No. 85912-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,
V.
ADAM EZRA PARIS,
Appellant.

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

Judges Schaller and Williams

PETITION FOR REVIEW

ADAM EZRA PARIS
Appellant, Pro se'
Doc# 435137
Airway Heights Corrections Center
P.O. Box 2049
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

Court of Appeals Case

Constitutional Provisions

Statutes

Court Rules

Other Authorities

A. IDENTITY OF PETITONER

Adam Ezra Paris asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

"Paris argues the trial court erred by dismissing a juror for bias at the close of the evidence. We disagree." Decision at 14.

"Paris argues he is entitled to a new trial because the court failed to establish that the juror was actually biased. We need not reach that issue because Paris fails to show prejudice." Decision at 15.

"The trial court did not excuse Juror 11 based on concern about the juror's view of the merits of the evidence presented. And Paris makes no argument that any error substantially swayed his verdict. Indeed, we presume an alternate juror is unbiased. Sassen Van Elsloo, 191 Wn.2d at 822. As a result, the release of Juror 11 had no substantial influence on the outcome of the trial, and any error was harmless." Decision at 16.

A copy of the decision is in the Appendix at pages A-1 through 20.

C. Issues Presented For Review

The Court of Appeals ruled that they need not reach the issue of whether the trial court improperly dismissed an impaneled juror because "Paris failed to show prejudice." Was the Court of Appeal's decision in conflict with this courts decision in Sassen Van Elsloo where such trial error is of constitutional magnitude, prejudice is presumed, and the State, not Paris, bears the burden of proving harmlessness beyond a reasonable doubt? (RAP 13.4(b)(1))

Does there exist a reasonable possibility of prejudice where the trial court made "assumptions" about juror 11's views of the facts of the case, and furthermore does dismissal based on those assumptions "violate the Sixth Amendment right to a unanimous verdict by an impartial jury?" (RAP 13.4(b)(3)).

D. Statement of the Case

The bailiff reported to the trial court that he had observed juror 11 shake hands with a spectator from the courtroom. The trial court then reported to both parties accordingly, and requested their thoughts on any

points of action. RP 770. Juror 11 was questioned in regards to his association with the Spectator. Juror 11 stated the spectator is a friend through ministry, and that his association with the spectator would not interfere with his ability to be fair and impartial. RP 772-78. With no objection by any party, Juror 11 remained on the panel, and continued to hear testimony. RP 779.

After the defendant testified without wearing a face mask it was reported to the court that Juror 11 recognized the defendant. The court then reported to both parties and asked of any specific requests of the court. RP 1264. The State motioned to excuse Juror 11 for cause because of the connection between the defendant, the spectator, and Juror 11. The State further argued whether or not Juror 11 can remain impartial is not something that is needed to be inquired. RP 1264-66. Defense argued there is not a sufficient record to excuse Juror 11 for cause. RP 1266-67. Juror 11 was then questioned about his association with the defendant. He explained he had played music with the defendant at church events, and that conversations would be limited to "Hi" or "How are you?" RP 1268-70.

The State motioned to excuse Juror 11 For cause claiming the state has a right to a fair trial, and that there has been way too many issues with Juror No. 11,

that has connections to the defendant and also his circle -- his support group that have been in court this whole entire time. RP 1271-72. Over defense objection, the trial Court granted the States motion to dismiss Juror 11 for cause without asking Juror 11 the follow-up question that, despite this information, does the Juror think he can be fair and impartial. The trial Judge explained that the handshake with the spectator, that the circumstantial evidence suggested was there for the defendant, and that Juror 11 played music with the defendant about 20 times over the last year can lead to an inference of bias and prejudice and not being able to be impartial. RP 1272-73.

E. ARGUMENT

Paris humbly argues that there is a compelling need for this court to grant review, where the Court of Appeals ruled they "need not reach the issue of whether the trial court improperly dismissed an impaneled Juror" because "Paris failed to show prejudice." (WASHINGTON APPELLATE PRACTICE DESKBOOK, 4TH Ed. § 18.2(5), "HOW TO Present Your Petition For Review.") Here, Paris argues that the Court of Appeals is in conflict with this court's decision in State v. Sassen Van Elsloo, 191 Wn. 2d 798, 425 P. 3d 807 (2018), because "such trial error is of constitutional magnitude, that prejudice is presumed whereby the State,

not Paris, bears the burden of proving harmlessness beyond a reasonable doubt." Because the Court of Appeals had forgone the State's burden, this Court should be convinced that a "significant point of law must be decided or clarified." (WASHINGTON APPELLATE PRACTICE DESKBOOK, Supra.) Paris further argues there also exists a "reasonable possibility" of prejudice because the trial Court made "assumptions" about Juror 11's views of the facts of the case, and furthermore Juror 11's dismissal, that was based on those assumptions, "violate the Sixth Amendment right to a unanimous verdict by an impartial Jury?"

