No. 100540-7
COA No. 80334-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM EARL TALBOTT II,

Respondent.

PETITION FOR REVIEW

ADAM CORNELL
Prosecuting Attorney

SETH A FINE
Deputy Prosecuting Attorney
Attorney for Petitioner

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

COURT RULES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The State of Washington asks this court to review the decision designated in part II. The State was plaintiff in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the respondent's conviction in an unpublished opinion filed December 6, 2021. The opinion is set out in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

(1) After challenging a juror for cause and having the challenge denied, the defendant chose not to exercise an available peremptory challenge against that juror. On appeal, can he claim that the juror should have been excused?

(2) When a potential juror gives equivocal answers concerning possible bias, is the trial court required to grant a challenge for cause?

IV. STATEMENT OF THE CASE

The defendant (respondent), William Talbott III, was found guilty by a jury of the aggravated first degree murders of Tanya Van Cuylenborg and Jay Cook. CP 143, 146. The evidence at trial is set out in the Brief of Respondent at 2-11. The murders were committed in November 1987. 3 RP 1035; 4 RP 1623-24.[1] The defendant was a stranger to both victims. 2 RP 901, 926. He was identified as the perpetrator in 2018 through genealogical DNA analysis. 5 RP 160-65.

The sole issue considered by the Court of Appeals concerned the trial court's denial of a challenge for cause to Juror 40. During voir dire, this juror said that her mother had been the victim of domestic abuse. She was questioned about this by counsel for both parties. The

---

[1] Most volumes of the report of proceedings cover multiple dates. They will be referred to as follows: 1 RP (December 13; March 14; April 12; June 7, 11, and 12); 2 RP (June 13 and 14); 3 RP (June 17 and 18); 4 RP (June 19 and 21); 5 RP (June 20).

relevant questioning is set out in the Court of Appeals' opinion at 5-8.

The juror said that if there was evidence of "action taken towards a young woman, I might take that personally and not be able to be impartial." 1 RP 293. If she saw graphic evidence, she didn't know if "a flood of emotion might come over me." 1 RP 294.

> I'm an emotional person as it is, and I try to be very, very logical and methodical in decisions I make in my life and, you know, trying to see both sides of everything. But like I said, if it's a case involving violence and women, it's just something that I've already experienced in my life, and I fear that I will always inherently have as a mother, so that's just the one thing that I probably couldn't get past.

1 RP 296-97.

The prosecutor asked her if she could put her emotional reaction aside and reach a conclusion based on the evidence. Juror 40 responded, "I could try." 1 RP 298.

> Just to note, it's something I usually express with my husband, that there's always multiple

> sides to a story, and I'm a fact-based person, so I could tell you that I will give it my very best, should I end up being on the jury, to do that.

1 RP 299.

The defense challenged Juror 40 for cause. 1 RP 301. The court denied the challenge:

> [T]he juror is not saying she cannot be fair and impartial, which clearly the Court would have to excuse the juror for that reason. I think we have jurors that express, as I think anybody would have to, because they haven't seen the evidence, and they're expressing some concerns about how they may react to it. I don't think there is sufficient basis here to excuse the juror for cause, because she's not saying she cannot be fair and impartial.

1 RP 302.

The defendant only exercised four peremptory challenges.[2] 2 RP 718-20; 2 CP 332. He did not challenge this juror, and she participated in deliberations.

---

[2] The respondent's brief incorrectly stated that the defendant exercised five challenges. Brief of Respondent at 20.

On appeal, the Court of Appeals considered the challenge to Juror 40. It rejected the State's argument that the defendant waived this issue by leaving his peremptory challenges unexhausted while failing to excuse that juror. Slip op. at 4. It then held that the juror had expressed actual bias, and her contrary statements were "equivocal at best." As a result, the trial court abused its discretion in failing to excuse her. Slip. op at 11-12. The court did not consider the other issues raised by the defendant. Slip op. at 12.

V. ARGUMENT

A. THIS COURT SHOULD RESOLVE THE CONFLICTING DECISIONS ON WHETHER A PARTY CAN DECLINE TO EXCUSE A JUROR VIA PEREMPTORY CHALLENGE, BUT STILL CHALLENGE THAT JUROR ON APPEAL.

The rule governing this case is set out in State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001). There, this court held that a defendant could "show no prejudice based on the jury's composition" if he "accepted the jury

as ultimately empaneled and did not exercise all of his peremptory challenges." The court characterized this as "well-settled case law." Id. at 762. It cited three prior cases with similar holdings: State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1999); State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969); and State v. Tharp, 42 Wn.2d 494, 500, 256 P.2d 482 (1953).

