FILED
SEP 02 2016
WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO. 93517-3

NO. 73297-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

FRANK BORDERS,

Petitioner.

FILED
Aug 17, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable William Downing, Judge

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# PETITION FOR REVIEW

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RULES, STATUES AND AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Frank Borders asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Borders, filed June 20, 2016 ("Opinion" or "Op."), attached as this petition's Appendix A. A motion for reconsideration was denied on July 19, 2016. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

Did the inclusion of a biased individual on the petitioner's jury deny him his federal and state constitutional rights to a fair and impartial jury?

D. STATEMENT OF THE CASE[1]

The State charged Borders second degree rape of S.C. and J.P. for separate incidents occurring in 2007. CP 1-5. Borders's first trial ended with jury deadlock, and the court declared a mistrial. CP 390. Following a second trial, the jury convicted him as charged. CP 6. The court sentenced Borders to life in prison without the possibility of parole as a

[1] This petition refers to the verbatim reports as follows: 1RP – 12/3 and 12/8/14; 2RP – 12/9/14; 3RP – 12/15 and 12/17/14; 4RP – 1/14/15; 5RP – 1/15/15; 6RP – 1/20/15; 7RP – 1/21/15; 8RP – 1/22/15; and 9RP – 1/26, 1/27, 2/27, and 3/20/15.

persistent offender under "two strikes" and "three strikes" provisions. CP 6-16; former RCW 9.94A.030(33) (2006); RCW 9.94A.570.

Borders appealed. CP 20. He argued that the trial court erred in admitting evidence of prior misconduct under RCW 10.58.090 because that statute was unconstitutional. He also argued that, given the complainants' credibility issues at trial, the error was not harmless.

Following this Court's decision in State v. Gresham,[2] the Court of Appeals agreed and reversed Borders's convictions. CP 20-25.

Borders was tried again in January of 2015. The jury was unable to agree as to count 2 (relating to J.P.), and a mistrial was declared as to that count. 9RP 631-35. But the jury convicted Borders of count 1, relating to S.C., and the court again sentenced him to life without the possibility of parole, this time under the two strikes provision of the Sentencing Reform Act. CP 559-60.

Borders appealed, raising the issue discussed in this petition. The Court of Appeals rejected his arguments. Opinion at 2-7. He now asks this Court to review his case and reverse the Court of Appeals.

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[2] 173 Wn.2d 405, 269 P.3d 207 (2012).

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3) BECAUSE THE CASE INVOLVES A SIGNIFICANT CONSTITUTIONAL QUESTION.

The trial court denied Borders his state and federal constitutional rights to a fair and impartial jury by permitting juror 31, who expressed bias, to serve on his jury. This Court should grant review under RAP 13.4(b)(3) because the case presents a significant question of constitutional law.

1. Introduction to applicable law

The federal and state constitutions guarantee every accused person the right to a fair and impartial jury. Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002). To protect these rights, a potential juror will be excused for cause if his or her views would "'prevent or substantially impair the performance of [his or her] duties as a juror in accordance with [the] instructions and [the juror's] oath.'" Id. at 277-78 (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)).

Under RAP 2.5(a)(3), a party may raise, for the first time on appeal, a "manifest error affecting a constitutional right." An accused has

federal and state constitutional rights to a fair and impartial jury. The error alleged here, seating a biased juror, violates those rights. State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (citing In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)), review denied, No. 92191-1 (Feb. 10, 2016).

A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193 (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012), cert. denied, 134 S. Ct. 62 (2013); Hughes v. United States, 258 F.3d 453, 464 (6th Cir. 2001)).

By statute, "actual bias" warranting a juror's dismissal is defined as "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). Although the statute refers to the "challenged person" and "the party challenging," removal does not turn on whether a party has exercised a challenge:

> CrR 6.4(c)(1) states that "[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case." *This rule makes clear that a trial judge may excuse a potential juror where grounds for a challenge for*

> *cause exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so. . . .*

Davis, 175 Wn.2d at 316 (emphasis added); see also RCW 2.36.110 (requiring trial judge to excuse from further duty any juror "who in the opinion of the judge, has manifested unfitness as a juror by reason of bias"). CrR 6.4(c) and RCW 2.36.110 impose a continuing obligation on the trial judge to excuse an unfit juror, regardless of whether either party has exercised a challenge. Davis, 175 Wn.2d at 316.

