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Case #: 1034989

No.
Court of Appeals No. 57160-9-II

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN WESTBROOK,

Petitioner.

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

Petition for Review

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TABLE OF CONTENTS

A. Identity of Petitioner 1

B. Opinion Below 1

C. Issues Presented 2

D. Statement of the Case 3

1. Representative Peter Abbarno, a friend of the prosecuting attorney, is seated on the jury and chosen as the presiding juror 3

2. The court allows the State to introduce evidence of Mr. Westbrook's arrest in California 11

E. Argument 12

1. Mr. Westbrook demonstrated he is entitled to a new trial based on Juror 11's professional relationship and personal friendship with the Lewis County Prosecuting Attorney 12

a. Mr. Westbrook was denied his right to a fair and impartial jury trial because Mr. Abbarno sat as a juror when he was actually or impliedly biased 13

b. Mr. Abbarno was impliedly biased because before this trial he was partners with Mr. Meyer in the business of getting elected 16

c. Mr. Abbarno was actually biased because before this trial he publically stated that

convicted child molesters should not be released from prison 19

d. Even if the particular facts of this case do not neatly fit into the challenges defined in RCW 4.44.170, had the trial judge been presented with truthful information about the relationship between Mr. Abbarno and Mr. Meyer, she would have been compelled to excuse Mr. Abbarno 20

e. The opinion of the Court of Appeals calls for review by this Court 22

2. The improper admission of evidence to show a "consciousness of guilt" warrants review by this Court 26

F. Conclusion.. 31

TABLE OF AUTHORITIES

Washington Constitution

Const. art. I, § 22 .... 14, 27

United States Constitution

U.S. Const. amend. VI 14
U.S. Const. amend. XIV 27

Washington Supreme Court

In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) 15
In re Yates, 177 Wn.2d 1, 296 P.3d 872 (2013) 14
Nelson v. Placanica, 33 Wn.2d 523, 206 P.2d 296 (1949) 15
State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014) 30
State v. Lupastean, 200 Wn.2d 26, 513 P.3d 781 (2022) 23, 24
State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 26
State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021) 27, 28, 30

Washington Court of Appeals

In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942 (2005) 15
State v. Boiko, 138 Wn. App. 256, 156 P.3d 934 (2007) 20
State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) 27, 28, 30
State v. Guevara Diaz, 11 Wn. App. 2d 843, 456 P.3d 869 (2020) 14
State v. Stackhouse, 90 Wn. App. 344, 957 P.2d 218 (1998) 21

United States Supreme Court

Hickory v. United States, 160 U.S. 408, 16 S. Ct. 327, 40 L. Ed. 474 (1896) 27

United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) 26

Washington Statutes

RCW 39.27.020 25
RCW 39.27.040 25
RCW 4.44.170 .... 13, 14, 20

Court Rules

RAP 13.4 .... 13, 26, 30
RPC 3.3 12

A. Identity of Petitioner

Petitioner Brian Westbrook asks this Court to accept review of the opinion in *State v. Westbrook*, 57160-9-II.

B. Opinion Below

This case involves two close personal and professional friends. Peter Abbarno, an attorney, a State Representative for Lewis County, and Juror 11 in this case, was the presiding juror in this prosecution. He and Jonathan Meyer, the Lewis County Prosecutor, are both licensed lawyers and close friends.

Neither man disclosed the extent of their relationship, prior to, or during, voir dire in a Lewis County criminal case. Neither disclosed the nature of their friendship during trial or during a hearing on a motion for new trial. Only after the appeal was filed, and after the Court of Appeals remanded the matter for an additional evidentiary hearing did the true nature of that friendship come to light.

Nonetheless, the Court of Appeals affirmed Mr. Westbrook's conviction concluding he had not shown Mr.

Abbarno was actually or impliedly biased or that nondisclosure of the relationship prejudiced him.

C. Issues Presented

1. Mr. Westbrook was entitled to a trial by an impartial jury. He was denied his right to a fair trial in Lewis County when the presiding juror hid from the court he was friends with, and had previously been publicly endorsed more than once by the Prosecutor and where that juror invited that Prosecutor to be a guest on the presiding juror's radio program and expressed negative views about persons convicted of child molestation, the charge Mr. Westbrook faced.

2. The trial court deprived Mr. Westbrook a fair trial when it admitted evidence that Mr. Westbrook was arrested in California as "consciousness of guilt."

D. <u>Statement of the Case</u>

> *1. Representative Peter Abbarno, a friend of the prosecuting attorney, is seated on the jury and chosen as the presiding juror.*

Mr. Abbarno, is a State Representative for Lewis County. Mr. Abbarno was Juror 11 in this case, and was the foreperson of the juror. CP 98. He and Jonathan Meyer, the Lewis County Prosecutor, are both licensed lawyers and close friends. Despite being asked during voir dire, in a Lewis County prosecution, about his relationship to the prosecutors, Mr. Abbarno chose to not disclose the existence or extent of his social and political relationship with Mr. Meyer. RP 23-24.

