SUPREME COURT NO. _____

NO. 84495-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONNIE JONES,

Petitioner.

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

The Honorable Aimee Sutton, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. PETITIONER & COURT OF APPEALS DECISION

Petitioner Lonnie Jones seeks review of the Court of Appeals' March 11, 2024 unpublished decision in State v. Lonnie Jones, which is appended to this Brief. ("App.").

B. ISSUES PRESENTED FOR REVIEW

1. A trial court should excuse a prospective juror for cause if the juror's views would prevent or substantially impair performance of their duties. In an assault prosecution involving a recidivism aggravator, where prospective jurors were told the State had charged Jones with committing the assault shortly after release from incarceration, prospective juror 76 expressed bias specific to recidivists and never assured the court of her impartiality. She initially said she would try to follow the law as instructed but then undercut even that assurance by stating that she would "struggle" to try to follow the law.[1] Did the seating of

[1] That is, even the attempt would cost her great effort. See WEBSTER'S THIRD NEW INT'L DICTIONARY 2267 (1993).

the juror, who ultimately deliberated, constitute manifest constitutional error requiring reversal?

2. Counsel is constitutionally ineffective where their performance is deficient in a specific way and there is a reasonable probability the deficiency prejudiced the accused person. Here, defense counsel was ineffective in failing to move to excuse the biased juror. Although Jones should prevail on the first issue raised, should this Court grant review for this reason, as well?

C. STATEMENT OF THE CASE

Lonnie Jones has experienced events in his life that no one should have to experience. 2RP 932-37; CP 130-40. Jones's mother experienced addiction, which led to state-sanctioned abuse in the foster care system. 2RP 932-33. Jones then spent most of his life incarcerated—under unimaginably hostile conditions—based on a crime he committed as a teenager. 2RP 935-39.

Police reports asserted that on October 23, 2021, Jones assaulted Jake Johnson, who was staying in an apartment at the apartment building where Jones's mother resided. CP 6. The State charged Jones with second degree assault and, seeking to prolong his sentence, alleged he was armed with a deadly weapon. CP 14; RCW 9A.36.021(1)(a), (c); RCW 9.94A.533(4) (deadly weapon sentencing enhancement).

The State also sought to prolong any resulting sentence by alleging Jones committed the crime shortly after release from incarceration on another crime. CP 14; RCW 9.94A.535(3)(t).

The case was tried to a jury. Jury selection occurred via video conference software; the court divided prospective jurors into three groups for voir dire. 1RP 90, 153, 223. Even though trial was eventually bifurcated between guilt and recidivism allegation phases, 2RP 858, each group learned from the outset that the State had charged Jones with committing the assault shortly after release from incarceration. 1RP 93, 156, 226.

Prospective juror 76, who ultimately served and deliberated, should have been excused because she told the court she was worried about her ability to be fair, specifically when it came to recidivists, yet never assured the court that she could be fair or that she would be able to follow the court's instructions despite her bias.

Prospective jurors were issued a questionnaire, and the parties had the opportunity to review it before voir dire of all three panels. During the questioning of the second panel, the prosecutor asked prospective jurors about questionnaire answers as follows:

> So, as [the judge] mentioned, the purpose of voir dire is to find a jury that will be able to be impartial and to try this case fairly for all of the parties involved. So, a couple of you, it looks like, were worried even before you heard more about the case that you might not be able to try this case impartially or fairly.

1RP 163-64.

Prospective juror 38, who "hope[d]" they could deliberate fairly, discussed feeling emotionally uncomfortable and unsafe

after serving on a jury in the past. 1RP 164. The court later excused them based on hardship. 1RP 209-10. Prospective juror 66 had concerns about their ability to be fair, having been previously assaulted. 1RP 166. They stated their prior experience might affect their consideration of the evidence: "I feel like if there . . . is sufficient evidence showing the—the person assaulted another person, I will have a very strong opinion, uhm, believing that the person is guilty. 1RP 166. Defense counsel later exercised the defense's final peremptory challenge against them. 1RP 291.

The prosecutor continued:

> Let's see here. [Prospective juror] 76[,] I think that you were also a little worried about whether you could be impartial[.] Can you tell me about that?
>
> [Prospective Juror] 76: Yeah. It's—it's in my case more general. I live in an area where there's fairly high crime rates and property crimes, and uhm, you know, have worked downtown for a number of years and *it's just this sort of feeling of increasing frustration with the amount of crime and repeat offenders who have, uhm, you know, it seems like the justice system is not working, and they keep*

ending up on the streets and victimizing people. So, uhm, you know, so—so that feeling of, you know, real frustration with the system, uhm, is kind of—is prevalent, I guess, in my thinking.