Whether the trial court should have removed a juror for cause is reviewed for abuse of discretion. State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001). And where a juror should have been dismissed for cause, but ultimately decides the guilt of the accused, reversal is required. Gonzalez, 111 Wn. App. at 282; see also United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating a juror who should have been dismissed for cause requires reversal); Fire, 145 Wn.2d at 158 (same).

2. The record shows that juror 31 expressed actual bias and was never rehabilitated, and the trial court failed in its duty to excuse her.

The following facts demonstrate that the trial court abused its discretion and denied Borders his constitutional right to a fair and impartial jury by permitting juror 31 to decide the case. CP 580; 4RP 512

(identifying juror, referred to by name throughout the verbatim reports, as juror 31).

Before jury selection began, the judge reassured counsel that challenges for cause "shouldn't arise, if I'm doing my job. If a juror seems to me to be problematic for this case, then I will probably excuse the juror before spending undue time . . . with any attempts at maneuvering by either of the parties." 3RP 399. The judge also told the attorneys that, in general, he did not believe it was appropriate for the parties to argue challenges for cause before the panel. 3RP 399.

The following exchange occurred during voir dire: The court asked if any potential juror had friends or family members who had been victims of sexual assault or sexual misconduct. 4RP 436. The court received a number of responses. 4RP 437-41.

The court then asked if there was any potential juror who had been so victimized. 4RP 441. The court explained,

> I have two goals in asking all these questions. You know, first we want people to look within and make sure that they would be a fair juror in this case, not prejudging issues. We don't want anybody who, because of personal experiences, is going to jump to conclusions about the allegations in this particular case. And second of all, my purpose is that I don't want to see anybody on the jury for whom it would be too emotional, too difficult to sit in this case because of personal experiences.

4RP 441-42. The second juror to express concerns was juror 31. 4RP 442.

> THE COURT: . . . .Was there anybody in the box that had a hand up? Okay.
>
> Now, in the back there were a couple more hands . . . . And in the second row I get to [juror 31].
>
> JUROR [31]: Yes, I was 16, stranger, no criminal charges.
>
> THE COURT: The two concerns that I mentioned, the fairness of the process and your comfort –
>
> JUROR [31]: It's hard to know. It's hard to know until –
>
> THE COURT: Yeah.
>
> JUROR [31]: – the proceedings (Inaudible).
>
> THE COURT: Sure.
>
> JUROR [31]: However, I don't know if we're going to be asked about this, my proximity to the location.[3] I already feel a certain sense of safety issues in my neighborhood. I'm two blocks – I live two blocks from one of the situations.
>
> THE COURT: Right. Okay, all right. And there were a couple more hands all the way in the back row, I think.
>
> Let's see, Ms. [M-C].

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[3] The count 1 incident involving S.C. was alleged to have occurred in the Central District of Seattle, near 19th Avenue and East Yesler Way. See, e.g., 6RP 21 (police officer's testimony). Borders was ultimately convicted of count 1 only. CP 512 (verdict).

[DIFFERENT JUROR]: Yeah, so I was in high school. . . .

4RP 442. Earlier, juror 31 had mentioned that she lived within blocks of the location of the count 1 crime. 4RP 431; see also 4RP 457 (juror's 31's self-introduction, including neighborhood where she resided).

The court did not inquire further of juror 31, but rather immediately moved on to the next juror. 4RP 442. The court dismissed one of the jurors, but not 31, immediately after that series of questions. 4RP 444.

The court then asked jurors to introduce themselves and, after that, moved hardship excusal requests. 4RP 444-68. The court then allowed the parties to conduct their own questioning.