The issue is, whether the Court of Appeal's decision is in conflict with this courts decision in State v. Sassen Van Elsloo, 191 Wn. 2d 798, 425 P.3d 807 (2018), (RAP 13.4(b)(1)), and whether there exists "a reasonable possibility" of prejudice where the trial court made "assumptions" about Juror 11's views of the facts of this case. (RAP 13.4(b)(3)).

We review a trial Court's decision to discharge a Juror for an abuse of discretion. State v. Depaz, 165 Wn. 2d 842, 858, 204 P.3d 217 (2009). The trial Court "has the advantage of observing a Juror's demeanor" and is "in the best position to determine a Juror's ability to be fair and impartial." State v. Teninty, 17 Wn. App. 2d 957, 964, 489 P.3d 679 (2021). "The range of discretionary

choices is a question of law and the Judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn. 2d 600, 609, 30 P. 3d 1255 (2001).

All criminal defendants are constitutionally entitled to a unanimous Jury verdict, Washington Constitution Article 1, Section 21; State v. Petrich, 101 Wn. 2d 566, 569, 683 P. 2d 173 (1984), reached by an impartial Jury, United States Constitution Amendment VI; Washington Constitution Article 1, Section 22. This right exists throughout the entire trial process and is safeguarded in part by statutes and rules that require the trial Judge to dismiss biased Jurors. RCW 4.44.170; RCW 2.36.110; CrR 6.5. The operation of these statutes and rules depends on whether the Juror is a potential, impaneled, or deliberating Juror. Sassen Van Elsloo, 191 Wn. 2d 798 at 807.

Dismissal of an impaneled Juror for bias requires the same findings as dismissal of a potential Juror for bias - proof that the Juror has formed a biased opinion and, as a result, cannot try the case impartially. Id at 808. Prejudice exists when the erroneous dismissal of an impaneled Juror stems from concern over the Juror's views of the merits of the evidence presented. Id at 815. The governing statute does not contemplate the role, import, or significance of a particular party as a basis

for dismissal. RCW 2.36.110. A Juror's acquaintance with a party, by itself, is not grounds for a challenge for cause. State v. Tingdale, 117 Wn.2d 595, 601, 817 P.2d (1991). Without the requisite showing of the Juror's bias and inability to be fair, the importance of a party is irrelevant.

Therefore, a defendant's constitutional right to a unanimous verdict is violated and a new trial is warranted if there exists a "reasonable possibility" that the trial Judge dismissed an impaneled Juror because of that Juror's "view of the sufficiency of the evidence." State v. Sassen Van Elsloo, 191 Wn.2d 798, 822, 425 P.3d 807 (2018); (citing State v. Elmore, 155 Wn.2d 758, 761, 123 P.3d 72 (2005)). One circumstance of "reasonable possibility" is where a trial Court dismissed a seated Juror based on the prosecutor's or trial court's "unsupported assumption" of bias. Id at 841 (McCloud, J., concurring. "Following the reasoning of Elmore, dismissal of seated Jurors due to assumptions about how they view the facts is also improper.")

If a "trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17L.Ed.2d 705 (1967);

State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011)). To show that an erroneous dismissal of an impaneled Juror was harmless, the State must present evidence that allows the appellate court "to 'say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Hinton, 979 A.2d at 691 (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). If the appellate court is in "virtual equipoise" as to the harmlessness of the error, the error should be treated as if it were not harmless. Id.

Here in this case, the Appellate Court's decision is in conflict with this courts decision in State v. Sassen Van Elsloo, 191 Wn.2d 798, 425 P.3d 807 (2018). The trial Court abused its discretion by improperly dismissing Juror 11, and there is a reasonable possibility that the improper dismissal was based on an unsupported assumption that Juror 11 would view the facts more favorably toward the defense. Sassen Van Elsloo, 191 Wn.2d at 841. Therefore, prejudice is presumed, and the State bears the burden of proving it was harmless beyond a reasonable doubt. Sassen Van Elsloo, 191 Wn.2d at 822. The Court of Appeals failed to abdicate this burden, and thus, this court should accept review in faith of promoting its role as

the "highest policy making Judicial body of the state." (WASHINGTON APPELLATE PRACTICE DESKBOOK, Supra) Moreover, the merits will be reached in this case. Id.

The record contains no indication that Juror 11 formed an opinion about Paris or that such opinion would prevent him from trying the case impartially. The record indicates that Juror 11 was indifferent to Paris, not biased toward him. Juror 11 made it clear that his contact with Paris was limited to Church events, and that conversations were limited to "hi" or "how are you?". Juror 11 also stated on the record, "it is with my most sincere heart that I will fulfill my obligation in the most pure way possible." RP 774. This shows Juror 11's resolve to remain impartial.