Here, the defendant accepted the panel after exercising only four peremptory challenges. 2 RP 718-20; 2 CP 332. He had at least another two challenges available. CrR 6.4(e)(1). If he was truly concerned that the juror was biased, he could have excused her. He would even have had another challenge left, for potential use against some other juror. Instead, he chose to leave the juror on the panel. Under the "well-settled law" cited in Clark, this should bar him from raising the issue on appeal.

The Court of Appeals, however, held that the defendant could still raise the issue. The court relied on its prior decision in State v. Peña Salvador, 17 Wn. App. 2d 769, 487 P.3d 923, review denied, 198 Wn.2d 1016 (2021). There, the court considered (and rejected) the defendant's challenge to a juror because it could not "definitively conclude" that the challenge was waived. Id. at 793 ¶ 27.

In Peña Salvador, the court examined this court's decision in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). That case involved the opposite situation from the present case: the defendant chose to use a peremptory challenge to dismiss a juror whom he had unsuccessfully challenged for cause. He subsequently exhausted his peremptory challenges. This court held that since no biased juror ultimately served, the defendant was not prejudiced. Id. at 164-65.

The decision in Fire includes the following statement:

> [I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Fire, 145 Wn.2d at 158.

No such situation was presented in Fire. There was therefore no issue before the court of what would happen if a defendant declined to use a peremptory challenge. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605, 618 ¶ 28, 486 P.3d 125 (2021). The dictum in Fire cannot overrule the holdings of Clark, Elmore, Robinson, and Tharp.

The Court of Appeals, however, is divided on whether to follow the dictum or the holdings. In Peña Salvador, the court cited a prior Division One decision that relied on the dictum. Peña Salvador, 17 Wn. App. 2d at 782 ¶ 24, citing State v. David, 118 Wn. App. 61, 68, 74 P.3d 686 (2003).[3] On the other hand, a published decision from Division Three held that a defendant waived his challenge to a juror, by deciding not to remove that juror via peremptory challenge. The court reached that result even though the defendant exhausted his peremptory challenges on other jurors. State v. Munzanreder, 199 Wn. App. 162, 179-80 ¶ 51, 398 P.3d 1160, review denied, 189 Wn.2d 1027 (2017). In cases where the defendant had unexhausted challenges, recent

[3] There were two subsequent appellate decisions in David following remands from this court. Both dealt with issues unrelated to jury selection. State v. David, 130 Wn. App. 232, 122 P.3d 764 (2005), remanded, 160 Wn.2d 1001, 156 P.3d 903, modified on remand, 140 Wn. App. 1018, 2007 WL 2411693 (2007).

unpublished decisions from both Division Three and Division One have reached the same result. State v. Cadenas, 15 Wn. App. 2d 1057, 2020 WL 7586972 (Div. III 2020); State v. Gebremariam, 16 Wn. App. 2d 1009, 2021 WL 164707 (Div. I), review denied, 198 Wn.2d 1012 (2021). The latter case specifically characterized the statement in Fire as dicta. Gebremariam at *2.

It is hard to understand the rationale for allowing a party to accept a juror by declining to use an available peremptory challenge, but then challenge that juror on appeal. A primary reason for peremptory challenges is "to help secure the constitutional guarantee of trial by an impartial jury." Fire, 145 Wn.2d at 166 (Alexander, C.J., concurring), quoting United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). When a defendant uses a peremptory challenge to achieve that goal, he has not been deprived of any constitutional right. Fire, 145 Wn.2d at 162 (court's

opinion). Conversely, if a defendant chooses *not* to use an available challenge to remove a juror, he should not be allowed to complain that the court should have removed the juror for him.

Under such circumstances, a defendant's decision not to remove a juror must rest on one of two possible tactical decisions. The most likely possibility is that the defendant agreed with the court's determination that the juror was not biased. The other possibility is that the defendant wished to create a situation of "heads I win, tails you lose"—one in which an acquittal would be final, while a conviction could be overturned on appeal. In either case, the fundamental situation is the same: the defendant knowingly and voluntary chose to entrust his liberty to the judgment of a particular juror, despite having full power to remove that juror.

One might think that it would be rare for a defendant to use this tactic. But an examination of recent appellate

decisions indicates that it has become somewhat common. Since 2020, the Court of Appeals has decided four cases in which defendants sought to challenge jurors on appeal, after failing to excuse the juror via peremptory challenge. In two of the cases (the present case and Peña Salvador), the court considered the challenge. In the other two cases (Cadenas and Gebremariam), the court refused to consider it.