After trial, however, the trial judge learned something about their social relationship. Mr. Abbarno, Mr. Meyer and another man, bought and divided season tickets for the Seattle Kraken. She said:

> Shortly [after the verdict], in a casual conversation with court administration . . . it was a casual conversation. I don't even really know how it came up. I think we were talking about sports and sporting events and season tickets and stuff like

> that and she had made the Court aware that Mr. Abbarno and Mr. Meyer shared tickets. And that, in fact, Mr. Meyer had utilized tickets at the time of trial or at least during Mr. Abbarno's service as a juror or being on the panel as a prospective juror.
>
> . . . . it occurred to me that could be an issue -- and trust me it was a really, really tough decision for me and it put me, kind of, in a really bad situation or a bad spot . . . .

RP 779-80.

Based on that information, information his attorney was unaware of, Mr. Westbrook filed a motion for a new trial. CP 97-100.

In response, Mr. Meyer and Mr. Abbarno filed affidavits admitting that prior to trial they shared tickets for Kraken games. CP 199. Mr. Meyer also stated he had been to Mr. Abbarno's home and they both attended "multiple functions" where dinner was served. *Id.*

Mr. Abbarno admitted he purchased season tickets to the Kraken with Mr. Meyer. He also provided records showing Mr.

Meyer and his wife made multiple donations to his campaigns. CP 204-206.

The Court voiced its dismay with Mr. Meyer's actions. RP 809-10. But she ultimately concluded there was no implied bias and denied the motion. RP 810-12.

But there was more.

Even after the judge inquired about their relationship, neither Mr. Meyer nor Mr. Abbarno revealed its full extent. CP 275 (FOF 22).

Instead, after initial appellate counsel was appointed, she discovered Mr. Abbarno and Mr. Meyer had an extensive political relationship. The Court of Appeals granted counsel's request to remand for an evidentiary hearing. At that hearing Mr. Westbrook proved a far more extensive relationship between the two men.

Mr. Meyer endorsed Mr. Abbarno's campaigns for public office in 2015 and 2020 after Mr. Abbarno asked him to do so. 11/22/23 RP 10. This was long before the trial. In 2020, Mr.

Meyer filmed at least two endorsements for Mr. Abbarno's campaign.

In one advertisement, Mr. Meyer stands in front of a large Abbarno campaign sign at a podium with another Abbarno sign on it. 11/22/23 RP 16; CP 273 (FOF 6); Exhibit 3. Mr. Meyer says:

> We are living in uncertain times, and need strong leadership in Olympia working for us. I'm Lewis County Prosecuting Attorney Jonathan Meyer, asking you to join me by supporting and electing Peter Abbarno as our state representative. Peter works tirelessly to improve our community, and will carry that work ethic to Olympia where we need him most. Learn more about how you can support and elect Peter Abbarno as our state representative at electpeterabbarno.com.

CP 274 (FOF 14); Ex. 3.

This advertisement remained on Mr. Abbarno's Facebook page as late as November, 2022. Mr. Abbarno has 3,200 followers. 11/22/23 RP 16. Mr. Abbarno took advantage of the endorsement on May 9, 2020, stating: "Lewis County Prosecuting Attorney Jonathan Meyer endorses and supports

the Campaign to Elect Peter Abbarno. I look forward to representing the 20th Legislative District and working on solutions to important issues facing our community." CP 274 (FOF 15); Ex. 3.

In the second video, Mr. Meyer is pictured in front of an Abbarno yard sign and says:

> "Hey guys, Jonathan Meyer, Lewis County Prosecutor. Just letting you know that I'm supporting Peter Abbarno because I want to keep the Twentieth District strong. I'm asking you to do the same." CP 274 (FOF 12); Ex. 3.

This video also remained on Mr. Abbarno's Facebook page until at least November 2022. And Mr. Abbarno responded on April 17, 2020: "Thank you Jonathan Meyer for your support of my campaign endorsement. Jonathan and I have supported each other for many years before he joined Lewis County Prosecutor's Office. ***I appreciate his support and friendship***." CP 274 (FOF 13); Ex. 3.

Mr. Abbarno also hosted a weekly local radio show called. 11/22/23 RP 17. Mr. Abbarno could not remember how

many times he had Mr. Meyer on his show. On the available recordings, he introduced Mr. Meyer as a "good friend to the show" on at least two occasions. Exhibit 3. The recordings reveal a long relationship where Mr. Meyer filled in as a host "a lot." CP 273 (FOF 9). The two discussed criminal justice matters, such as Governor Inslee's decision to release inmates in response to the pandemic. CP 273 (FOF 10).

During one broadcast long before this trial, Mr. Meyer and Mr. Abbarno discussed the Governor's release of non-violent inmates. Mr. Meyer defined non-violent offenses to include child molestation in the third degree. Mr. Abbarno responded by stating "we're talking about non-violent. Do you want a child molester released? I mean that is a huge deal." CP 273-74 (FOF 10). During the same broadcast, Mr. Abbarno and Mr. Meyer opined the governor was "allowing inmates to dictate criminal justice reform" by authorizing their release. CP 274 (FOF 11).

A few weeks later, Mr. Meyer again appeared on Mr. Abbarno's radio program. The two took calls from members of the public and discussed Governor Inslee's release of prisoners in response to the pandemic. CP 274 (FOF 16); Ex. 3.