[The State]: *Yeah. Thank you, [prospective juror] 76. I appreciate that. I think you were also concerned that you might not be able to follow the law that the Judge gives you in this case.[ ] Is that based on the same thing that you were just talking about, or is that something different*?

[Prospective juror] 76: Uhm, that's based upon that—that same thing. *You know, if it seemed like, you know, justice wasn't gonna prevail, I—I would struggle with that*. Uhm—

[The State:] Yeah. So, let's say that [the court] gives you the law in this case and tells you that this is the law you have to follow, and there's some piece of it you disagree with, maybe not even a big piece, but there's something that you disagree with. Do you think that you would be able to put aside your personal feelings and your own experiences and follow what [the court] tells you to do, even if you don't agree with it or the outcome?

[Prospective juror 76]: *I think I would try*, but you know, given—depending on what it is, uh, *I guess I would struggle.*

[The State]: Okay.

[Prospective juror 76]: I would say.

1RP 166-68 (emphasis added).

Prospective juror 76's only other comments were to speak favorably about police officers. 1RP 162-63. Defense counsel did not challenge prospective juror 76 for cause, nor did counsel exercise a peremptory challenge against the juror. 1RP 290-91. She did, however, use all six peremptory challenges allotted by the court on jurors with lower numbers. 1RP 288-91; CP 99-100.

According to the verbatim report, prospective jurors 1, 7, 10, 16, 24, 39, 42, 46, 50, 52, 56, 61, and 76 were selected to serve. 1RP 291 (listing 13 jurors).[2] Juror 76 was not excused as an alternate and deliberated. See 2RP 737-51, 816-17.

The jury convicted Jones of the underlying charge but deadlocked on the weapon allegation. CP 45-46. As indicated, the jury then considered the recidivism aggravator in a bifurcated proceeding. 2RP 858. Following the bifurcated proceeding on the recidivism aggravator, the jury also deadlocked. CP 53.

---

[2] The trial minutes list *14* total jurors by name, though not by prospective juror number. CP 87-88.

Jones appealed to Division One of the Court of Appeals, arguing that his conviction should be reversed based on the issues identified above. The Court of Appeals affirmed, stating in part that "although Juror 76 expressed concern about the justice system not adequately addressing recidivism, she ultimately stated that she 'would try' to put aside her personal feelings and follow the law as instructed." App. at 8. The juror's statement that she would "try" was sufficiently assuring to the Court of Appeals, which therefore found no error. App. at 8.

Jones now asks that this Court grant review and reverse.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(2) and (3).**

Review is appropriate under RAP 13.4(b)(2) *and* (3) because the decision conflicts with several other Court of Appeals decisions. The decisions cannot be reconciled and, in any event, this Court's clarification of a significant question of constitutional law is needed.

2. **This Court should grant review and hold that the seating of an unrehabilitated biased juror—a juror who would *struggle to try* to follow the law where a recidivist was concerned—constituted manifest constitutional error requiring reversal**.

The Court of Appeals appears to have retreated from its own prior decisions protecting the fundamental right to an impartial jury. A court's failure to remove a prospective juror like 76—a juror who would *struggle to try* to follow the law where a recidivist was on trial, and where she suspected "justice" might not prevail—requires reversal. Even assuming some deference is required to account for demeanor, words themselves must matter. This Court should grant review and reverse.

Accused persons "have a federal and state constitutional right to a fair and impartial jury." State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (citing 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)); accord U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22. "[S]eating a biased juror violates this right." Irby, 187 Wn. App. at 193; see also

State v. Zamora, 199 Wn.2d 698, 708, 512 P.3d 512 (2022) (Fourteenth Amendment and article 1, section 3 also guarantee right to impartial jury).

An appellate court will consider an unpreserved error on appeal if it constitutes a manifest constitutional error. RAP 2.5(a)(3); see State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869, review denied, 195 Wn.2d 1025 (2020). A party demonstrates manifest constitutional error by showing that the issue before the appellate court affects that party's constitutional rights and that they suffered actual prejudice. Id. Moreover, the presence of a biased juror cannot be harmless. Rather, the resulting error requires a new trial. Irby, 187 Wn. App. at 193; United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (quoting Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998)).

The constitutional right to a jury trial includes the right to an unbiased and unprejudiced jury. Zamora, 199 Wn.2d at 708. A trial court must excuse a juror if they demonstrate actual bias.

"Actual bias" means their state of mind is such that they "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2); see RCW 4.44.190 (challenge under RCW 4.44.170(2) should be granted where "juror cannot disregard [their] opinion and try the issue impartially"). "Jurors who exhibit prejudice by being unwilling or unable to follow the law or participate in deliberations are unfit to serve on the jury." State v. Smith, 27 Wn. App.2d 838, 848, 534 P.3d 402 (2023) (citing State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005)), review granted, 2 Wn.3d 1011 (2024).