This situation cries out for clarification from this court. In a series of cases, this court has set out a rule precluding appellate challenges to jurors who could have been removed via peremptory challenge. In dicta, however, this court seemingly repudiated that rule. The Court of Appeals is rendering conflicting decisions on whether to follow the rule or the dicta.

The decision of the Court of Appeals in the present case conflicts with this court's decisions in Clark, Elmore, Robinson, and Tharp. It also conflicts with the published

decision of Division Three in Munzanreder. There continue to be conflicting decisions on this recurring issue. This creates an issue of substantial public interest that should be determined by this court. Review should be granted under RAP 13.4(b)(1), (2), and (4).

B. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' SUBSTANTIAL MODIFICATION OF THE ESTABLISHED STANDARD FOR REVIEWING TRIAL COURTS' DECISIONS ON CHALLENGES FOR CAUSE.

1. The Court Of Appeals Rejected This Court's Holding That A Juror's Equivocal Answers Alone Do Not Require Granting A Challenge For Cause.

If the defendant can raise the issue, this case presents an important question about the standard for granting challenges for cause. The governing decision is State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991). During voir dire in that case, a prospective juror said that she might find it difficult to give the accused a fair trial. She said, however, that she hoped that she would be fair and that she would try to be fair. Id. at 836. Despite these equivocal statements, this court deferred to the trial

court's exercise of discretion in determining that the juror was not biased. Id. at 839-40.

In the present case, the juror gave similarly equivocal answers. On the one hand, she said that she "probably couldn't get past" her emotional reaction. 1 RP 297. On the other hand, she said that she was a "fact-based person" and would "give it my very best" to decide the case on the evidence. 1 RP 299. The Court of Appeals nonetheless held that these statements required the trial court to excuse the juror. Slip op. at 12.

In reaching this result, the Court of Appeals reversed the standard set out in Noltie. Noltie holds that "equivocal answers alone do not require a juror to be removed when challenged for cause." Noltie, 116 Wn.2d at 839. The same rule was reiterated in State v. Sassen Van Elsloo, 191 Wn.2d 798, 808-09 ¶ 21, 425 P.3d 807 (2018). In the present case, however, the Court of Appeals held that absent an "unequivocal statement

indicative of [the juror's] rehabilitation," the trial court was required to grant a challenge of cause. Slip op. at 11.

The Court of Appeals' explanation for failing to follow Noltie was that it "does not reflect the nuance that has developed in the case law over time." Id. To establish this new case law, the court cited two Ninth Circuit decisions: United States v. Kechedzian, 902 F.3d 1023 (9th Cir. 2018), and United States v. Gonzalez, 214 F.3d 1109 (9th 2000). Both of those cases hold that a juror's equivocal statements concerning impartiality may compel a finding of bias. Kechedzian, 902 F.3d at 1031; Gonzalez, 213 F.3d at 1114. The Court of Appeals also cited its own prior holding in State v. Guevara Diaz, 11 Wn. App. 2d 843, 456 P.3d 869 (2020). That decision relies on the same federal cases.

The Court of Appeals clearly erred in relying on federal cases that contradict this court's holding. The Court of Appeals is bound by decisions of this court. State

v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Even on issues of federal law, Washington courts are not bound by decisions of inferior federal courts (such as the Ninth Circuit Court of Appeals). State v. Barefield, 110 Wn.2d 728, 732 n. 2, 756 P.2d 731 (1988). If the holding of Noltie needs to be modified in light of subsequent federal cases, the responsibility of doing so rests with this court. The Court of Appeals lacks that power.

2. The Court Of Appeals Failed To Respect The Trial Court's Assessment Of The Juror's Demeanor.

This court has recognized that a juror's demeanor is an important factor in deciding whether that juror can be impartial.

> 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. The [appellate] court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision.

Noltie, 116 Wn.2d at 839, quoting Orland & Tegland, Trial Practice § 202 (4th ed. 1986).

Instead of respecting the trial court's assessment of demeanor, the Court of Appeals put determinative weight on whether the juror's statements were "equivocal" or "unequivocal." The problem with this approach is that people vary greatly in their willingness to express certainty. One person's "I will give it my very best" may express more certainty than another person's "I will do it." Only the trial court was in a position to make an accurate determination of whether this juror was or was not able to accomplish what she said she wanted to do—put emotion aside and make a rational assessment.

Indeed, the Court of Appeals' emphasis on certainty can be counterproductive in some situations. This court

has recognized the need for judges to "develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases." Letter from Supreme Court to Legal Community (June 4, 2020), quoted in State v. Scabbyrobe, 16 Wn. App. 2d 870, 906-07, 482 P.3d 301 (2021) (Appendix to dissenting opinion of Fearing, J.). The same should be true of jurors. If a juror is aware of potential biases and determined to overcome them, this may make her a better juror than one who denies any bias. Yet the Court of Appeals decision assumes the opposite—that if a juror expresses uncertainty about her ability to overcome bias, she cannot be fair and must be disqualified. This court should review the Court of Appeals' new standard.