Over the years, Mr. Abbarno had collaborated on legislation with Mr. Meyer, including criminal justice matters. CP 274 (FOF 17).

Mr. Abbarno was aware the trial judge inquired about his relationship with Mr. Meyer when the issue of the hockey tickets arose. He signed the declaration drafted by the prosecutor's office and made no changes. CP 204-206. He did not disclose Mr. Meyer's endorsements or appearances on his radio show in that declaration. CP 275 (FOF 25). When asked why he did not reveal these details about his relationship with Mr. Meyer, Mr. Abbarno claimed he had "no recollection." CP 275 (FOF 23).

Despite Mr. Abbarno's lack of recall, Mr. Meyer filled in he had done more than merely endorse his friend. Mr. Meyer

testified Mr. Abbarno asked him to appear on his programs in 2020. 11/22/23 RP 44. He emceed at Mr. Abbarno's campaign kick-off event in 2020. 11/22/23 RP 44. He introduced Mr. Abbarno to "different dignitaries or people of importance that were there, and I may have introduced Mr. Abbarno as well. I don't have any specific recollection." 11/22/23 RP 45.

Mr. Meyer filed a declaration about his relationship with Mr. Abbarno and hockey tickets in response to Mr. Westbrook's initial motion for new trial. Exhibit 5. He did not include any information regarding his appearances on Mr. Abbarno's radio show or his endorsements of Mr. Abbarno. 11/22/23 RP 50.

The trial judge concluded this Court's order on remand permitted her only to enter factual findings. 11/22/23 RP 1-10. She did not engage in any legal analysis about how her findings might affect the validity of Mr. Westbrooks convictions.

2. The court allows the State to introduce evidence of Mr. Westbrook's arrest in California.

Monica Cox reported allegations that Mr. Westbrook sexually assaulted one of her children. CP 6. Charges were filed a few weeks later and a warrant for Mr. Westbrook's arrest was issued the following week. CP. He was arrested in California and had a first appearance in Lewis County a month later.

The State offered evidence Mr. Westbrook was arrested in California because he "fled" Lewis County. 11/15/21 RP at 24. The defense objected noting there was no evidence about when Mr. Westbrook left Lewis County or why. *Id*. There was no evidence Mr. Westbrook knew a warrant for his arrest existed or police were looking for him. RP 11/15/21 RP 25.

Regardless, the judge permitted the evidence because:

> [H]e was not where he was supposed to be, where everyone expected him to be, and he could not be found, he was eventually found somewhere else.

Id.

Thus, an officer testified he went to Mr. Westbrook's house, but he was not there. RP 552. He tried again "a handful of times." RP 552. Mr. Westbrook was arrested in California and police in Lewis County were notified. RP 554.

In closing, the prosecutor argued Mr. Westbrook's arrest in California was "consciousness of guilt." RP 754. Her argument was the jury could infer Mr. Westbrook went to California because he knew the police were looking for him and he knew he was guilty.

The jury convicted Mr. Westbrook.

E. Argument

1. Mr. Westbrook demonstrated he is entitled to a new trial based on Juror 11's professional relationship and personal friendship with the Lewis County Prosecuting Attorney.

Lawyers have a duty of candor to the Court. RPC 3.3. Jurors are sworn to truthfully answer questions during voir dire. Peter Abbarno, an attorney, legislator, and presiding juror in this case, and Jonathan Meyer, the Lewis County Prosecutor,

violated those principles. The Court of Appeals opinion endorsed this deceit when it denied Mr. Westbrook a new and fair trial. The court's conclusion demands review under RAP 13.4.

a. Mr. Westbrook was denied his right to a fair and impartial jury trial because Mr. Abbarno sat as a juror when he was actually or impliedly biased.

There are three kinds of bias challenges in Washington. Only two are relevant here. A juror can be challenged for "implied bias." RCW 4.44.170(1). There are several ways to prove "implied bias." RCW 4.44.180. Only one is relevant here. A juror is impliedly biased if he is: "Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party." RCW 4.44.180(2)

And a juror can be challenged for actual bias. That is: "a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170 (2).

The Sixth Amendment and article I, §section 22 of the Washington State Constitution guarantee a defendant the right to an impartial jury. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854-55, 456 P.3d 869 (2020). This right is violated by the seating of a biased juror, "whether the bias is actual or implied." *In re Yates*, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). Even if neither party challenges a juror, a trial court must dismiss a biased juror sua sponte. *Guevara Diaz*, 11 Wn. App. 2d at 855. Seating a biased juror requires reversal in every instance, a defendant is entitled to a new trial without showing prejudice and an appellant may raise a juror bias claim for the first time on appeal. *Id.* at 851-52.

When there is strong evidence a juror began a case with bias but concealed that bias in jury selection, the trial court may grant a motion for new trial because "[t]he misconduct consists of his deception of the court and counsel as to his incompetence as an impartial juror." *Nelson v. Placanica*, 33 Wn.2d 523, 528–29, 206 P.2d 296 (1949). Typically, to obtain a new trial for juror bias for undisclosed information in voir dire, a party must show (1) the juror intentionally failed to answer a material question and (2) a truthful disclosure would have provided a valid basis for a challenge for cause. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994).