Relatedly, a trial judge must protect an accused person from biased jurors even where the defense fails to act. Irby, 187 Wn. App. at 193; accord Hughes v. United States, 258 F.3d 453 (6th Cir. 2001). "If the judge after examination of any juror is of the opinion that grounds for challenge are present, [they] shall excuse that juror from the trial of the case." CrR 6.4(c)(1)); 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").

"If the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)). Doubts about bias must be resolved against allowing the juror to serve. State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); accord Guevara Diaz, 11 Wn. App. 2d at 855; United States v. Kechedzian, 902 F.3d 1023, 1027 (9th Cir. 2018).

Nonetheless, a trial court need not excuse every prospective juror who gestures toward bias, provided the record demonstrates the juror can set that bias aside and decide the case based solely on the court's instructions and evidence presented at trial. Guevara Diaz, 11 Wn. App. 2d at 855-56. Thus, the central question is "'whether a juror with preconceived ideas can set them aside.'" Id. at 856 (quoting State v. Noltie, 116 Wn.2d

831, 839, 809 P.2d 190 (1991)). As the federal Supreme Court has stated, moreover, a juror is impartial "only if [they] can lay aside [their] opinion and render a verdict based on the evidence presented in court." Patton v. Yount, 467 U.S. 1026, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

Here, prospective juror 76 signaled bias, as well as concern about ability to follow the court's instructions, on her questionnaire. The situation only became worse upon questioning. Even though trial was ultimately bifurcated between guilt and recidivism aggravator phases, 2RP 858, each panel of prospective jurors learned, before trial, that Jones was charged with committing an assault shortly after release from incarceration. 1RP 93, 156, 226. Prospective juror 76 had indicated on her questionnaire that she was concerned about her ability to be fair. 1RP 166. She explained that she lived and worked in areas where she was concerned about the crime and, specifically, about "repeat offenders" because "it seems like the justice system is not working, and they keep ending up on the

streets and victimizing people." 1RP 167. As stated, prospective juror 76 had also indicated on her questionnaire she would have difficulty following the law. Asked if she could set aside her feelings and experiences and follow the court's instructions, she told the prosecutor she "th[ought] she would try" but twice repeated that she would *struggle* to do so, specifically where she felt the case—and likely deliberations—were going in a direction that *she* believed was unjust. 1RP 167-68 . Based on her prior comments, the perceived injustice would be acquittal of a recidivist in a close case. Her sense of justice took precedence.

The juror's only other comments were to indicate that she felt "a lot of support for the police" and that she had several friends, colleagues, and family members who were police officers or former police officers. 1RP 162-63. These comments are not alone problematic, but they do not ameliorate the concern Jones has identified.

Prospective juror 76 expressed bias against the defense and never assured the court that she could set it aside and follow

the law. But the Court of Appeals rejected Jones's argument, stating that "ultimately [she] stated that she 'would try' to put aside her personal feelings and follow the law as instructed. This equivocal statement is more reassuring of impartiality than was the statement made by the juror in [State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016)] and equally as reassuring as the answers given by Juror 27 in [Irby, 187 Wn. App. 183]." App. at 8.

The word "try" does appear in the transcript—although the Court of Appeals omits that the juror hedged further. Nonetheless, several federal cases discussing federal constitutional rights clarify that "try" is not a magic word. In Kechedzian, for example, a prospective juror said she might have difficulty being fair and, when asked if she could fairly serve, she said, "I might be able to put that aside," "I would want to put my personal stuff aside, but I honestly don't know if I could," and "I would try to be fair." Kechedzian, 902 F.3d at 1029. The federal appellate court held "I'll try" is not an unequivocal statement of

impartiality. Id. Because equivocal statements of impartiality cannot comport with the Sixth Amendment jury trial right, the court reversed the convictions. Id. at 1031.

In Gonzalez, a juror's personal experiences led to a concern of bias. Gonzalez, 214 F.3d at 1110-12. In response to questions about whether she could be impartial, the juror answered, "I will try to," "[r]ight. I'll try," and "I'll try." Id. at 1111. The trial court's failure to excuse the juror based on bias was, nonetheless, constitutional error: "When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict." Id. at 1114.

Jurors in Kechedzian and Gonzalez said they would try to be fair. Those courts found the assurances inadequate. But even assuming this Court would disagree and accept an assurance that the juror would "try," the juror in this case immediately undercut even that.