Neither the State nor the Trial Judge inquired whether Juror 11 could put aside any prior opinions and Judge the case fairly, and the record contains no facts supporting such a finding. The States motion to dismiss Juror 11 for cause failed to articulate any evidence in the record that Juror 11 was unfit to serve. Rather, the state argued that whether or not Juror 11 can remain impartial is not something that is needed to be inquired, and that the State would be in a different position if Juror 11 had recognized any of the other defense witnesses. The State further argued that the Juror's connection to the defendant, and his circle, would affect the States right to a fair trial.

The trial Judge granted the States motion to dismiss Juror 11 not because he was biased, but because he shook the hand of a spectator, that the circumstantial evidence suggested was there for the defendant, and because he played music with the defendant at church events. The trial Judge stated this "close connection" can lead to an inference of bias and prejudice and not being able to be impartial. Like the State, the trial Judge also fails to articulate any proof of actual bias as defined in RCW 4.44.190. Instead, the trial Judge applies this assumption of bias, and forgoes the necessary follow-up question, "that despite this information does the Juror think that he can be fair and impartial." RP 1272.

There is at the least a very real possibility that the Judge dismissed Juror 11 because of his evaluation of the testimony and his views on the merits of the case. Sassen VanElsloo, 191 Wn.2d at 825. There is no indication that Juror 11 was biased for or against the defendant, the only possible reason for dismissal was for his views on the merits of the case.

Therefore, the trial Court abused its discretion by dismissing Juror 11 without proof of actual bias. Applying the "reasonable possibility" standard, the defendants Constitutional right to a unanimous verdict was violated

and a new trial is warranted because there exists a reasonable possibility that the trial Judge dismissed Juror 11 because of his views of the sufficiency of the evidence. Sassen Van Elsloo, 191 Wn.2d at 822. However, the Court of Appeals ruled "Paris failed to show prejudice," but, according to Sassen Van Elsloo, the burden is not on Paris to show prejudice. Paris needs only to show "error of constitutional magnitude" (whereby prejudice is "Presumed"), and then, the burden is imputed upon the State to establish harmlessness beyond a reasonable doubt. Therefore, placing the decision made by the Court of Appeals in conflict with this Courts decision in Sassen Van Elsloo, and raising a significant question of law. RAP 13.4(b)(1),(3). This Court should accept review accordingly. (WASHINGTON APPELLATE PRACTICE DESKBOOK, Supra.)

F. CONCLUSION

For the foregoing reasons, the Court of Appeals decision is in conflict with this courts decision in Sassen Van Elsloo, and also raises a significant, Constitutional, question of law. This court should grant review, Paris's convictions be reversed, and a new trial granted.

Respectfully Submitted,

Adam Ezra Paris

Adam Ezra Paris

Appellant, Pro se'

Doc #435137

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

STATE OF WASHINGTON, Respondent, v. ADAM EZRA PARIS, Appellant.	No. 85912-9-I UNPUBLISHED OPINION

BOWMAN, J. — Adam Ezra Paris appeals his jury convictions for two counts of rape of a child in the first degree and two counts of child molestation in the first degree. Paris argues that insufficient evidence supports his conviction for one count of child molestation. He also argues that the trial court erred by giving an "abiding belief" reasonable doubt jury instruction and concluding that Paris opened the door to prejudicial testimony. Paris also raises several issues in a statement of additional grounds for review (SAG). We affirm.

FACTS

In December 2010, Paris began dating Danielle,[1] who had two daughters, eight-year-old P.M. and five-year-old K.G.-R. In 2011, Paris moved in with Danielle and her children. After Paris moved in, he began to sexually assault P.M., which eventually became a daily occurrence. Paris also sexually assaulted

[1] Although now divorced, Danielle used the last name Paris at trial. For clarity, we refer to Danielle by her first name and mean no disrespect.

K.G.-R. In 2012, Paris and Danielle married. They then had two sons of their own, E.M.P. in 2013 and E.P. in 2016.

Because of digestive issues, K.G.-R. suffered from painful constipation and required a rectal suppository, which Danielle helped her administer. Paris would insist on helping K.G.-R. insert the suppository, but Danielle consistently refused. One day, Paris and K.G.-R. were home alone when K.G.-R. needed her medication. Paris again insisted on helping her, but K.G.-R. refused. Paris yelled at K.G.-R. until she complied. He directed K.G.-R. to "get on all fours," or get down on the floor on her hands and knees, and removed her pants and underwear. Rather than insert the rectal suppository, Paris repeatedly poked at and inserted his fingers into K.G.-R.'s vagina.