But, a juror's failure to speak during voir dire regarding a material fact can amount to juror misconduct. *In re Detention of Broten*, 130 Wn. App. 326, 337, 122 P.3d 942 (2005). Mr. Abbarno was well aware during voir dire the court was trying to discern whether he knew the attorneys for the parties. Mr. Abbarno, an experienced attorney had to know he needed to disclose his personal relationship with Mr. Meyer. He did not.

Mr. Abbarno's claim at the subsequent evidentiary that he did not recall Mr. Meyer's endorsement is simply unbelievable. In addition, Mr. Meyer was aware Mr. Abbarno was seated on the jury but did not disclose his relationship with Mr. Abbarno to the court.

Once a portion of their relationship came to light, the trial court expressed extreme displeasure with the situation. But she refused to grant a new trial. Even though Mr. Abbarno and Mr. Meyer had a second chance to be honest, they again withheld information, not telling judge their relationship extended well beyond shared hockey tickets.

This evidence establishes Mr. Abbarno's intentional failure to answer both during voir dire and in his post-trial declaration.

b. Mr. Abbarno was impliedly biased because before this trial he was partners with Mr. Meyer in the business of getting elected.

Only in response to the motion for new trial did Mr. Abbarno acknowledge Mr. Meyer had contributed money to his

campaign and that the two shared hockey tickets. That alone is arguably enough to find implied bias.

But Mr. Meyer and Mr. Abbarno continued to withhold that their social and political involvement went far beyond that. Mr. Meyer had actively campaigned for Mr. Abbarno. Mr. Meyer further assisted Mr. Abbarno's political efforts introducing him to "different dignitaries or people of importance." Mr. Abbarno understood and readily acknowledged the value of Mr. Meyer's endorsements on his Facebook page. Such a public endorsement was likely far more valuable in a small district than the monetary contributions Mr. Meyer made.

The undisputed evidence is Mr. Abbarno and Mr. Meyer were partners in the business of getting Mr. Abbarno elected and in discussing legislation and other governmental activities. They were also partners in broadcasting that information to the public and answering call-in questions.

This later-disclosed evidence demonstrates Mr. Abbarno's statement he could decide this case fairly and impartially was untrue. He needed and valued Mr. Meyer's support. If he acquitted Mr. Westbrook, he would have jeopardized Mr. Meyer's support.

Mr. Abbarno's repeated failure to disclose the extent of his relationship even when that was the prime issue in the motion for new trial, is additional proof of Mr. Abbarno's inability to be impartial. As a lawyer who has tried cases, he would know that by revealing the full extent of his relationship with Mr. Meyer would have resulted in his removal from this case. And he knew that Mr. Meyer's support for him would be material to the trial judge's decision on the motion for new trial because he revealed Mr. Meyer's monetary donation to his campaign. But he concealed the arguably far greater contribution – Mr. Meyer's forceful endorsement of his campaign to the public and to other dignitaries and important people.

Mr. Abbarno did not reveal relevant facts to the judge because he wanted to be retained as a juror because of his relationship with Mr. Meyer.

c. Mr. Abbarno was actually biased because before this trial he publically stated that convicted child molesters should not be released from prison.

Mr. Westbrook was charged with multiple counts of child molestation. During voir dire, after being advised of the charges against Mr. Westbrook, Mr. Abbarno swore he could be fair and impartial to both sides. CP 269 (FOF 6). But Mr. Abbarno withheld he had publicly stated that he opposed the release of prisoners during the pandemic. He specifically questioned availability of release to inmates charged or convicted of child molestation. Mr. Abbarno made these statements – *in the presence of Mr. Meyer* - on the radio presumably to get his position on this issue in front of his constituents.

Despite his general statement during voir dire, Mr. Abbarno's public statement before this trial was proof of "a

state of mind" on his part, directly in reference to the issue he would be presented with as a juror, which would substantially prejudice Mr. Westbrook. Had he revealed his prior statement on this issue, the trial court would have been compelled to excuse him for cause. But defense counsel had no basis to challenge him for cause, because Mr. Abbarno withheld all that and more from Mr. Westbrook and the court.

d. Even if the particular facts of this case do not neatly fit into the challenges defined in RCW 4.44.170, had the trial judge been presented with truthful information about the relationship between Mr. Abbarno and Mr. Meyer, she would have been compelled to excuse Mr. Abbarno.

The statute governs a party's challenge for cause on implied bias. But CrR 6.4(c)(1) permits the trial judge to excuse a juror, *sua sponte*, when the judge believes grounds for challenge are present. *State v. Boiko*, 138 Wn. App. 256, 265, 156 P.3d 934 (2007). *Boiko* held these criminal rules govern criminal procedure and supersede all procedural statutes in conflict with the rules. *Id.* (citing CrR 1.1). The Court pointed

out under RCW 2.36.110, the 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, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." *See State v. Stackhouse*, 90 Wn. App. 344, 352, 957 P.2d 218 (1998) (granting a motion for a new trial where two empaneled jurors knew about prior murder charges the defendant had faced).

