defendant may have text messages on his phone where MDJ is allegedly engaging in pill seeking behavior[.] To date, the State has not seen this evidence. . . .").

Furthermore, following opening statements at the second trial, when the State complained that Mr. Lawler alleged in his opening statement that MDJ was seeking pain medication, Mr. Lawler responded that he was "not talking about her text messages requesting [drugs] from Mr. Lawler and her being unhappy that he didn't provide her with the drug she wanted, which was originally the issue, talking about this motive of why she was upset." RP 250; RP 249 ("We didn't talk about that in opening statement, about their relationship and why they were angry – she was angry at him for not bringing . . . her drugs."). Because Mr. Lawler

refused to substantiate his claims regarding MDJ's behavior and provided contradictory reasons for the why evidence might be relevant, his offer of proof on this issue was too speculative to be relevant. This is especially the case because had he asked MDJ about seeking pills, she could have just said no and that would have been the end of the so-called impeachment on that issue since he did not produce a witness who would have been able to rebut that claim, and the treating doctor testified that MDJ did not ask for pain medication. RP 360-61.

Moreover, because the evidence, through testimony and admitted exhibits, demonstrated that when MDJ was at the hospital she had abrasions, bruising, or swelling on her head, both shoulders, both calves, both feet, both thighs, on her lips and teeth line, finger, jaw, and left ear amongst her complaints of pain in areas that lacked visible injury, it is highly unlikely that the juror would have believed she only claimed to be in pain to receive medication. RP 360-61, 365, 424, 429-32, 435-36, 445-48, 454-55. Additionally, the level of pain she was or was not actually in is not relevant to the determination about whether Mr. Lawler committed his crimes. Her pain level was a collateral matter. Nonetheless, Mr. Lawler did ask MDJ about her drug use contemporaneous to the events to which she acknowledged using marijuana and he still characterized the two

parties as "two drug users at the Value Motel" during his closing argument. RP 486-87, 573.

In sum, the trial court did not abuse its discretion when it properly limited Mr. Lawler's cross-examination of MDJ because his offer of proof was insufficient, the evidence he sought to admit was too speculative to warrant relevance, and the State has a compelling interest in assuring that witnesses who come forward to report a crime will not be discouraged from testifying because alleged misconduct may be revealed. Even if the court erred, however, in limiting the cross-examination, the error was harmless. Aside from the plethora of injuries MDJ suffered as catalogued above, the physical evidence in the hotel room, to include the damaged toilet, drapes/curtains, and the sheets, also corroborated her version of the events. Moreover, that MDJ made up the lie that she was raped, kidnapped, and assaulted by her boyfriend all for the purposes of obtaining pain medication—and that she would continue this lie all the way through a jury trial—is too far-fetched to be believed. The evidence of Mr. Lawler's guilt was overwhelming.

III. The state did not ask the jury to consider the defendant's demeanor during trial.

Whether a jury can ever consider a non-testifying defendant's demeanor during trial as evidence is an open question. *State v. Barry*, 183

Wn.2d 297, 305, 352 P.3d 161 (2015). Nonetheless, in general, the practice of a prosecutor calling a jury's attention to a defendant's demeanor or otherwise commenting on it is disfavored. *Id.* at FN 4. Even if, however, a trial court improperly instructs the jury on the issue, the error is considered nonconstitutional and the nonconstitutional harmless error standard is applied. *Id.* at 305, 317-38.

Under that standard, "[t]he party presenting an issue for review has the burden of providing an adequate record to establish error. *Id.* at 317 (citing *State v. Andy*, 182 Wn.2d 294, 299-301, 340 P.3d 840 (2014) Thus, an appellant must be able to demonstrate that "within reasonable probabilities . . . the outcome of the trial would have been materially affected had the error not occurred." *Id.* at 318 (citations and internal quotation omitted). When the record is silent regarding a defendant's demeanor during trial "any argument about prejudice is completely speculative" and "it is impossible to know whether the demeanor 'materially affected' the verdict at all, and, even if it did, it is impossible to determine whether the effect was favorable or unfavorable" to the defendant. *Barry*, 183 Wn.2d at 318. Consequently, in such a procedural posture the defendant cannot succeed.

Here, Mr. Lawler complains that the State, during its closing argument, commented on his demeanor during MDJ's testimony and that

the trial court gave an improper oral instruction to the jury following Mr. Lawler's objection. Br. of App. at 22-23. Mr. Lawler's complaint cannot prevail for two reasons: (1) the State did not comment on Mr. Lawler's demeanor and (2) the record is silent as to Mr. Lawler's demeanor so even if there were error, he cannot prevail under the nonconstitutional error standard as explained in *Barry*. In closing the State said the following:

> [THE STATE]: Let's talk about [MDJ]. So we talked in voir dire and we talked about the topic of talking about a sexual encounter to the group during jury selection. It seemed to be pretty unanimous that nobody was really excited to do that. It seemed like something that – it's a private thing. And it's something that you keep within a circle of people that you trust: your friends, your family. It's not something that you want to get up and talk about in front of a group of people. And then we talked about well, what would it be like to talk about a nonconsensual experience in front of a group of people. And we seemed to have agreement that that would be an even more uncomfortable situation.
>
> And the reason I bring this up is [MDJ] came in, she came into a group of strangers in a rather grand, rather intimidating courtroom setting and she took the stand. And she talked about a nonconsensual experience. The variable for her that wasn't present in my hypothetical during jury selection was while she's talking about that experience, the person that was there was seated a few feet to her left. And he's sitting there a few feet to her left where he can eye her, stare her down. And she's –
>
> [MR. LAWLER]: Objection; Your Honor. There's no evidence of anything like that occurred.
>
> THE COURT: And, members of the jury, as I advised you earlier, what the attorneys say is not evidence in the case.

> It's up to you as the jury to reach the facts from the evidence you have heard. That includes closing argument here. So whether something is a part of the evidence or is not would be up to you to conclude. Counsel are certainly not to suggest something that they don't believe or think that the evidence did present, but it is up to you to reach those conclusions.
>
> [THE STATE]: So that's the context with which she gets up in front of all of you to testify.

RP 563-64.

In context, the State was not arguing that Mr. Lawler's demeanor or presence made him guilty, in fact, it did not comment on his demeanor at all, rather the State was commenting about the difficulty of testifying about being raped and how it's even more difficult to testify about such an incident in front of the person who did it—a straightforward notion. As the State continued its closing this purpose became even clearer:

> So here she is in what I would argue is a highly stressful situation for her. And was she acting in a way – again, going back to preconceived notions – the way we would expect from a victim? Well, that's up to you guys. But what I would ask is that when you're judging her credibility and the credibility of the testimony that you keep these things in mind in that lens that you view her testimony.

RP 565. Thus, the State did not impermissibly comment on Mr. Lawler's demeanor. Even if, however, the State's comments were in error such an error was harmless under any standard. For one, under *Barry*, Mr. Lawler

cannot show prejudice since the record is silent as to his demeanor. Second, the comment about which Mr. Lawler complained was fleeting, objected to, the court reminded the jury that the lawyer's comments were not evidence, and the State quickly moved on. Consequently, there was little, if any, prejudice and the physical evidence combined with the testimony of MDJ, the officers, and medical personal was enough to prove Mr. Lawler's guilt and the error harmless beyond a reasonable doubt.

D. CONCLUSION

For the reasons argued above, Mr. Lawler's convictions should be affirmed.

DATED this14th day of September 2015.

Respectfully submitted:

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September 14, 2015 - 3:57 PM

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