That is why the Court of Appeals was wrong to rely on Lawler and its own prior decision in Irby in rejecting Jones's arguments on appeal. In Lawler, Division Two highlighted the trial court's ability to observe body language and concluded the trial court have reasonably characterized the challenged comments as "convey[ing] a vague, nonspecific discomfort with the case rather than a firm bias." Lawler, 194 Wn. App. at 297. For example, that juror's statement it would be a "pain in the neck" to judge the case on its merits "seems to refer to inconvenience rather than bias." Id. The same cannot be said for the juror here, who said she thought she would try but would struggle to follow the law. 1RP 167-68

In Irby, the Court of Appeals found bias on the part of one juror challenged on appeal, but not another, explaining "the record does not clearly demonstrate actual bias on the part of juror 27 [in favor of law enforcement]." Irby, 187 Wn. App. at 196. The juror was predisposed to believe police officers because of family relationships and work experience. But when

the State followed up, stressing the importance of putting personal connections aside and deciding the case only on the evidence, the juror "responded that although she had some concerns, 'I will try.' It was within the court's discretion to view juror 27's answers as an adequate assurance of impartiality." Id. Meanwhile, in the present case, prospective juror 76 unequivocally told the court and parties she could not properly serve. Although she initially stated, "I think I would try," she landed on the admission that she would struggle—that is, that she would have to overcome great difficulty to set aside her bias against recidivists and follow the law. 1RP 167-68.

Juror 76 expressed a specific bias, provided equivocal assurance, and then immediately undercut even that assurance. Failure to strike this juror constituted manifest constitutional error. Such an error cannot be harmless. Irby, 187 Wn. App. at 193. This Court should grant review to clarify what assurance is required and that a statement that a juror would struggle to even *try* cannot satisfy any appropriate constitutional standard.

3. **This Court should grant review and hold that defense counsel was ineffective in failing to move to excuse the prospective juror, also requiring reversal of the conviction.**

Jones does not believe it is necessary to reach this issue in order to prevail. However, in addition, counsel was constitutionally ineffective in failing to challenge prospective juror 76 for cause. Although Jones prevails on the first issue, this Court may grant review to address this question as well.

Failure to request the removal of a biased juror can constitute ineffective assistance of counsel. Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992). The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Under Strickland, [to prevail on such a claim,] the defendant must show both (1) deficient performance and (2) resulting prejudice." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Estes, 188 Wn.2d at 458 (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the evidence standard; "it is a probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458. To show prejudice from deficient performance, moreover, an accused must show it is reasonably likely the court would have taken the action that counsel should have urged it to take. See State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996). In the present case, that means Jones must also demonstrate reasonable likelihood that the trial court would have granted a motion to dismiss prospective juror 76 for cause.

A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); accord Strickland, 466 U.S. at 690.

First, as to the deficient performance criterion: Defense counsel does not perform reasonably by silently waiving their client's right to trial by a fair and impartial jury. As the Hughes court put it, "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." Hughes, 258 F.3d at 463 (citing United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)). The court continued, "[i]f counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury." Hughes, 258 F.3d at 463. However, if counsel can't waive a defendant's basic Sixth Amendment jury trial right

"'without the fully informed and publicly acknowledged consent of the client,' then counsel cannot . . . waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury[.]" Id. (quoting Taylor v. Illinois, 484 U.S. 400, 418 & 418 n. 24, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)). The court concluded that it was unable to identify any trial strategy that would allow such a waiver. Hughes, 258 F.3d at 463; cf. Zamora, 199 Wn.2d at 717 ("[d]efense counsel cannot waive [a] client's constitutional right to a fair trial").

The Court of Appeals stretches to find rhyme and reason in what was likely inattention. The court states that it "appears that defense counsel's decision not to move to strike [prospective juror] 76 was a legitimate tactical decision aimed at finding other jurors who might have a predisposition against someone charged with a rapid recidivism enhancement." App. at 10. But, even accepting that premise, the court does not explain why defense counsel would not have moved to excuse prospective juror 76 once that task was satisfied.

The other possible reason proffered by the Court of Appeals—that (1) counsel *knew* the trial court, which had made several rulings in favor of a defense, (2) would *not* grant a for-cause motion against a juror who said she would struggle to follow the law, (3) the juror would then be offended, *and* (4) counsel knew a peremptory would be unavailable—is unacceptably speculative. The Court offers no authority or analogous case supporting such speculation. App. at 12.

Several persuasive cases make it clear that there can be no legitimate strategy in failing to protect a client's right to a fair trial by an impartial jury. Prospective juror 76, given several opportunities to provide assurance that she could follow instructions despite her personal feelings about repeat criminals, repeatedly stated that she would struggle to do so. 1RP 167-68. Counsel's failure to move to excuse 76 was objectively deficient. The first Strickland criterion is satisfied.

The second, prejudice, criterion is also satisfied. Preliminarily, although the trial court did not independently

intervene to remove prospective juror 76, it is reasonably likely the court would have granted a for-cause motion. Prospective juror 76 could not adequately assure the parties and the court that she would follow the law, despite lengthy attempted rehabilitation by the prosecutor. Meanwhile, the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. Irby, 187 Wn. App. at 193; Hughes, 258 F.3d at 463. "[G]iven that a biased juror was impaneled in this case, prejudice . . . is presumed, and a new trial is required." Id. Thus, Strickland's second prong is also satisfied.