This is an exceptional case. Mr. Abbarno and Mr. Meyer are licensed members of the Washington State Bar Association with knowledge of the purpose of voir dire and their duty of candor to the tribunal. Both had publicly acknowledged Mr. Meyer's political support for Mr. Abbarno's campaign. Yet given more than one opportunity to reveal the extent of their relationship, they did not do so.[1] Both had publicly

[1] Mr. Westbrook has described the radio program above. But he urges this Court to listen to audio in Exhibit 3. The audio

acknowledged Mr. Meyer's political support for Mr. Abbarno's campaign. And during one show, Mr. Abbarno specifically commented negatively about the release of persons convicted of child molestation.

An objective observer of the facts would be compelled to conclude the relationship between Mr. Abbarno and Mr. Meyer made it impossible for Mr. Abbarno to be a fair and impartial juror. Even if the facts here do not fit neatly into Title RCW 4.44, had the full extent of the two men's relationship been revealed, the trial court would have had an independent duty to discharge Mr. Abbarno.

e. The opinion of the Court of Appeals calls for review by this Court.

Despite all that transpired, the Court of Appeals denied Mr. Westbrook the fair trial he was entitled to.

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reveals an easy and warm relationship between two men who appear to share the same opinions about the criminal justice system.

In support of its conclusion the opinion of the Court of Appeals sets forth a portion of this Court's opinion in *State v. Lupastean*, 200 Wn.2d 26, 53, 513 P.3d 781 (2022). Opinion at 9. But *Lupastean* also said "a timely raised motion for a new trial **must** be granted where a juror intentionally fails to disclose information that **would have provided a valid basis for a challenge for cause**." 200 Wn.2d at 53-54 (Internal citations omitted, emphasis added).

The personal and professional relationship between Mr. Meyer and Mr. Abbarno certainly would have provided a valid basis for a cause challenge. The two publicly endorsed each other's political viewpoints. The two described themselves as personal friends. The two shared season tickets to the Seattle Kraken. The two are both attorneys with a duty of candor to the court. And yet neither shared the fact or details of their relationship, during voir dire or even in response to the motion for a new trial. The nature of their relationship, "would have provided a valid basis for a challenge for cause." Accordingly,

the *Lupastean* opinion makes clear the trial court had to grant the motion for new trial.

Mr. Westbrook need not establish Mr. Abbarno "withheld information in response to questions asked of him during voir dire." *See* Opinion at 12. While *Lupastean* cites that as one example of "exceptional circumstances" requiring a new trial, *Lupastean* is clear it is just that, one example of exceptional circumstances not the full scope of such circumstances. 200 Wn.2d at 54 (". . . in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror's factual circumstances, **including** . . .). Courts can and must expect more of licensed attorneys.

The trial court specifically called out the inaction of the Mr. Meyer.

> I'm frankly frustrated with the State . . . that any of us are even put in this situation, because I think it was very easily avoided.
>
> I will start off by saying I do not condone the conduct of the elected prosecutor in this case. And I can't deny that his actions may have ethical

> consequences beyond this courtroom. But that's
> not for me to decide.

RP 809-810.

But the Court of Appeals minimizes Mr. Meyer role as Prosecuting Attorney, offering Mr. Meyer had "no direct involvement" in this case. Opinion at 13. The charges were filed in Mr. Meyer's name. CP 12, 22. His name appears on every brief in this case. It is Mr. Meyer's statutory duty to represent the State in criminal prosecutions. RCW 39.27.020. While Mr. Meyer may appoint deputies to assist him in carrying out his constitutional and statutory requirements "the prosecuting attorney **shall be responsible** for the acts of his or her deputies." RCW 39.27.040 (Emphasis added).

Whether he personally conducted the trial is neither here nor there. Mr. Meyer was directly involved in the case. To hold otherwise is to conclude he violated his statutory duty.

A "prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v.*

Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Mr. Meyer was aware his close friend was a juror on a case he was prosecuting, even if he was not aware of that fact at the time of jury selection. CP 275 (FOF 25.) Mr. Meyer said nothing.

The trial court was rightly concerned with Mr. Meyer's behavior. The Court of Appeals refusal to provide relief to the person harmed by the behavior of two members of the bar, one an elected prosecutor with an added constitutional duty, is contrary to this Court's opinions and raises a substantial constitutional question. The refusal to grant Mr. Westbrook a new and fair trial in light of the behavior of these two attorneys is a gross departure from the accepted course of judicial proceedings. Review is warranted under RAP 13.4.

2. *The improper admission of evidence to show a "consciousness of guilt" warrants review by this Court.*

A person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend.

XIV; Const. art. I, § 22. The inference that a person's behavior reflects their consciousness of guilt has tenuous probative value. *State v. Slater*, 197 Wn. 2d 660, 667-68, 486 P.3d 873 (2021). The Supreme Court "has warned for over a century that flight is not limited to those who are guilty, it also includes some who are innocent." *Slater,* 197 Wn. 2d at 667-68 (internal citations ommitted). It is a "fundamental truth" that innocent people often try to evade the authorities due to "fear or other emotion." *Id*.