As the court had indicated, without prompting from the parties, the court later dismissed a number of other jurors who had offered problematic opinions or expressed discomfort with the facts of case. But it did not dismiss juror 31. 4RP 530-31, 533, 543. The parties did not exercise a peremptory challenge against her, and she sat on the jury. 4RP 545-56; CP 580.

3. Borders's conviction violates federal and state constitutional principles.

Contrary to the conclusion reached by the Court of Appeals, Op. at 7, the record demonstrates juror 31 expressed actual bias and was never

rehabilitated, and the court failed in its duty to excuse her. As the following cases reveal, it is error for a court to fail to inquire further of a juror, such as juror 31, who expresses serious doubts as her ability to be impartial. Such error violates the right of an accused to a fair and impartial jury, and it requires reversal in this case.

In Gonzales, a juror indicated she was more inclined to believe police officers and admitted she was not certain she could presume the defendant innocent in the face of officer testimony indicating his guilt. 111 Wn. App. at 278-81. Although the prosecutor expressed the intent to speak more with the juror, that never occurred. The juror was seated, and the defendant convicted. Id. at 279-80.

On appeal, the Court of Appeals recognized that the juror had admitted a bias for police and had questioned her own ability to follow the presumption of innocence. Moreover, the juror was never rehabilitated; in fact, there was not even an effort at rehabilitation. Id. at 281-82. Gonzales's conviction was reversed. Id. at 282.

In Hughes, the Sixth Circuit determined that the seating of an unchallenged juror who displayed actual basis likewise required a new trial. 258 F.3d at 464. The court asked potential jurors whether they thought they could be fair. One of the jurors volunteered that she had "'quite close'" ties to police officers. When the court asked if anything in

that relationship would prevent her from being fair, she said, "I don't think I could be fair.'" The court asked her again, "'You don't think you could be fair?'" The juror answered, "'No.'" Id. at 456. The court moved on to inquire of other jurors, and there was no follow up to this exchange. Later, the juror did not respond to general questions defense counsel posed to the group, including whether they would find a police officer witness more credible. Nor did she or any other juror respond when the court asked the group "if they all could find at that moment that [Hughes] was not guilty because there had not yet been any testimony." Id.

The appellate court discussed a number of cases in which courts denied relief where one or more jurors expressed doubts as to their own impartiality or even made statements that, on their face, clearly indicated actual bias. Id. at 458. The court held, however, that Hughes's case was distinguished by "the conspicuous lack of response, by both counsel and the trial judge, to [the juror's] clear declaration that she did not think she could be a fair juror." Id. Moreover, the court rejected the contention that "group questioning" of potential jurors was sufficient to rehabilitate the juror in question. Id.

Finally, in State v. Irby, the Court of Appeals reached the same result based on the trial court's failure to inquire of a potential juror who expressed her bias during voir dire. 187 Wn. App. at 197. At the

beginning of voir dire, the judge posed a general question designed to elicit potential bias. Juror 38 raised her hand, leading to the following exchange:

> JUROR: I'm a little concerned because I did work for the government, Child Protective Services, I'm more inclined towards the prosecution I guess.
>
> THE COURT: Would that impact your ability to be a fair and impartial juror? Do you think you could listen to both sides, listen to the whole story so to speak?
>
> JUROR: I would like to say he's guilty.

Id. at 190.

As in Hughes, there was no follow-up to this exchange. The judge moved on to a different juror, and juror 38 was never questioned individually about her remark that she "would like to say he's guilty."

The Court of Appeals determined the juror's statement was similar to the Hughes juror's statement that she did not think she could be fair. As in Hughes, there was a "'conspicuous lack of response.'" Irby, 187 Wn. App. at 196 (quoting Hughes, 258 F.3d at 458). Neither the trial court nor the prosecutor attempted to elicit from juror 38 any assurance that she had an open mind as to guilt. Irby, 187 Wn. App. at 196. Moreover, the situation was not remedied by the fact that, at the end of voir dire, the prosecutor reiterated the State's burden of proof and questioned the group generally: "does everybody here think that they can basically make a

finding of guilty or not guilty based on the evidence that you hear?" Id. The Court rejected State's contention that juror 38's impartiality could be inferred from the fact that she, like the rest of the potential jurors, made no response to this question. "[S]uch questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias. Id. (citing Hughes, 258 F.3d at 461).