For this reason, as well, this Court should grant review and reverse.

E. CONCLUSION

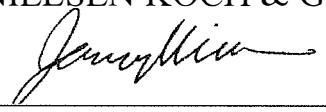
The Court of Appeals has tacked too far from the common-sense premise that, in evaluating bias, a prospective juror's words themselves matter. This Court should grant review under RAP 13.4(b)(2) and (3) and reverse.

I certify this document is prepared in 14-point font and contains 4,235 words excluding RAP 18.17 exemptions.

DATED this 3rd day of April, 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



JENNIFER WINKLER
WSBA No. 35220
Attorneys for Petitioner

APPENDIX

FILED
3/11/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LONNIE WILLIAM JONES, Appellant.	DIVISION ONE No. 84495-4-I UNPUBLISHED OPINION

DWYER, J. — Lonnie Jones appeals from the judgment entered on the jury verdict finding him guilty of assault in the second degree. Jones claims that the trial court erred by not sua sponte removing a biased juror and that his counsel was ineffective for failing to challenge the juror for cause. Jones also contends that the victim penalty assessment (VPA) should be stricken from his judgment and sentence, an issue which the State concedes. We remand for the trial court to strike the VPA from Jones' judgment and sentence but otherwise affirm.

I

On October 23, 2021, Lonnie Jones struck Jacob Johnson in the head multiple times with a hammer while Johnson was asleep in his friend's apartment. Jones was charged with assault in the second degree. Jones was also charged with the aggravating factors of being armed with a deadly weapon and rapid recidivism.

During voir dire, the trial court informed the prospective jurors that Jones was charged with assault in the second degree and that he was "accused of being armed with a deadly weapon, that is, a hammer, and the crime involves the aggravating factor that Mr. Jones committed the offense shortly after being released from incarceration."

Prior to voir dire, prospective jurors were required to complete questionnaires, which asked, among other things, whether jurors had any reservations about their ability to be impartial during the proceedings. During voir dire, the State followed up with those jurors who answered that they had reservations about their ability to be impartial. When questioned about why she answered on the questionnaire that she had reservations, Juror 76 explained:

> I live in an area where there's fairly high crime rates and property crimes, and uhm, you know, have worked downtown for a number of years and it's just this sort of feeling of increasing frustration with the amount of crime and repeat offenders who have, uhm, you know, it seems like the justice system is not working, and they keep ending up on the streets and victimizing people. So, uhm, you know, so—so that feeling of, you know, real frustration with the system, uhm, is kind of—is prevalent, I guess, in my thinking.

The State then asked Juror 76 why she had indicated on her questionnaire that she might not be able to follow the law. The juror answered "that's based upon that—that same thing. You know, if it seemed like, you know, justice wasn't gonna prevail, I—I would struggle with that." The State followed up by asking Juror 76:

> So, let's say that Judge Sutton gives you the law in this case and tells you that this is the law you have to follow, and there's some piece of it you disagree with, maybe not even a big piece, but there's something that you disagree with. Do you think that you

> would be able to put aside your personal feelings and your own experiences and follow what Judge Sutton tells you to do, even if you don't agree with it or the outcome?

Juror 76 responded, "I think I would try, but you know, given—depending on what it is, uh, I guess I would struggle." Neither party asked any further questions of Juror 76 and neither party asserted a for-cause challenge.

Juror 76 was not the only person to express reservations about their ability to remain impartial. Juror 66 similarly indicated:

> But I feel like if there are, uhm—if there is sufficient evidence showing the—the person assaulted another person, I will have a very strong opinion, uhm, believing that the person is guilty. It's just—but obviously, I will try to do my best and be, uhm, unbiased, but if there is a solid evidence.

This juror was also not challenged for cause.

Jones used all six of his peremptory challenges, the final one on Juror 66. Juror 76 was the last member of the jury to be seated.

The jury found Jones guilty of assault in the second degree. It could not reach a unanimous verdict on either aggravating factor. Jones was sentenced to 84 months of imprisonment followed by 18 months of community custody. As part of the judgment and sentence, the trial court imposed the then-mandatory $500 VPA.

Jones appeals.

II

Jones contends that the trial court erred by failing to, sua sponte, excuse Juror 76 for cause because the juror expressed actual bias during voir dire. We disagree.

Under RAP 2.5(a)(3), a party may raise for the first time on appeal a "manifest error affecting a constitutional right." An error is manifest if it actually affected the defendant's rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Seating of a biased juror implicates the defendant's constitutional right to a fair and impartial jury. In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice. Thus, if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citation omitted) (citing United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)).