In November 2017, Danielle discovered photographs on their shared computer of Paris having sexual contact with the family dog. Danielle also found a picture of P.M. mixed in with the photos. This prompted her to contact the police, and the State charged Paris with animal cruelty.[2] She also asked P.M. if Paris had ever touched her inappropriately, but P.M. did not disclose the abuse. Danielle then filed for divorce in late November 2017 and in December 2017, she received a restraining order limiting Paris' contact with the children as part of the dissolution proceedings.

In early 2018, K.G.-R. disclosed the sexual abuse to her school counselor. In February 2018, K.G.-R. and P.M. both met with a child forensic interviewer. K.G.-R. described "weird cuddling" but did not disclose the extent of Paris' abuse.

[2] Paris pleaded guilty to animal cruelty in the second degree in June 2018.

P.M. also disclosed that Paris was inappropriate with her but did not disclose the extent of the abuse.

In January 2019, E.M.P. disclosed to Danielle that Paris sexually abused him. Later that month, P.M. disclosed to her therapist that Paris sexually assaulted her. That night, K.G.-R. also fully disclosed to Danielle that Paris sexually assaulted her. Then, in February 2019, P.M. and K.G.-R. both disclosed the abuse to a child forensic interviewer. Shortly after, in March, the State charged Paris with one count of rape of a child in the first degree and one count of child molestation in the first degree of P.M. and one count of rape of a child in the first degree and one count of child molestation in the first degree of K.G.-R.[3]

Before trial, Paris moved under ER 403 to exclude testimony about his animal cruelty conviction and the "underlying" photos of him with the family dog. The trial court granted the motion, determining that "the probative value [of the testimony] . . . is substantially outweighed by the prejudicial impact to defense." But the court explained that it would "revisit" the issue if defense solicited testimony "that raise[s] an issue about the reason for the mother pursuing the divorce."

At trial, P.M. and K.G.-R. testified in detail about Paris raping and molesting them. Danielle then testified about when and how the girls disclosed the abuse. On cross-examination, Paris asked Danielle questions about her attempts to limit his contact with the children, including when she filed for divorce

[3] The State also charged Paris with one count of first degree child rape and one count of first degree child molestation of E.M.P. The jury acquitted Paris of those charges, so they are not at issue in this appeal.

and her request for a restraining order. Paris then pointed out that Danielle alleged that he sexually assaulted the girls shortly after seeking the divorce and restraining order. And he elicited testimony that P.M. did not initiate her disclosure to Danielle. Instead, Danielle asked P.M. whether Paris had inappropriately touched her.

Outside the presence of the jury, the State argued that Paris' cross-examination opened the door to testimony about Danielle's discovery of the photos of Paris with the family dog because it put at issue Danielle's motivation in seeking a divorce and restraining order and prompting P.M. to tell her about any abuse. According to the State, Paris' questions suggested that Danielle "coached" the girls' disclosures for her own purpose in the dissolution proceedings. The trial court agreed and allowed Danielle to testify that she sought the restraining order and confronted P.M. only after she found "concerning" pictures of Paris and the family dog with a picture of P.M. mixed in.

At the close of trial, the court instructed the jury about reasonable doubt. It instructed the jury that reasonable doubt is "such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." And if, "from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

The jury convicted Paris of two counts of first degree child rape of P.M. and K.G.-R. and two counts of first degree child molestation of P.M. and K.G.-R. On December 16, 2022, the court sentenced Paris to a standard range,

indeterminate sentence under RCW 9.94A.507. It imposed 292 months to life for the child rape counts and 182 months to life for the child molestation counts.

Paris appeals.

ANALYSIS

Paris argues that insufficient evidence supports his conviction for the one count of child molestation in the first degree of K.G.-R. He also argues that the trial court erred by giving the jury an "abiding belief" reasonable doubt instruction and concluding that Paris opened the door to testimony about the photographs of him with the family dog. Finally, Paris raises several issues in his SAG. We address each argument in turn.

1. Sufficiency of the Evidence

Paris contends that insufficient evidence supports his conviction of child molestation in the first degree of K.G.-R. We disagree.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017) (citing U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3). We review a challenge to the sufficiency of the evidence de novo as a question of constitutional law. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Such a challenge admits the truth of the State's evidence and all reasonable inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). So, we examine the evidence in a light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Id.* We "defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence." *State v. Loos*, 14 Wn. App. 2d 748, 765, 473 P.3d 1229 (2020). And we "consider circumstantial and direct evidence equally reliable." *Id.*

The court instructed the jury that to convict Paris of first degree child molestation of K.G.-R., it must find that "on or between January 1, 2011 and December 31, 2017, in an incident separate and distinct from any other count, the defendant had sexual contact with [K.G.-R.]." The court further instructed the jury that "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party."