Consciousness of guilt evidence such as flight "tends to be only marginally probative" yet is often markedly prejudicial. *Slater*, 197 Wn. 2d at 668 (quoting *State v. Freeburg*, 105 Wn. App. 492, 498, 501, 20 P.3d 984 (2001)). In *Slater*, the defendant missed court on the day of trial. *Id*. at 666. The prosecution contended his failure to come to court showed his consciousness of guilt. *Id*. This Court rejected this argument ruling missing a court date does not "rise to the level" of evidence from which jurors may infer consciousness of guilt on

the underlying crime. *Id*. at 671. This inference is too "speculative." *Id*. at 673. "A trial court must not automatically allow this type of evidence" and must exclude such evidence when the consciousness of guilt inference rests on speculation. *Id*. at 674.

In *Freeburg*, the defendant fled after shooting someone and, when arrested later, had a gun with him. *Id*. at 497. Although this gun was unrelated to the homicide, the prosecution claimed it showed his consciousness of guilt by arming himself to avoid arrest. *Id*. at 500. The Court rejected that contention finding the evidence had no substantial connection to the crime and made the defendant appear dangerous and violent. *Id*. at 501.

In *Slater* and *Freeburg*, court's set forth a test for admitting a person's conduct as consciousness of guilt evidence. The court must determine the party offering the evidence proves this inference is "substantial and real," and not "speculative, conjectural, or fanciful." *Slater,* 197 Wn. 2d at

668. The court must confidently find the required connection between the behavior and the inference by determining: (1) the behavior constituted flight, (2) this flight shows consciousness of guilt, (3) this consciousness of guilt concerns the crime charged; and (4) this consciousness of guilt shows actual guilt of the crime charged. *Id*. at 668-69 (quoting *Freeburg*, 105 Wn. App. at 498).

The trial court did not engage in this four-part inquiry. That was error. The test is not Mr. Westbrook was not "where he was supposed to be."

Had the trial judge applied the correct test, she would have been compelled to conclude there was no evidence of flight. The evidence was simply that Mr. Westbrook was not at his reported address when an officer went to speak to him. There was no evidence Mr. Westbrook knew the officer wanted to talk about an alleged crime or even that he had left Lewis County. Because there was no showing Mr. Westbrook knew of the allegations, no "consciousness" of guilt can be inferred.

And the fact he was later arrest in California, where he was raised and had family does not support he fled.

As in *Slater* and *Freeburg* the addition of highly "speculative, conjectural, or fanciful" evidence prejudiced Mr. Westbrook. The prosecutor argued in closing the jury could use this evidence to infer Mr. Westbrook was guilty.

When assessing the prejudice of an evidentiary error, the court must determine more than that the remaining evidence was sufficient to support a conviction. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). But here, the Court of Appeals simply looked to the remaining evidence and surmised the error was harmless because the alleged victim "established sufficient facts to support" the convictions. Opinion at 15. That is a clear misapplication of this Court's precedent. Review is warranted under RAP 13.4.

F. Conclusion

This Court should accept review in this case.

This pleading complies with RAP 18.17 and contains 4956 words.

Respectfully submitted this 25th day of September, 2024.

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Washington State
Court of Appeals
Division Two

August 30, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

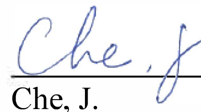
STATE OF WASHINGTON, Respondent, v. BRIAN A. WESTBROOK, Appellant.	No. 57160-9-II ORDER DENYING MOTION TO RECONSIDER

On August 21, 2024, appellant, Brian A. Westbrook, filed a motion to reconsider the court's August 6, 2024 unpublished opinion. After consideration, the court denies the motion for reconsideration. Accordingly, it is

SO ORDERED

PANEL: Jj. Lee, Veljacic, Che

FOR THE COURT:



Che, J.

Filed
Washington State
Court of Appeals
Division Two

August 6, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN A. WESTBROOK, Appellant.	No. 57160-9-II UNPUBLISHED OPINION

CHE, J. — Brian A. Westbrook appeals his judgment and sentence and the trial court's denial of his CrR 7.5 motion for a new trial. Westbrook argues that the trial court (1) abused its discretion by denying his motion for a new trial because a juror's nondisclosure of his relationship with the elected prosecutor violated his right to a fair and impartial trial, (2) abused its discretion by admitting evidence of flight, and (3) improperly imposed a $500 crime victim penalty assessment (VPA).

We hold that (1) Westbrook fails to show that the trial court abused its discretion by denying his motion for a new trial, (2) the admission of evidence of Westbrook's flight was harmless error, and (3) the VPA should be stricken.

Accordingly, we affirm Westbrook's convictions but remand for the trial court to strike the VPA.

FACTS

I. Background

MC and Westbrook began dating in 2020 and moved in together in 2021. MC had two children prior to dating Westbrook, ALA and AJA. Westbrook watched MC's kids while MC worked. Westbrook drove MC to work "most of the time." Rep. of Proc. (RP) at 339.

One day, Westbrook drove MC to work and told her children he would be back after he dropped off MC. MC called a friend to retrieve her children from the house before Westbrook could return. MC decided to flee from Westbrook that day because Westbrook had been acting paranoid, agitated, and angry. His actions over the prior two months scared her. MC gave her phone to her boss, fearing it was being tracked. The next day, MC saw Westbrook at her workplace, and security removed Westbrook from the property.