Whether a juror has demonstrated actual bias is a determination that falls within the discretion of the trial court. State v. Morfin, 171 Wn. App. 1, 7, 287 P.3d 600 (2012). Accordingly, we review a trial court's decision regarding whether to excuse a juror for an abuse of discretion. State v. Elmore, 155 Wn.2d 758, 768-69, 123 P.3d 72 (2005); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). "A trial court abuses its discretion when its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

"While a trial court may have a duty to sua sponte intercede where actual bias is evident or where the defendant is not represented by counsel, this duty must also be balanced with the defendant's right to be represented by competent

counsel." State v. Phillips, 6 Wn. App. 2d 651, 667, 431 P.3d 1056 (2018). A trial court must therefore exercise caution before injecting itself into the jury selection process, because the decision to select or dismiss a juror is often "based on the trial counsel's experience, intuition, strategy, and discretion." State v. Lawler, 194 Wn. App. 275, 285, 374 P.3d 278 (2016).

Jones contends that the following comments by Juror 76 demonstrated her actual bias and required that she be dismissed:

> [PROSECUTOR]: I think that you were also a little worried about whether you could be impartial. Can you tell me about that?
> JUROR NO. 76: Yeah. It's—it's in my case more general. I live in an area where there's fairly high crime rates and property crimes, and uhm, you know, have worked downtown for a number of years and it's just this sort of feeling of increasing frustration with the amount of crime and repeat offenders who have, uhm, you know, it seems like the justice system is not working, and they keep ending up on the streets and victimizing people. So, uhm, you know, so—so that feeling of, you know, real frustration with the system, uhm, is kind of—is prevalent, I guess, in my thinking.
> [PROSECUTOR]: Yeah. Thank you, Juror 76. I appreciate that. I think you were also concerned that you might not be able to follow the law that the Judge gives you in this case. Is that based on the same thing that you were just talking about, or is that something different?
> JUROR NO. 76: Uhm, that's based upon that—that same thing. You know, if it seemed like, you know, justice wasn't gonna prevail, I—I would struggle with that. Uhm—
> [PROSECUTOR]: Yeah. So, let's say that Judge Sutton gives you the law in this case and tells you that this is the law you have to follow, and there's some piece of it you disagree with, maybe not even a big piece, but there's something that you disagree with. Do you think that you would be able to put aside your personal feelings and your own experiences and follow what Judge Sutton tells you to do, even if you don't agree with it or the outcome?
> JUROR NO. 76: I think I would try, but you know, given—depending on what it is, uh, I guess I would struggle.
> [PROSECUTOR]: Okay.
> JUROR NO. 76: I would say.

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). "Equivocal answers alone are not sufficient to establish actual bias warranting dismissal of a potential juror." State v. Sassen Van Elsloo, 191 Wn.2d 798, 808-09, 425 P.3d 807 (2018) (citing State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). Rather, the issue is whether a juror with preconceived notions cannot set them aside. Sassan Van Elsloo, 191 Wn.2d at 809.

In Irby, this court examined whether the statements made by two jurors demonstrated actual bias such that the trial court should have removed them from the jury sua sponte. 187 Wn. App. at 192. The first, Juror 38, responded to the trial court's question about whether her employment with Child Protective Services would affect her ability to be impartial by saying "I would like to say he's guilty." Irby, 187 Wn. App. at 190. The second, Juror 27, expressed that she was more inclined to believe the testimony of law enforcement, but when asked whether she could set that aside and decide the case based on the evidence presented, stated that "I think it will be hard for me" and "I will try, but it does cause me some concern." Irby, 187 Wn. App. at 191.

This court held that the record demonstrated that Juror 38 exhibited actual bias because her statement that "I would like to say he's guilty," constituted an unqualified statement that she did not think she could be fair and no attempts were made to assure that she could be fair despite her predisposition. Irby, 187

Wn. App. at 196. We rejected the State's argument that impartiality could be implied from Juror 38's failure to respond to the question posed to the entire venire "Does everybody here think that they can basically make a finding of guilty or not guilty based on the evidence that you hear?", noting that general questions posed to a group are not a substitute for individual questioning after a juror expresses bias. Irby, 187 Wn. App. at 196.

On the other hand, we held that Juror 27 did not exhibit actual bias when she stated that she had a predisposition to believe law enforcement, but that she "will try" to set that predisposition aside even if "I think it will be hard for me." Irby, 187 Wn. App. at 196. Rather, we determined that it was "within the court's discretion to view juror 27's answers as an adequate assurance of impartiality." Irby, 187 Wn. App. at 196.