Paris argues that no evidence shows he acted for sexual gratification because "[t]he act of successfully inserting an enema into K.G.-R.'s anus to relieve constipation cannot be considered sexual." But K.G.-R. testified that Paris "never" inserted the suppository. Instead, K.G.-R. described getting "on all fours" and Paris standing behind her, "poking" and penetrating her vagina with his fingers.

Poking and penetrating K.G.-R.'s vagina is unrelated to the act of inserting a rectal suppository. And Paris engaged in those acts several times.[4] Viewing

[4] We note that first degree child rape and first degree child molestation are separate offenses and that the double jeopardy clause does not prevent convictions—and attendant penalties—for both offenses arising out of a single incident where the only evidence of sexual intercourse supporting the rape is penetration. *State v. Wilkins*, 200 Wn. App. 794, 807-08, 403 P.3d 890 (2017). But here, the court instructed the jury that it must find Paris committed first degree child molestation of K.G.-R. in an incident "separate and distinct from any other count." And unchallenged jury instructions become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The parties do not dispute that the act of penetration supports the jury's determination that Paris committed rape of a child in the first degree of K.G.-R. So, we focus on only the act of "poking" in our analysis.

the evidence in a light most favorable to the State, a reasonable jury could conclude that Paris acted for the purpose of sexual gratification.

2. Reasonable Doubt Jury Instruction

Paris claims the trial court erred by instructing the jurors that if, after considering all the evidence, they had "an abiding belief in the truth of the charge," they are satisfied beyond a reasonable doubt. We disagree.

We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Although no specific wording is required, jury instructions must define "reasonable doubt" and clearly communicate that the State carries the burden of proof. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Id.*

Here, the trial court gave the jury the Washington Practice jury instruction for "reasonable doubt." *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 98 (5th ed. 2021) (WPIC). It instructed the jury:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Citing *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), Paris argues that the "court's instruction impermissibly encouraged the jury to undertake a search for the truth."

In *Emery*, the prosecutor told the jury during closing argument, " 'Members of the jury, I ask you, go back there to deliberate, consider the evidence, use your life experience and common sense, and speak the truth by holding these men accountable for what they did.' " 174 Wn.2d at 750-51. Our Supreme Court held that encouraging jurors to "speak the truth" was improper because "[t]he jury's job is not to determine the truth of what happened . . . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Id.* at 760.

We rejected Paris' argument in *State v. Fedorov*, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014). In that case, we acknowledged that it is improper for a prosecutor to tell the jury to "speak the truth" because it misstates the jury's role. *Id.* at 200. But we distinguished *Emery* because "the 'belief in the truth' phrase accurately informs the jury its 'job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.' " *Id.* at 200 (quoting *Emery*, 174 Wn.2d at 760).

Division Two of our court reached the same conclusion in *State v. Jenson*, 194 Wn. App. 900, 902, 378 P.3d 270 (2016) (adopting *Fedorov*). It concluded that the "existence or nonexistence of an 'abiding belief in the truth' . . . correctly invites the jury to weigh the evidence." *Id.*

Paris argues that our court wrongly decided *Fedorov* and *Jenson*. According to Paris, those cases relied on *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), and *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), and neither case directly addresses his argument.

In *Pirtle*, our Supreme Court approved a jury instruction that read, " 'If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.' " 127 Wn.2d at 657-58.[5] The court concluded that while the language was unnecessary, the trial court did not err by including it. *Id.* at 658. And in *Bennett*, our Supreme Court specifically approved the use of WPIC 4.01[6] as a whole because it "adequately permits both the government and the accused to argue their theories of the case." 161 Wn.2d at 317 (citing *Pirtle*, 127 Wn.2d at 656-58).

Fedorov and *Jenson* each cited *Pirtle* and *Bennett* and then independently determined that the "abiding belief in the truth" language in WPIC 4.01 serves a different purpose than the "speak the truth" language used by the prosecutor during closing in *Emery*. *Fedorov*, 181 Wn. App. at 200; *Jenson*, 194 Wn. App. at 901-02. And our Supreme Court denied review in both cases. *State v. Fedorov*, 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, 186 Wn.2d 1026, 385 P.3d 119 (2016). We decline the invitation to depart from that precedent.

3. Testimony About Photographs

Paris argues that the trial court abused its discretion by admitting Danielle's testimony about the photographs of Paris engaged in "concerning"

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[5] Emphasis omitted, alteration in original.