3. The Court Of Appeals Created A New Rule That Doubts Regarding Bias Must Be Resolved Against Seating The Juror.

The standard applied by the Court of Appeals is also new in a third respect. The court announced a rule

that "[d]oubts regarding bias must be resolved against a juror." Slip op. at 12. This court has said the opposite: "a mere possibility of bias is not sufficient to prove actual bias; rather, the record must demonstrate that there was a probability of actual bias." Sassen Van Elsloo, 191 Wn.2d at 809 ¶ 21; see Noltie, 116 Wn.2d at 840.

In applying this standard, the Court of Appeals followed a two-stage analysis. It distinguished between "express[ing] actual bias" and being "rehabilitated by further questioning." At the first stage, the court found "clear, repeated statements of actual bias."[4] Slip op. at 12.

---

[4] The opinion asserts that "[a]t oral argument on appeal, ... the State agreed that juror 40 demonstrated actual bias." Slip op. at 5. The recording of the argument shows no such statement. To the contrary, when asked about the juror's statement that purportedly indicated bias, the prosecutor said that "her answers are still very equivocal." The recording can be accessed at invintus-audio.global.ssl.fastly.net/9375922947/e4550f72fe0aacff47b7470e328d69c9d1b89f5c_audio.mp3. The quoted statement begins at time 13:03.

In fact, those statements were equivocal. The juror's strongest statement was that she "probably couldn't get past" her emotional reaction. 1 RP 297. Apart from that, the juror said that might not be able to be impartial, and that she didn't know if she could be. 1 RP 293-95. All of this is equivocal.

At the second stage, the court determined that the juror's equivocal statements were insufficient to overcome the showing of bias. Slip op. at 12. This reflects the court's new standard that doubts must be resolved against the juror. Id.

The two-stage analysis has no basis in this court's decisions. In Noltie, this court did not separately analyze the juror's "bias" and "rehabilitation." The court instead looked at the juror's responses as a whole. In doing so, it did not assume that equivocal statements indicated bias. Rather, it deferred to the trial court's discretion in

determining whether the answers reflected honest caution or a likelihood of actual bias. Noltie, 116 Wn.2d at 839-40.

The intensive scrutiny of juror qualifications in this case is not an isolated occurrence. This is the third time in the past six months that the Court of Appeals has found an abuse of discretion in a trial court's rejection of a challenge for cause. See State v. Turnbough, 19 Wn. App. 2d 1001, 2021 WL 3739178 (Div. II 8/24/2021); State v. Girault, 2021 WL 4947120 (Div. I 10/25/21). The Court of Appeals also cited its 2020 decision in Guevara Diaz. There, the court held that a juror's answer to a questionnaire was sufficient by itself to establish actual bias. Guevara Diaz, 11 Wn. App. 2d at 858 ¶¶ 38-40. In reaching this result, it disregarded the trial court's explanation of why an unbiased juror might give that answer. Id. at 847-48 ¶ 9.

These decisions reflect a new era of scrutinizing trial courts' denials of challenges for cause. The Court of

Appeals has expressly abandoned the standards set out by this court in Noltie and reiterated in Sassen Van Elsloo. In their place, the Court of Appeals has adopted standards based on federal cases. These standards do not defer to the trial court's assessment of juror demeanor when interpreting equivocal responses. Instead, they treat equivocal answers as establishing bias, unless that bias is unequivocally repudiated.

The decision of the Court of Appeals conflicts with this court's decisions in Noltie and Sassen Van Elsloo. The intensive scrutiny of trial court decisions creates an issue of substantial public interest that should be determined by this court. Review should be granted under RAP 13.4(b)(1) and (4).

VI. CONCLUSION

This court should grant review and reverse the decision of the Court of Appeals. The case should be

remanded to that court for determination of the other issues raised in the appellant's briefs.

This petition contains 3631 words (exclusive of appendix, title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on January 5, 2022.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: Seth A Fine
SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Petitioner

APPENDIX

FILED
12/6/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM E. TALBOTT II, Appellant.	)	No. 80334-4-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — William E. Talbott II was found guilty of two counts of aggravated murder in the first degree following a jury trial. He was arrested over 30 years after the murders were committed. Talbott asserts numerous evidentiary and constitutional errors occurred at trial that warrant reversal. Since seating a biased juror is reversible error, we need not reach his other various challenges argued in briefing or the issues Talbott raises in a pro se statement of additional grounds for review. We reverse.