The Court of Appeals concluded that juror 38 demonstrated actual bias and that seating her was manifest constitutional error requiring reversal and remand for a new trial. Irby, 187 Wn. App. at 197.

As in the foregoing cases, jurors 31's responses to the court's initial inquiry suggested she would be biased toward the State based on her history as a sexual assault victim. Not only did she express doubt as to her ability to be fair for that reason, also expressed concern that the proximity of her residence to the location of the crime in count 1 would interfere with her ability to decide the case. As in Hughes, no one, including the court, followed up on either concern.

The court had a duty to seat only unbiased jurors. The court had, in addition, painstakingly reassured counsel that it was the *court's* responsibility to dismiss jurors for cause if any issues arose. The court's failure to adhere to its promise and failure to inquire further regarding this juror's biases denied Borders a fair trial. Reversal is required. Irby, 187 Wn.

App. at 197.

In summary, the Sixth and Fourteenth Amendments and article 1, section 22 guarantee an impartial jury. Taylor, 419 U.S. at 526; Gonzalez, 111 Wn. App. at 277. The presence of even one biased juror cannot be deemed harmless. United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). Borders's conviction must be reversed.

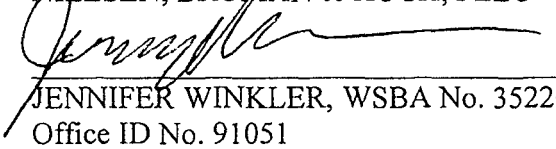
## E. CONCLUSION

This Court should accept review under RAP 13.4(b)(3) and reverse Borders's conviction.

DATED this 17TH day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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# APPENDIX A

COURT OF APPEALS DIV
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON, Respondent, v. FRANK RICARDO BORDERS, Appellant. | No. 73297-8-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: June 20, 2016 |

BECKER, J. — To assure a criminal defendant's constitutional right to a fair and impartial trial, the trial court has an obligation to excuse a juror for bias or other grounds of unfitness, regardless of whether either party has exercised a challenge. On appeal, Frank Borders contends the trial court erred by failing to dismiss sua sponte an allegedly biased potential juror. But the juror made no unequivocal comments reflecting actual bias. Nor does the record disclose any other circumstances establishing that the juror was unable to try the issues impartially. Because the trial court did not abuse its discretion in seating the juror, we affirm Borders' conviction for one count of rape in the second degree.

FACTS

The State charged Borders with two counts of rape in the second degree for separate incidents occurring in 2007 involving S.C. and J.P. Borders' first trial ended in a hung jury, and the trial court declared a mistrial.

Following a second trial, the jury found Borders guilty as charged. The court sentenced Borders to a mandatory life sentence under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981 (POAA), chapter 9.94A RCW. On appeal, we reversed and remanded for a new trial because the trial court erred in admitting evidence of a prior uncharged rape under RCW 10.58.090. State v. Borders, noted at 167 Wn. App. 1037 (2012); see also State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).

Borders' third trial occurred in January 2015. The jury found Borders guilty as charged for the count involving S.C. but was unable to reach a verdict on the count involving J.P. The court again imposed a mandatory life sentence under the POAA.