[6] The language in WPIC 4.01 has not changed since the *Bennett* decision. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 79 (2d ed. Supp. 2005).

conduct with the family dog.[7] The State contends Paris opened the door to the evidence when he questioned Danielle on cross-examination about initiating divorce proceedings and confronting P.M. We agree with the State.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Scherner*, 153 Wn. App. 621, 656, 225 P.3d 248 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* A trial court may admit only "relevant evidence." ER 402. Evidence is "relevant" if it tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401.

A court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Still, the court "has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to the evidence." *State v. Warren*, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006), *aff'd*, 165 Wn.2d 17, 195 P.3d 940 (2008). The "open door" doctrine promotes fairness by preventing one party from raising a subject and then barring the other party from further inquiry. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). Indeed, " '[i]t would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all

[7] Paris argues that the trial court "abused its discretion permitting the [S]tate to introduce evidence of Paris's animal cruelty conviction." But the jury never heard evidence that the State charged Paris with that crime or that he pleaded guilty to it.

further inquiries about it.' " *State v. Bennett*, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985)[8] (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Before trial, Paris moved under ER 403 to exclude any reference to the photographs Danielle found of him with the family dog. The court granted the motion because at that time, the prejudicial impact of the evidence "substantially outweighed" its probative value. But the court explained that "in the event that it becomes more precise that the defense is raising questions that raise an issue about the reason for [Danielle] pursuing the divorce[,] [i]f that becomes relevant in cross-examination, . . . the court without the jury present will revisit the issue."

During Danielle's cross-examination, defense counsel asked:

Q. Okay. Now, [Paris] moved out of the house, the family home, on November 24th, 2017, correct?
A. Yes.
Q. Okay. November 25th, 2017 was the last day that [Paris] was ever in that house; is that correct?
A. That is correct.
Q. Okay. And five days later, on November 30th, 2017, you filed for divorce?
A. I did.
Q. Okay. As part of that divorce case, on December 7th, 2017, you obtained a restraining order barring [Paris] from the residence and limiting his contact with the two boys, right?
A. Yes, I did.
Q. Now, there was a guardian ad litem appointed in your divorce proceeding, correct?
A. Yes.
. . . .

[8] *Bennett* analyzes the admission of evidence under ER 404(b), which prohibits the admission of "[e]vidence of a person's character or a trait of character . . . for the purpose of proving action in conformity" with the current offense. The fourth element of the test in assessing whether to admit evidence of a person's prior misconduct under ER 404(b) "ensure[s] that the evidence does not run afoul of . . . ER 403." *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (courts must weigh the probative value of the evidence against its prejudicial effect).

Q. . . . Did a portion of that guardian ad litem report to the court have to do with recommendations on child custody and visitation?
A. Yes.
Q. Okay. And a couple days after the report was filed, you filed a declaration in response to that guardian ad litem report, correct?
A. I believe so.
Q. And that was because you didn't agree with some of the recommendations by the guardian ad litem regarding how much visitation [Paris] should have with [E.M.P.] and [E.P.]?
A. I can't fully disclose on everything.
Q. Okay. Fair enough.

. . . .

Q. Do you remember the court issuing an order regarding [Paris'] opportunity to visit with the girls?
A. Yes, I do.
Q. Okay. Do you remember objecting to it or disagreeing with it?
A. I do remember.
Q. And that was around the fall of 2018?
A. Timeline, I'm not clear. I'm sorry.
Q. That's okay. No, I appreciate that. That's totally fine.
And then fast forward about — I guess it's about four months. January 1st, 2019, that is the day that [E.M.P.] disclosed to you that he had been the victim of sexual abuse at the hands of [Paris], his father, right?
A. That's around the time he did come forward about some of what happened, yes.
Q. Okay. And then just over two weeks after that, January 18th, 2019, you were the recipient of additional disclosures by [P.M.] and [K.G.-R.] that [Paris] had sexually abused them as well?
A. I was secondary on [P.M.] and then yes, [K.G.-R.].
Q. Okay. And you learned of their disclosures either secondarily or primarily on the very same day?
A. Yes, I did.
Q. Okay. And that was the same day that [E.M.P.] was being forensically interviewed . . . ?
A. Yes, it was.

. . . .

Q. I'd like to ask you a few questions about [P.M.], if I may.
You indicated that her disclosure to you occurred in the car while [E.M.P.] was at an occupational therapy appointment?
A. Yes.
Q. And it was just the two of you in the car?

A. Yes, it was.
Q. And that was the first time that [P.M.] ever told you that [Paris] had touched her in a sexual or inappropriate way?
A. That was the first time I'd gotten more of an open conversation, so yes.
Q. Do you recall asking [P.M.] in November 2017 directly, "Has [Paris] ever touched you inappropriately?"
A. There is a problem with asking that question, sir. I can't really answer.
Q. Okay. I will move on then.