FACTS

Jay Cook and Tanya Van Cuylenborg left Victoria, British Columbia on November 18, 1987. Cook was 20 and Van Cuylenborg was 18-years-old. The couple was on an errand for Cook's father to retrieve furnace parts from Gensco, Inc. in Seattle.

On November 24, 1987, Van Cuylenborg's body was discovered down a steep embankment off Parson Creek Road in a rural wooded area in Skagit County. She was nude from the waist down, her bra was pulled above her breasts and she had a single, close-range gunshot wound to the back of her head. A bullet fragment was recovered from her skull.

The following day, the van that the pair had been traveling in was found in Whatcom County. Inside the van was a money order made out to Gensco. A used tampon and a comforter, with what appeared to be blood on it, were also found in the rear cargo area.

On November 26, 1987, Cook's body was discovered in a rural area of Snohomish County. Cook was partially covered with a blue blanket and he had multiple blunt force wounds to his head. A pack of cigarettes had been shoved down his throat. Cook's cause of death was determined to be strangulation by ligature, specifically twine and what appeared to be a red dog collar.

An unknown DNA[1] profile was developed from a semen stain on Van Cuylenborg's pants found inside the van. A vaginal swab taken from Van Cuylenborg's body contained the same male DNA profile. Another non-sperm DNA profile was also identified on the vaginal swab. Cook was excluded as the contributor of either DNA profile. No comparison could ultimately be made as to the non-sperm DNA profile.

Through genealogy matching in 2018, William Talbott was identified as a possible source of the unknown male DNA profile developed from the semen. As

[1] Deoxyribonucleic acid.

a result, undercover officers surveilled Talbott and eventually collected a coffee cup he discarded. Talbott's DNA from the coffee cup matched the male profile from Van Cuylenborg's pants and vaginal swab. Based on this match, police arrested Talbott at his job site in May 2018.

Talbott was charged with two counts of aggravated murder in the first degree and proceeded to trial. During voir dire, a juror was identified for further individual questioning based on her answers to a general questionnaire administered at the start of jury selection. During the individualized inquiry, the juror indicated that she believed she might have difficulty with the topics and evidence of the trial, due to past traumatic experiences and as a new mother, such that she was unsure if she could be fair. Talbott moved to have this juror dismissed for cause. The trial court denied the motion, and the potential juror was seated on the jury and deliberated.

At trial, the State presented a theory in which Van Cuylenborg had been murdered after she was raped and that Cook's death was related to those crimes since they were known to have been traveling together. The State admitted graphic photos of the couple's bodies, the scenes in which they were discovered, and the autopsies of the victims. There was testimony as to the vaginal swab and other forensic evidence collected from the van. The State relied on this testimony as support for its theory that Van Cuylenborg had been raped. The jury found Talbott guilty as charged following three days of deliberation. The trial court sentenced Talbott to life in prison without the possibility of parole. Talbott now timely appeals.

ANALYSIS

Talbott argues that his right to an impartial jury was violated because a juror who expressed actual bias was seated and deliberated on his case. He challenged juror 40 for cause, but it was denied by the court after individual voir dire by both parties.

As a preliminary matter, the State argues that Talbott had waived this issue by failing to exhaust all of his peremptory challenges after the for-cause challenge to juror 40 was denied. Having previously held that this precise waiver argument is incorrect, we disagree with the State and reach the issue. See State v. Peña Salvador, 17 Wn. App.2d 769, 776–83, 487 P.3d 923 (2021).

Both our federal and state constitutions guarantee a criminal defendant the right to trial by an impartial jury. State v. Guevara Diaz, 11 Wn. App. 2d 843, 854–55, 456 P.3d 869 (2020). "To protect this right, the trial court should excuse a prospective juror for cause if the juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Peña Salvador, 17 Wn. App. 2d at 784 (internal quotation marks omitted) (quoting State v. Gonzalez, 111 Wn. App. 276, 277–78, 45 P.3d 205 (2002)). Either party may challenge a prospective juror for cause based on actual bias. RCW 4.44.130; .170(2). 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). The seating of

a biased juror cannot be harmless; such an error requires a new trial without a showing of prejudice. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

This court reviews a trial court's denial of a for-cause challenge for abuse of discretion. Guevara Diaz, 11 Wn. App. 2d at 856. Though the trial court is in the best position to evaluate a juror's ability to be fair and impartial, the trial court's discretion in conducting voir dire is "nevertheless subject to essential demands of fairness." Id. (internal quotation marks omitted) (quoting Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2011)).