JUROR BIAS

Borders contends the trial court committed reversible error when it failed to excuse a biased juror who was not challenged by either party. He argues the presence of the biased juror, juror 31, violated his right to a fair and impartial jury

The trial court began voir dire with several preliminary questions about the potential jurors' knowledge of the case and their familiarity with the defendant, potential witnesses, and the location of the alleged crimes. The court then asked if anyone had family members or friends who had been the victim of sexual assault or sexual misconduct. After listening to the responses, the court asked if potential jurors had personally experienced such conduct:

> I have two goals in asking all these questions. You know, first we want people to look within and make sure that they would be a fair juror in this case, not prejudging issues. We don't want anybody

> who, because of personal experiences, is going to jump to conclusions about the allegations in this particular case. And second of all, my purpose is that I don't want to see anybody on the jury for whom it would be too emotional, too difficult to sit in this case because of personal experiences. So, again, those are — that's the purpose for asking.
>
> One of the first responses came from juror 31:
>
> THE COURT: . . . .
> Was there anybody in the box that had a hand up? . . . And in the second row I get to [juror 31].
>
> JUROR [31]: Yes, I was 16, stranger, no criminal charges.
>
> THE COURT: The two concerns that I mentioned, the fairness of the process and your comfort —
>
> JUROR [31]: It's hard to know. It's hard to know until —
>
> THE COURT: Yeah.
>
> JUROR [31]: — the proceedings (Inaudible).
>
> THE COURT: Sure.
>
> JUROR [31]: However, I don't know if we're going to be asked about this, my proximity to the location. I already feel a certain sense of safety issues in my neighborhood. I'm two blocks — I live two blocks from one of the situations.
>
> THE COURT: Right. Okay, all right. And there were a couple more hands all the way in the back row, I think.

After questioning the remaining potential jurors who had experienced sexual misconduct or abuse, the court asked the panel members to introduce themselves and provide limited biographical information. The deputy prosecutors and defense counsel then questioned the jurors.

During defense counsel's second session, she asked whether any juror or a close friend or family member had been the victim of a violent crime. Seven jurors, including juror 31, responded and identified themselves. When jurors 45 and 46 indicated they had significant concerns or discomfort because of the nature of the case, defense counsel asked whether anyone else had "similar feelings." One other person, juror 32, raised her hand. Juror 31 did not respond.

The trial court excused several potential jurors who expressed strong opinions or discomfort about the case. Neither party exercised a peremptory challenge for juror 31, and she sat on the jury.

"The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 22 of the Washington Constitution, guarantee a criminal defendant the right to trial by an impartial jury." State v. Davis, 175 Wn.2d 287, 312, 290 P.3d 43 (2012) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)), cert. denied, 134 S. Ct. 62 (2013).

Either party may challenge a prospective juror for actual bias, which 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); see also RCW 4.44.130. A juror's mere expression or formation of an opinion, however, is not sufficient to sustain a challenge. Rather, the trial court "must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

Under CrR 6.4(c), when the trial judge determines that there are grounds for challenging a juror, "he or she shall excuse that juror from the trial of the case." RCW 2.36.110 requires the trial judge to excuse from further duty any juror "who in the opinion of the judge, has manifested unfitness as a juror by reason of bias." CrR 6.4(c) and RCW 2.36.110 impose a continuing obligation on the trial judge to excuse an unfit juror, regardless of whether either party has exercised a challenge. See Davis, 175 Wn.2d at 316; State v. Lawler, No. 46593-1-II, 2016 WL 3022404 (Wash. Ct. App. May 25, 2016); see also State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000) (RCW 2.36.110 places "a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror"), review denied, 143 Wn.2d 1015 (2001).

We necessarily accord the trial court broad discretion in determining whether to excuse a juror for cause:

> "The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like."

State v. Irby, 187 Wn. App. 183, 194, 347 P.3d 1103 (2015) (quoting State v. Gonzales, 111 Wn. App. 276, 278, 45 P.3d 205 (2002)), review denied, No. 92191-1 (Wash. Feb. 10, 2016). But "the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." Irby, 187 Wn. App. at 193.

In responding to the trial court's question about whether her experience as a victim of sexual misconduct would affect "the fairness of the process" and her "comfort," juror 31 responded, "It's hard to know. It's hard to know until . . . the

proceedings." Juror 31 also volunteered that she felt "a certain sense of safety issues in my neighborhood" because she lived about two blocks away from where one of the charged incidents occurred. Borders argues that in the absence of any follow-up or rehabilitative questioning, juror 31's comments were sufficient to indicate actual bias and require the trial court to excuse her, even without a challenge for cause. We disagree.