Similarly, in Lawler, Division Two of this court held that the trial court did not err by failing to dismiss a juror sua sponte who stated that he had multiple family members who were victims of domestic violence and, when asked whether he could set aside his personal experiences, stated "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." 194 Wn. App. at 279-80. The reasons for so holding were fourfold. First, the court emphasized that the trial court is in the best position to evaluate whether a juror should be dismissed as the trial court is able to observe the prospective juror and others in the courtroom. Lawler, 194 Wn. App. at 287. Second, the court noted that the juror's answers were equivocal and "convey[ed] a vague, nonspecific discomfort with the case rather than a firm bias." Lawler,

194 Wn. App. at 287. Third, the record demonstrated that the trial court was alert to the possibility of biased jurors and dismissed two such prospective jurors sua sponte. Lawler, 194 Wn. App. at 287-88. Fourth, the record demonstrated that defense counsel was also alert to the possibility of biased jurors, challenging two jurors for cause. Lawler, 194 Wn. App. at 288. Also notable to the appellate court was the fact that defense counsel chose not to ask any questions of the juror at issue, "suggest[ing] that defense counsel observed something during voir dire that led him to believe that juror 23 could be a fair juror." Lawler, 194 Wn. App. at 288.

Here, although Juror 76 expressed concern about the justice system not adequately addressing recidivism, she ultimately stated that she "would try" to put aside her personal feelings and follow the law as instructed. This equivocal statement is more reassuring of impartiality than was the statement made by the juror in Lawler and equally as reassuring as the answers given by Juror 27 in Irby. The record also demonstrates that both the trial court and defense counsel herein were alert to the possibility of biased jurors. Defense counsel asserted one for cause challenge to a juror who was very concerned about her ability to be fair in light of her experience with the attempted murder-for-hire of her sister.[1] The trial court granted the motion and excused that juror for cause. The trial court also acted sua sponte in excusing a juror who questioned the juror's own ability to concentrate on account of a mental health crisis. Finally, we emphasize

[1] The State asserted two for-cause challenges, one to Juror 35 and one to Juror 97. The trial court denied the motion as to Juror 35 after asking additional questions of the juror. The trial court granted the motion as to Juror 97 because the juror knew information specific to the case.

that the trial court was able to observe Juror 76 during voir dire and thus was in the best position to be able to judge whether the prospective juror was expressing bias or merely acknowledging difficulty in setting aside her personal experiences.

"When the juror has expressed reservations but agrees they can set those aside to be fair and impartial, it is within the trial court's discretion to allow that juror to remain." Phillips, 6 Wn. App. 2d at 666. Accordingly, the trial court did not abuse its discretion by not sua sponte removing Juror 76 for cause.

III

Jones additionally contends that his counsel was ineffective for not asserting a for-cause challenge against Juror 76. We disagree.

In order to succeed on an ineffective assistance of counsel claim, a defendant must show that (1) the defense attorney's performance was deficient and (2) the defendant was prejudiced by that deficient performance. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015) (quoting State v. Borsheim, 140 Wn. App. 357, 376, 165 P.3d 417 (2007)). "Deficient performance is that which falls below an objective standard of reasonableness." State v. Weaville, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). We presume adequate representation when there is any "'conceivable legitimate tactic'" that explains counsel's performance. Hatfield, 191 Wn. App. at 402 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). "Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different." Weaville, 162 Wn.

App. at 823 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). "Competency of counsel is determined based upon the entire record below." McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Jones asserts that there is no legitimate strategic reason not to challenge a biased juror for cause. As we held in section II, supra, Jones has not demonstrated that Juror 76 exhibited any actual bias. Where a juror has expressed only a *possible* bias, trial counsel may have legitimate, tactical reasons not to challenge the juror, based on counsel's experience, strategy, and judgment. Lawler, 194 Wn. App. at 285.

Here, defense counsel heard the answers given by Juror 76 during the State's portion of voir dire and chose not to ask any more questions of Juror 76. Instead, defense counsel decided to use Juror 76's answers as a springboard to question other jurors about their possible biases against repeat offenders. Defense counsel's first question to the jury venire was "Juror 76 indicated that—that she has a real frustration with the system. Do any of the other jurors have that same feeling?" Four other jurors answered that they had concerns about the system's failure to address recidivism. It thus appears that defense counsel's decision not to move to strike Juror 76 was a legitimate tactical decision aimed at finding other jurors who might have a predisposition against someone charged with a rapid recidivism enhancement.

In arguing to the contrary, Jones relies heavily upon Hughes v. United States, 258 F.3d 453 (6th Cir. 2001). In that case, the defendant was charged

with stealing a firearm from a federal marshal. Hughes, 258 F.3d at 455. During introductory questioning, one of the prospective jurors expressed that she was "quite close" to a number of police officers and when asked whether those relationships would prevent her from being fair, she replied, "I don't think I could be fair." Hughes, 258 F.3d at 456. No one asked any follow up questions of the juror. Hughes, 258 F.3d at 456.