Here, Talbott argues the trial judge improperly allowed juror 40 onto the jury after she had expressed actual bias and was not rehabilitated by further questioning. At oral argument on appeal, both Talbott and the State agreed that juror 40 demonstrated actual bias through her comments during voir dire and that the primary question for this court was whether she had been rehabilitated. As such, the relevant portions of voir dire are as follows:

> [Juror 40] A. Okay. I grew up in a single-parent household, and my mother was the victim of a lot of domestic abuse. So while I am able to reasonably set aside my own, I guess, experiences in life, I just wanted to put that out there, because I don't know how I would feel, being shown evidence of something that could bring up memories that I have worked to get rid of.
>
> [Defense counsel] Q. Okay. So do you think that would affect you to the point where you think you could not be fair and impartial in assessing the evidence in this case as to both the [S]tate and Mr. Talbott?
>
> A. To be honest, I—feel like I wouldn't know until the time came. But I also have a daughter, and I think that might also play a part in how I might feel. If there was some action taken towards a young woman, I might take that personally and not be able to be impartial.
>
> . . .
>
> A. She just had very abusive men in her life.
>
> Q. And so that was sort of ongoing?

A. Yes. Bad choices. Lots of them.
Q. How old is your daughter now?
A. She's 14 months.
Q. So in—from our perspective, what we're doing is, we're looking to find jurors who can just assert that they could be fair and impartial in a case like this because of the difficult subject matter. You've indicated that because of your experience, both as a daughter and a mother, that this may not be that kind of case for you.
A. Yeah. Based on what I read in the questionnaire that we were given, there was a small section that referenced seeing potentially graphic evidence. And that's where I don't know if, you know, me sitting here, just looking at photos of people I don't know, allow me to be impartial, and what I believe my judgment towards something could be.

However, I just—I don't know if a flood of emotion might come over me, if I were to look at pictures that were very graphic, or made me think what if this was my loved one, or this looks similar to something that I saw previously in my life and cloud my judgment.

Q. And I appreciate that. Obviously, we're not mind readers, and if—so you're honest in telling us that you think that this could happen, that you could see these things and feel outrage, I guess; correct?
A. I suppose.
Q. And react. Well, I mean—
A. A myriad of emotions. I don't know what could happen.
Q. When we talk about being biased, it isn't that you're an unfair person or dishonest person, it's just that you may see things that may make you think of the defendant unfavorably so you can't be fair in this case.
A. Yes.
Q. And that can be outrage from the pictures that you see, based on an emotional response that you have to them, that you don't want to consider that stuff anymore, you just want to put that in a box and be done with it; right?

In this case you would hear and see all of that kind of evidence. You would hear about a young woman, 18 years old, who was murdered, who the [S]tate is accusing of—is accusing was sexually assaulted. You would hear that her boyfriend was murdered. You would hear from family members who would testify about the loss that they've suffered. And this would go on for weeks.

I mean I can't—I don't—you have to tell me if you think that this is just not the right case for me, that there's enough of a chance that I could be biased that I don't want to sit on a jury where I have to be fair where I don't know if I can. If that's your position, I would ask that you tell me.

A. That's my position.
Q. And is there anything that would—I mean, the Court can't order you not to be emotional; right?
A. Right.
Q. I mean, the Court can't order you not to have an emotional response to certain things; correct?
A. Right. I mean, it's natural. Nobody is without emotion, I guess, unless you're a bona fide sociopath. I don't know, even then, I guess you would have some degree of emotion; right?
Q. Right
A. It's just, like I said, I'm an emotional person as it is, and I try to be very, very logical and methodical in decisions I make in my life and, you know, trying to see both sides of everything. But like I said, if it's a case involving violence and women, it's just something that I've already experienced in my life, and I fear that I will always inherently have as a mother, so that's just the one thing that I probably couldn't get past.
Q. I mean, you would be a great juror on a different kind of case; it's just not this kind of case.
A. Right.
. . .
[Deputy Prosecutor] Q. So regardless of whether or not you think you would be this—this is the best case for you to be a juror on, that's not really the question. The question is, do you think that you can take anything that happened to your mother, anything that could potentially happen to your daughter, my daughter, anyone's daughter, set those things aside, listen to the evidence, look at the evidence, and come to a conclusion at the end just based on the evidence that you hear in this courtroom.
[Juror 40] A. I could try.
Q. Okay
A. I can't guarantee anything; right?
Q. No, I think that's a fair way to put it. Especially when you're dealing with things like this, and sort of this mirror that we put in front of your soul today, so you can look in and sort of think about some of these things you probably never thought about before.