We are unpersuaded by Borders' contention that juror 31's comments are comparable to those found to establish actual bias in State v. Irby; Hughes v. United States, 258 F.3d 453 (6th Cir. 2001); and State v. Gonzalez. In Irby, a prosecution for aggravated murder, a potential juror explained that because she had worked for Child Protective Services, she was "'more inclined towards the prosecution.'" Irby, 187 Wn. App. at 190. When asked whether that experience would affect her ability to be fair and impartial, the juror responded, "'I would like to say he's guilty.'" Irby, 187 Wn. App. at 190. Neither the trial court nor the prosecutor asked any follow-up questions seeking to determine whether the juror could remain impartial. We held that the juror's response was effectively an "unqualified statement that she did not think she could be fair" and that the trial court committed reversible error by refusing to excuse the juror sua sponte. Irby, 187 Wn. App. at 196.

In Hughes, discussed in Irby, one of the jurors stated that she had "'quite close'" connections to police officers and repeatedly informed that court that "'I don't think I could be fair.'" Hughes, 258 F.3d at 456. The Sixth Circuit found this declaration was "an express admission of bias" and that defense counsel's

failure to challenge the juror for cause constituted ineffective assistance. Hughes, 258 F.3d at 460.

In Gonzalez, a juror expressed her belief that "'unless they are proven otherwise,'" police officers "'are always honest and straightforward, and tell the truth.'" Gonzalez, 111 Wn. App. at 278. During a follow-up question, the juror added she would "'presume'" an officer who contradicted the defendant's testimony was telling the truth and expressed uncertainty that she could follow the court's instruction on the presumption of innocence. On appeal, we concluded that the juror "demonstrated actual bias" and that the trial court therefore erred in denying defense counsel's challenge for cause. Gonzalez, 111 Wn. App. at 282.

Irby, Hughes, and Gonzalez involved specific and clear expressions of bias or reservations about the jurors' ability to render a fair verdict. Unlike the responses in those cases, juror 31's statement that "It's hard to know. It's hard to know until . . . the proceedings" and acknowledgment of a "certain sense of safety issues in my neighborhood" constituted at best a cautious expression of uncertainty or potential concern in response to preliminary and general questioning. Juror 31 did not express a personal bias or concern that she could not follow the court's instructions or render a fair verdict. Such equivocal answers do not, without more, demonstrate the probability of actual bias or require removal for cause. See State v. Noltie, 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991); see also Lawler, 2016 WL 3022404, at *6. The trial court did not abuse its discretion in failing to excuse juror 31 for actual bias.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review, Borders contends the evidence was insufficient to support his conviction because S.C. committed perjury and made false statements to various State witnesses. But Borders' contentions involve credibility determinations, which this court cannot review. See State v. Hayes, 81 Wn. App. 425, 430, 914 P.2d 788 (appellate court defers to trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence), review denied, 130 Wn.2d 1013 (1996).

Borders also alleges that the State's use of a 1983 conviction was unconstitutional. But this bare assertion, which provides no information about the nature and occurrence of the alleged error or the resulting prejudice, is too conclusory to permit appellate review. See RAP 10.10(c) (appellate court will decline to consider issues in statement of additional grounds for review if they do not "inform the court of the nature and occurrence of alleged errors").

Affirmed.

Becker, J.

WE CONCUR:

Cox, J.

# APPENDIX B

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

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>FRANK RICARDO BORDERS,<br><br>Appellant. | No. 73297-8-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant, Frank Borders, has filed a motion for reconsideration of the opinion filed on June 20, 2016. Respondent, State of Washington, has not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 19th day of July, 2016.

FOR THE COURT:

Becker, J.

Judge

COURT OF APPEALS
STATE OF WASHINGTON
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