The Sixth Circuit Federal Court of Appeals held that "[g]iven [the juror]'s express admission of bias, with no subsequent assurance of impartiality and no rehabilitation by counsel or the court by way of clarification through follow-up questions directed to the potential juror, we find [the juror] to have been actually biased in this case." Hughes, 258 F.3d at 460. The court noted that

> Although the precedent of the Supreme Court and this Court makes us circumspect about finding actual juror bias, such precedent does not prevent us from examining the compelling circumstances presented by the facts of this case-where both the district court and counsel failed to conduct the most rudimentary inquiry of the potential juror to inquire further into her statement that she could not be fair.

Hughes, 258 F.3d at 458-59. The court further held that defense counsel's *complete* failure to follow up on the juror's admission of bias constituted ineffective assistance of counsel entitling the defendant to a new trial. Hughes, 258 F.3d at 462-63.

Hughes is factually anomalous and does not support Jones's argument.[2] This is not a case in which the juror expressed bias and no follow up was

[2] We note that Hughes, a federal circuit court case, is not binding upon this court. W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014) (quoting Home Ins. Co. of N.Y. v. N. Pac. Ry., 18 Wn.2d 798, 808, 140 P.2d 507 (1943)).

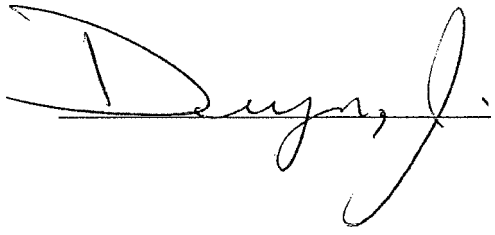
conducted. Here, Juror 76 indicated on her juror questionnaire that she had concerns about her ability to be impartial. The State asked Juror 76 about the nature of her concern and then asked multiple rehabilitational questions about whether she could follow the instructions given to her by the trial court. In response to those questions, Juror 76 indicated that she would try to set aside her personal feelings and follow the court's instructions. Defense counsel did not ignore Juror 76's statements, but instead used them to determine whether other prospective jurors held similar feelings that might be detrimental to Jones. Thus, unlike the defense counsel in Hughes, defense counsel here did not completely and totally fail to take action on an actually biased juror.

Finally, simple reality has a place in the law. Here, defense counsel likely well knew that a challenge to Juror 76 for cause would be unsuccessful. At a minimum, a lack of success in such a challenge was within the range of reasonably foreseeable outcomes. Because all of the defendant's peremptory challenges were exercised against other potential jurors, it is perfectly conceivable that a competent attorney would forego the challenge for cause, thus eliminating the possibility of having seated on the jury a juror who might feel insulted or slighted by counsel's actions in seeking to challenge the juror—an action, the juror would know, that was unwarranted under the law by virtue of the trial judge's ruling rejecting the for-cause challenge. It cannot be said that *no reasonable* trial lawyer would seek to avoid such an eventuality. For this reason, also, deficient performance is not established.

Because Juror 76 was not actually biased and defense counsel had conceivable, legitimate tactical reasons for not challenging the juror for cause, Jones has not established that his counsel was ineffective. Accordingly, we affirm his conviction.

IV

Finally, Jones asserts that the victim penalty assessment (VPA) should be stricken from his judgment and sentence pursuant to RCW 7.68.035 because the trial court found him to be indigent. The State agrees that RCW 7.68.035 applies and concedes error as to the imposition of the VPA. The amended version of RCW 7.68.035 applies to cases on direct appeal. See State v. Ellis, 27 Wn. App. 2d 1, 17, 530 P.3d 1048 (2023); see also State v. Wheeler, No. 83329-4-I, slip op. at 22 (Wash. Ct. App. Aug. 7, 2023) (unpublished), https://www.courts.wa.gov/opinions /pdf/833294.pdf.[3] We remand for the trial court to strike the VPA from Jones's judgment and sentence.



[3] Pursuant to GR 14.1(c), we may cite to unpublished cases as "necessary for a reasoned decision." We adopt the expanded reasoning set out in Wheeler as to the application of this statutory amendment to cases on direct appeal.

WE CONCUR:

Díaz, J.

Hazelrigg, ACJ

NIELSEN KOCH & GRANNIS P.L.L.C.

April 03, 2024 - 2:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84495-4
Appellate Court Case Title:	State of Washington, Respondent v. Lonnie William Jones, Appellant

The following documents have been uploaded:

- 844954_Petition_for_Review_20240403144906D1048739_5622.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Lonnie Jones 84495-4-I.PFR.pdf

A copy of the uploaded files will be sent to:

- Samantha.Kanner@kingcounty.gov
- Sloanej@nwattorney.net
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20240403144906D1048739