In regards to looking at the graphic evidence, once again, is that something—I don't think you're going to find anyone in here that's going to tell you you shouldn't be emotional about that, or it shouldn't affect you, but is that something that you can take those emotions, set them aside, know that bad things happened to the female and the male alleged victims in this case, but then come to a conclusion of Mr. Talbott's innocence or guilt based on the evidence, and not based on anything, any other experience that you've had?
A. I could try

> Q. Okay.
> A. Just to note, it's something I usually express with my husband, that there's always multiple sides to a story, and I'm a fact-based person, so I could tell you that I will give it my very best, should I end up being on the jury, to do that. I just wanted to point this out to you, in case, in how you make your determination, that's a factor, you know. I'm an emotional being, like all of us, so it's just—the potential is there.

Talbott argues his case is comparable to United States v. Kechedzian, 902 F.3d 1023 (9th Cir. 2018). In that case, the Ninth Circuit found that a biased juror was seated in violation of Kechedzian's right to an impartial jury under the Sixth Amendment to the United States Constitution. Id. at 1031. Kechedzian was charged with multiple counts relating to identity theft. Id. at 1025. During voir dire, a juror expressed that they had been a victim of identity theft previously, and asserted, "I would try to be fair . . . and put my personal experience aside." Id. at 1026. The court then requested, "But if it turns out you're going through this process and you feel you can't—it's not working, would you tell us?" To which the juror responded "Yes." Id. Later, the court asked a general question as to whether anyone felt they could not follow the principles in regard to the presumption of innocence and juror 3 did not respond in the affirmative. Id. The defense brought a for-cause challenge to juror 3. The district court denied the challenge, citing the fact that the juror did not respond in the affirmative to the general question of the venire. Id.

The Kechedzian court analyzed actual bias as to the juror and determined that the case was controlled by United States v. Gonzalez, which rejected the notion that equivocal answers regarding a juror's ability to be fair were sufficient to ensure a fair and impartial verdict. Id. at 1028-30 (citing Gonzalez, 214 F.3d 1109,

1113–14 (9th Cir. 2000)). The Ninth Circuit noted in particular that the jurors in both Gonzalez and Kechedzian were asked three separate times if they could remain impartial. Id. at 1030. The Kechedzian court rejected the argument that the general question regarding the presumption of innocence and the burden of proof was sufficient to provide any assurance that the juror could be impartial because those are distinct legal principles from impartiality. Id. at 1030–31. It further noted that the suggestion that the juror would inform the court if "it's not working" was not an acceptable resolution to addressing bias. Id.

The matter before us is similar to both Kechedzian and Gonzalez in that juror 40 indicated she had personal experience that led her to question whether she would be able to be impartial in her consideration of the case. Further, juror 40 was directly asked several times if she believed that she could be impartial, and each time she responded with equivocal answers and affirmative statements that she may be biased, like the jurors in Kechedzian and Gonzalez. Kechedzian, 902 F.3d at 1029; Gonzalez, 214 F.3d at 1111 (Responses of Kechedzian juror to inquiries about her ability to be impartial were: (1) "I might be able to put that aside;" (2) "I would want to put my personal stuff aside, but I honestly don't know if I could;" and (3) "I would try to be fair."; Gonzalez juror responses regarding being fair/impartial were: (1) "I will try to;" (2) "Right. I'll try;" and (3) "I'll try."). Here, we have equivocal responses to attempts at rehabilitation similar to those in these federal cases. When the State asked if she could "come to a conclusion at the end just based on the evidence that you hear in this courtroom," juror 40 replied "I could try." When the State tried again and asked directly if she could put her

emotions aside to "come to a conclusion of Mr. Talbott's innocence or guilt based on the evidence, and not based on anything, any other experience that you've had," she again only offered "I could try." When asked at oral argument to identify where the purported rehabilitation of juror 40 could be found in the record, the State offered nothing beyond this latter exchange. It is especially noteworthy that the concerns raised by juror 40 as to the sort of things which gave rise to her bias were in fact introduced by the State at trial; both violence against a young woman and accompanying graphic photos.

The State's argument that this court should reject Ninth Circuit case law based on substantive differences in our state case law, fails in light of a recent opinion from this division, Guevara Diaz, which expressly utilized Gonzalez and other federal cases to reach its ultimate conclusion. 11 Wn. App. 2d 843, 456 P.3d 869 (2020). This is necessarily because the federal constitution is implicated in cases where one is claiming a violation of their right to a fair trial and federal case law guides us as to the minimum standards for jury selection. Further, the State's argument seems to ignore the fact that seating a biased juror in a criminal trial in state court would still violate the federal constitution.