Outside the presence of the jury, the State argued defense counsel's questions opened the door to testimony about Danielle finding the pictures of Paris with the family dog. It explained that the defense "paint[ed] a picture of [Danielle] coaching the children along the [divorce] process because she's trying to put a separation between the defendant and the kids," when actually the pictures of Paris with the dog and the photo of P.M. mixed in motivated Danielle to seek the divorce and restraining order and to confront P.M. about Paris' abuse.

The trial court agreed. It allowed the State to ask Danielle "what motivated you to seek a restraining order in December of 2017" and "what motivated you to ask [P.M.] . . . during that same timeframe . . . about whether the defendant had touched her inappropriately."[9] Danielle testified, "Because of

[9] The court also read the jury a limiting instruction before Danielle's redirect examination by the State:

> [The prosecutor] is going to ask the witness some questions, and you are being — evidence is being allowed by me to be inquired into on the topic of why the witness pursued a restraining order and why the witness asked a particular question of her daughter. You are being allowed to hear this evidence only for the limited purpose of hearing the motivation behind the witness taking those actions and not for any other purpose, so the use of that evidence is only for the limited purpose of the why from the witness.

photos I found of . . . Paris and the family dog - it was concerning to me - and within those pictures a photo of my daughter [P.M.]."

Because Paris' questions on cross-examination put at issue Danielle's motivation to seek a restraining order and ask P.M. directly whether Paris had ever inappropriately touched her, the trial court did not abuse its discretion by allowing Danielle to testify about the source of her motivation.

4. SAG

In his SAG, Paris argues that the trial court erred by dismissing an impaneled juror, failing to instruct the jury on "the medical exception to sexual intercourse," failing to engage in a "same criminal conduct" analysis when calculating his offender score, and imposing an unlawful enhanced sentence.

A. Biased Juror

Paris argues the trial court erred by dismissing a juror for bias at the close of the evidence. We disagree.

We review a trial court's decision to excuse a juror for an abuse of discretion. *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 806-07, 425 P.3d 807 (2018). The trial court "has the advantage of observing a juror's demeanor" and is " 'in the best position to determine a juror's ability to be fair and impartial.' " *State v. Teninty*, 17 Wn. App. 2d 957, 964, 489 P.3d 679 (2021) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). So, we "will uphold a trial court's decision so long as it falls within the broad range of reasonable decisions." *Id.*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a fair trial "by an

erroneous action from the whole, that the judgment was not substantially swayed by the error.' " *Id.* at 823[10] (quoting *Hinton v. United States*, 979 A.2d 663, 690-91 (D.C. Cir. 2009)).

The trial court did not excuse juror 11 based on concern about the juror's view of the merits of the evidence presented. And Paris makes no argument that any error substantially swayed his verdict. Indeed, we presume an alternate juror is unbiased. *Sassen Van Elsloo*, 191 Wn.2d at 822. As a result, the release of juror 11 had no substantial influence on the outcome of the trial, and any error was harmless.

B. Medical Exception Instruction

Paris argues that the facts of his case supported a jury instruction on the "medical exception" to "sexual intercourse." He now asserts his conduct with K.G.-R. was for medical purposes because he inserted a suppository into K.G.-R.'s rectum to treat her constipation. According to Paris, the failure to provide such an instruction violated his right to due process by preventing him from presenting a complete defense. But the evidence adduced at trial did not support such an instruction.

While the trial court must fully instruct the jury on the applicable law, there is no right to an instruction that is not supported by the evidence. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008). And there is no evidence in the record to suggest that Paris inserted a suppository into K.G.-R's rectum. First, as discussed above, K.G.-R. testified that Paris did not insert a suppository and,

[10] Internal quotation marks omitted.

impartial jury." Under RCW 2.36.110, a trial judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias . . . or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110 places a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform their duties as a juror. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). To dismiss an impaneled juror for actual bias, the challenging party must show that the juror "has formed or expressed" a biased opinion and that the juror "cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

Before closing arguments, juror 11 realized that he had "played music together with the defendant [at church events] for about 20 times over the last year." The trial court dismissed the juror because "[t]hat close connection can lead to an inference of bias and prejudice and not being able to be impartial." Paris argues he is entitled to a new trial because the court failed to establish that the juror was actually biased. We need not reach that issue because Paris fails to show prejudice.

Prejudice exists and a defendant is entitled to a new trial when the erroneous dismissal of an impaneled juror "stems from concern over the juror's views of the merits of the evidence presented." *Sassen Van Elsloo*, 191 Wn.2d at 815. But when the erroneous dismissal of an impaneled juror does not stem from concern over the juror's views of the merits of the evidence presented, no new trial is warranted if any error was harmless. *Id.* Error is harmless if we can say, " 'with fair assurance, after pondering all that happened without stripping the

instead, repeatedly touched and poked her vagina. That conduct is unrelated to the act of inserting a suppository. Further, Paris completely denied the allegation at trial, testifying that he "never helped [K.G.-R.] insert suppositories in her anus." As a result, the evidence did not support the trial court giving a "medical exception" instruction.