Police interviewed MC and MC's 13-year-old daughter, ALA. ALA reported Westbrook sexually assaulted her on multiple occasions when she was between 12-13 years old. Police also interviewed MC's 7-year-old son, AJA, who reported that Westbrook picked him up by his throat and set him back down, and that Westbrook had "thrown him" in the past. Clerk's Papers (CP) at 8.

Officer Kyle Stockdale attempted to contact Westbrook at his residence "a handful of times" but did not personally ever locate Westbrook. RP at 552. The State charged Westbrook with five counts of second degree child rape, five counts of second degree child molestation, one count of harassment—threat to kill, and one count of fourth degree assault. Westbrook was arrested in California and extradited to Washington. Westbrook's case proceeded to jury trial.

II. Trial

Prior to trial, Westbrook moved to exclude evidence of his arrest in California and extradition to Washington. Westbrook argued there was no evidence indicating he knew that law enforcement was seeking to serve him with criminal charges or anything of the like. The State sought admission of evidence that Westbrook "fled to California." RP at 24. The trial court admitted the evidence of flight because "the State's entitled to tell the whole story of what happened . . . [Westbrook] was not where he was supposed to be, where everyone expected him to be, and he could not be found, he was eventually found sometime later." RP at 25.

During voir dire, juror 11 was known to the parties as a state legislator and local attorney, who had experience working in both criminal defense and criminal prosecution. The trial court asked the jury panel whether anyone knew Westbrook, the trial attorneys, the judge, or witnesses. Juror 11 shared that he knew Westbrook's attorney, one of the trial prosecutors, the trial judge, and a witness. Juror 11 was asked multiple times about his ability to be fair and impartial to both sides given the nature of his employment and acquaintance with the trial attorneys for both parties. Juror 11 advised he could be fair and impartial to both sides. The trial court also asked if any juror had "any other reason that I haven't mentioned, why you just absolutely cannot be fair and impartial in this case? Any reasons that I haven't thought of?" RP at 70. No juror responded in the affirmative.

Neither party challenged juror 11 or moved to excuse him for cause. Westbrook did not use any of his peremptory challenges. Juror 11 went on to serve as the presiding juror.

The witnesses testified consistently with the facts above. Additionally, MC testified that Westbrook never told her about any plans to go to California by himself, and that she was not

aware of any such plans. MC further testified that to the extent they had conversations about going to California, the conversations revolved around taking the entire family. MC stated that Westbrook had been living in Washington "off and on his whole life" and had not visited California, where he was originally from, since July 2014. RP at 394.

The State, in its closing argument rebuttal, argued that Westbrook's arrest in California was evidence of his "consciousness of guilt," "[w]hen after seven years of never having been to California, all of a sudden that's where [Westbrook] needed to be with no -- no advance notice." RP at 756.

The jury convicted Westbrook on four counts of second degree child rape, five counts of second degree child molestation, and one count of fourth degree assault. The jury acquitted Westbrook of one count of second degree molestation and one count of harassment—threat to kill.

Immediately prior to sentencing, the trial judge informed counsel that the judge had inadvertently received information that juror 11 and another person shared season tickets to a professional hockey team with the elected prosecutor, not the trial prosecutors. The judge also learned that the elected prosecutor attended a hockey match during the time that juror 11 served as a juror but did not attend the match with juror 11.

III. Motion for a New Trial

Westbrook moved for a new trial under CrR 7.5 or relief from judgment under CrR 7.8, arguing he was unaware of any relationship between juror 11 and the elected prosecutor, and he would not have agreed to accept juror 11 if he had known.

After the hearing, the trial court entered the following findings of fact: The elected prosecutor and his wife contributed $250 of the $88,130 raised by juror 11's election campaign for state legislator. In 2022, the elected prosecutor and his wife contributed $50 of the $43,365 raised for juror 11's reelection campaign. The elected prosecutor was unaware of juror 11's jury service until after the trial had commenced. The elected prosecutor had no contact with juror 11 during juror 11's jury service.

The trial court also found that: In March 2018, the elected prosecutor, juror 11, and a third party pooled their money together to purchase season tickets for a Seattle hockey team. In August 2021, the tickets were divided between the three purchasers based on a predetermined number of games each purchaser would attend. No other exchange of tickets was made, neither during the trial nor during juror 11's jury service.

The trial court concluded Westbrook was not entitled to relief under CrR 7.8(b) because he had yet to be sentenced or have final judgment entered in his case. The court further held that Westbrook was not entitled to relief under CrR 7.5 because he had not presented evidence meeting the threshold for implied juror bias. Additionally, the trial court determined that Westbrook's allegations involved facts outside the record, which must be proven with competent evidence; there was no evidence of actual bias by juror 11; the professional relationship between the elected prosecutor and juror 11 did not meet the definition of consanguinity or affinity within the fourth degree; the elected prosecutor and juror 11 had no familial relation, no business or employment network, or other association defined by law; and there was no evidence of improper conduct by a juror which denied Westbrook of a substantial right.

The trial court sentenced Westbrook and imposed a $500 VPA.

In March 2022, Westbrook appealed his judgment and sentence. Westbrook then moved for remand under RAP 9.11. We granted Westbrook's RAP 9.11 motion and remanded this matter to the trial court to take additional evidence regarding newly discovered information concerning juror misconduct alleged in Westbrook's CrR 7.5 motion.