The State instead urges reliance on State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991). In Noltie, a juror stated that she "might" have difficulty being fair in the case. Id. at 836. However, that statement was followed by numerous clear indications of her rehabilitation, providing "The more I've listened to the Court and the more I participated in it, it seems that it would be a lot easier to be fair, but at first I was very apprehensive about it." Id. The Noltie juror then went even further

with her comments indicative of rehabilitation, expressly declaring that "it would be a terrible injustice to the defendant not to have a fair trial and not to have people see him as innocent."

Noltie was decided decades prior to Guevara Diaz and Gonzalez and therefore does not reflect the nuance that has developed in the case law over time. More critically here, though, is the fact that juror 40 did not provide an unequivocal statement indicative of her rehabilitation. In her final responses after the State's attempt to rehabilitate her, she reaffirmed that she remained unsure of her ability to set aside her bias. After questioning by the defense and the State, juror 40 was still not confident in her ability to overcome her clearly expressed bias, which involved the precise nature of allegations that went to the heart of this case ("some action taken towards a young woman") and the exact sort of graphic evidence introduced throughout the trial ("a flood of emotion might come over me, if I were to look at pictures that were very graphic, or . . . similar to something that I saw previously in my life and cloud my judgment"). This was a case centered on sexual and other physical violence against a woman, and a man based on his proximity to her, and necessarily required jurors to examine and consider graphic descriptions and visual evidence of such.

Finally, the statements juror 40 made that the State relies on for its argument that she was properly rehabilitated, are equivocal at best. The challenged juror in Noltie offered other statements beyond merely that they would try to set their bias aside, such that the court was assured that the juror understood their obligation to afford the accused a fair trial. We find this case to be most similar

to the Ninth Circuit's recent decisions regarding juror's equivocal answers, particularly in response to attempts for rehabilitation. The record before us contains no such statements by juror 40 that would demonstrate anything other than that she might be "a great juror on a different kind of case; it's just not this kind of case." After her clear, repeated expressions of actual bias as to the precise nature of the allegations at the heart of this trial and evidence which would be introduced, we cannot conclude that juror 40 was sufficiently rehabilitated such that Talbott was provided a fair and impartial jury. "Under Washington case law, a determination of actual juror bias cannot be harmless." State v. Wilborne, 4 Wn. App. 2d 147, 172, 420 P.3d 707 (2018). "Doubts regarding bias must be resolved against the juror." State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); see also Gonzalez, 214 F.3d at 1114 (quoting Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991)). As such, denial of Talbott's for-cause challenge was error and we reverse.

At oral argument, the parties both indicated that this panel could address Talbott's other assignments of error even if we concluded that the juror issue was dispositive. We decline their invitation. In light of reversal, we similarly decline to reach the matters raised by Talbott in his statement of additional grounds for review.

Reversed.

WE CONCUR:

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

THE STATE OF WASHINGTON, Petitioner, v. WILLIAM EARL TALBOTT, II, Respondent.	No. 80334-4-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

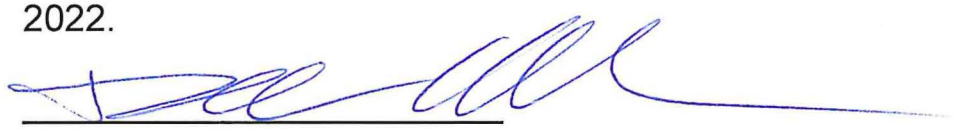
DECLARATION OF DOCUMENT FILING AND SERVICE

I, DIANE K. KREMENICH, STATE THAT ON THE 5th DAY OF JANUARY, 2022, I CAUSED THE ORIGINAL: PETITION FOR REVIEW TO BE FILED IN THE COURT OF APPEALS – DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

[X] NIELSEN, KOCH
Sloanej@nwattorney.net
swiftm@nwattorney.net;

[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 5th DAY OF JANUARY, 2022.



DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

January 05, 2022 - 1:57 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80334-4
Appellate Court Case Title:	State of Washington, Respondent v. William Earl Talbott, II, Appellant
Superior Court Case Number:	18-1-01670-8

The following documents have been uploaded:

- 803344_Petition_for_Review_20220105135520D1803836_6760.pdf
  This File Contains:
  Petition for Review
  The Original File Name was talbott petition for review.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- swiftm@nwattorney.net

Comments:

Sender Name: Diane Kremenich - Email: diane.kremenich@co.snohomish.wa.us
Filing on Behalf of: Seth Aaron Fine - Email: sfine@snoco.org (Alternate Email: diane.kremenich@snoco.org)

Address:
3000 Rockefeller Avenue, M/S 504
Everett, WA, 98201
Phone: (425) 388-3333 EXT 3501

Note: The Filing Id is 20220105135520D1803836