C. Same Criminal Conduct

Paris argues that the trial court erred in failing to engage in a "same criminal conduct analysis" when calculating his offender score. Paris waived this argument on appeal because he did not seek a same criminal conduct analysis at sentencing.

"We review a sentencing court's calculation of an offender score de novo." *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The sentencing court follows the guidelines of the Sentencing Reform Act of 1981, chapter 9.94A RCW, to calculate an offender score. *See* RCW 9.94A.525, .510. In calculating an offender score, the court must (1) identify all prior convictions, (2) eliminate those that "wash out," and (3) count the prior convictions that remain. *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

If a trial court finds that some or all of a defendant's current crimes encompass the same criminal conduct, the court must count those offenses as a single crime to calculate the defendant's offender score. RCW 9.94A.589(1)(a). But a defendant must request that the trial court conduct a same criminal conduct analysis at sentencing to preserve the issue for appeal. *State v. Jackson*, 28 Wn. App. 2d 654, 667-68, 538 P.3d 284 (2023).

Paris did not ask the sentencing court to engage in a same criminal conduct analysis. Indeed, Paris told the court that he is "not arguing that [the child rape and child molestation] counts . . . are [the] same criminal conduct" because the law would not support such a finding.[11] Paris waived the issue for appeal.

D. Sentencing Enhancement

Paris also argues that the trial court unlawfully elevated his minimum sentence by imposing an indeterminate sentence under RCW 9.94A.507 because "any fact that increases a mandatory statutory minimum is required to be submitted to a jury." We disagree.

Whether an issue presents a question of law or fact is a question of law that we review de novo. *State v. Mullen*, 186 Wn. App. 321, 328, 345 P.3d 26 (2015). Under RCW 9.94A.507(1)(a)(i) and (3), a person convicted of rape of a child in the first degree or child molestation in the first degree is subject to a minimum and maximum term of confinement. In such cases, the minimum term must be either within the standard range or, if grounds for an exceptional sentence apply, it may be outside the standard range. RCW 9.94A.507(3)(c)(i). The maximum term "shall consist of the statutory maximum sentence for the offense." RCW 9.94A.507(3)(b). The statute also requires an offender to comply

[11] The State and Paris both told the court that under *State v. Torrence*, No. 52432-5-II, slip op. at 13-19 (Wash. Ct. App. Oct. 6, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2 52432-5-II Unpublished Opinion.pdf, convictions for first degree child rape and first degree child molestation do not constitute the same criminal conduct because each crime requires a different criminal intent.

with the Indeterminate Sentence Review Board and provides for community custody up to the maximum term of a sentence. RCW 9.9A.507(5), (6).

In support of his argument, Paris cites *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). In *Alleyne*, the United States Supreme Court held that under the Sixth Amendment, any fact (i.e., a sentencing factor) that increases punishment for a crime is an "element" of that crime and "must be submitted to the jury and proved beyond a reasonable doubt." *Id.* at 107-08.

Here, the trial court imposed a minimum term of 292 months—a sentence within his standard range.[12] So, the trial court did not elevate his minimum sentence. In any event, as much as Paris characterizes RCW 9.94A.507 as increasing his punishment based on facts that must be decided by a jury, the statute does not defy *Alleyne*. Paris is subject to the indeterminate sentencing statute only because a jury determined beyond a reasonable doubt the facts sufficient to support his convictions for first degree rape of a child and first degree child molestation. In turn, those convictions authorized the trial judge to impose an indeterminate sentence under RCW 9.94A.507.

In sum, sufficient evidence supports Paris' conviction for child molestation in the first degree of K.G.-R., and the trial court did not err by instructing the jury that it is satisfied beyond a reasonable doubt if "you have an abiding belief in the truth of the charge[s]" and concluding that Paris opened the door to testimony

[12] Paris had an offender score of 9, making the standard range on the most serious offense 240 to 318 months.

about the photographs of him with the family dog. Finally, none of the issues Paris raises in his SAG amount to error.

We affirm Paris' convictions for two counts of rape of a child in the first degree and two counts of child molestation in the first degree of P.M. and K.G.-R.

Brennan, J.

WE CONCUR:

Chung, J.

Mann, J.

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Appellate Court Case Title:	State of Washington, Respondent v. Adam Ezra Paris, Appellant
Trial Court Case Number:	19-1-00469-3

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