On remand, the trial court entered supplemental findings of fact, including: Juror 11 is a member of the Washington State Bar Association and practices law in Lewis County. The elected prosecutor endorsed juror 11's campaign for city council in 2015 and was asked by juror 11 to make an endorsement video, which was posted to juror 11's social media page. Juror 11 ran for State Representative twice and is currently a State Representative. In 2020, the elected prosecutor emceed the campaign kick-off breakfast for juror 11's election campaign.

Juror 11 hosted a local radio talk show on AM radio for approximately five years. In April 2020, juror 11 cohosted the show with the elected prosecutor, introducing the elected prosecutor as a "good friend to the show" and noted that the elected prosecutor filled in for him as host "a lot last year." CP at 273. They discussed Governor Jay lnslee's decision to release prison inmates amid COVID-19.[1] The elected prosecutor provided a legal definition for non-violent offenses, which included third degree child molestation. Juror 11 stated, "We're talking about [a] non-violent [crime]. Do you want a child molester released? I mean that is a huge deal." CP at 274. Juror 11 and the elected prosecutor opined the Governor was "allowing inmates to dictate criminal justice reform" by authorizing their release. CP at 274.

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[1] In February 2020, Governor Jay Inslee declared a state of emergency in Washington State in response to the outbreak of the COVID-19 virus. Proclamation of Governor Jay Inslee, No. 20-25 (Wash. Mar. 23, 2020), https://governor.wa.gov/sites/default/files/proclamations/20-25%20Coronovirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf.

Two days after the show, juror 11 posted a video to his social media page of the elected prosecutor standing in front of juror 11's campaign sign stating, "I'm supporting [juror 11] because I want to keep the 20th District strong and I'm asking you to do the same." CP at 274. On the same day, juror 11 posted a message stating, "Thank you [elected prosecutor] for your support of my campaign endorsement. [He] and I have supported each other for many years before he joined [the] Lewis county Prosecutor's Office. I appreciate his support and friendship." CP at 274.

In May 2020, juror 11 posted an additional video of the elected prosecutor's endorsement to social media. In that video, the elected prosecutor is pictured standing at a podium with juror 11's campaign sign in the background. In the video, the elected prosecutor states, "We are living in uncertain times and need strong leadership in Olympia working for us. I'm [the elected] Lewis County Prosecuting Attorney [ ] asking you to join me by supporting and electing [juror 11] as our state representative. [Juror 11] works tirelessly to improve our community and will carry that work ethic to Olympia where we need him most. Learn more about how you can support and elect [juror 11] as our state representative at [website]." CP at 274. On the same day, juror 11 commented on the social media endorsement by the elected prosecutor and stated, "Lewis County Prosecuting Attorney [ ] endorses and supports the Campaign to Elect [juror 11]." CP at 274. Three days later, the elected prosecutor again appeared as a cohost on the radio show, wherein he and juror 11 took phone calls from listeners concerning the Governor's release of prison inmates in response to COVID-19.

Previously, on multiple occasions, juror 11 and the elected prosecutor collaborated on legislation involving both criminal and civil matters. At the time of juror 11's jury service in this

case, juror 11 was aware that the elected prosecutor had donated to his campaign in 2020 and 2022. Neither the elected prosecutor nor juror 11 disclosed the campaign endorsement videos or the radio show during jury selection, or in their subsequent affidavits prepared in response to Westbrook's motion for a new trial.

The elected prosecutor had no direct involvement in Westbrook's trial. The elected prosecutor was unaware of juror 11's jury service until after juror 11 was selected and sworn as a juror. The elected prosecutor had no contact with juror 11 during his service as a juror.

The trial court did not make any supplemental or amended conclusions of law in this matter.

Westbrook appeals.

ANALYSIS

I. Motion For A New Trial

Westbrook argues that the trial court abused its discretion by denying his motion for a new trial because the relationship between juror 11 and the elected prosecutor violated his right to a fair and impartial jury trial. We disagree.

A. *Legal Principles*

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Meza*, 26 Wn. App. 2d 604, 609, 529 P.3d 398 (2023). A trial court abuses its discretion when its decision is based on untenable grounds or made for untenable reasons. *Id.* at 609. A trial court's findings of fact stand if they are supported by substantial evidence. *See Id.* at 610.

We treat juror nondisclosure like other nonconstitutional errors that warrant a new trial only on an affirmative showing of prejudice. *State v. Lupastean*, 200 Wn.2d 26, 31-32, 513 P.3d

781 (2022). The denial of a motion for a new trial "should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *Id.* at 54 (internal quotation marks omitted) (quoting *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010)). We look to whether the moving party "has been so prejudiced that nothing short of a new trial can insure that [they] will be tried fairly." *Id.* (internal quotation marks omitted) (quoting *Gamble*, 168 Wn.2d at 177).

Actual bias and implied bias are bases, among others, to challenge jurors for cause. RCW 4.44.170 (1), (2).

> A juror's failure to disclose information that is properly and understandably requested during jury selection will certainly require a new trial if the undisclosed information reveals the juror's actual or implied bias. This is true regardless of whether the juror's failure to disclose was intentional because "'[a] trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial.'"

Lupastean, 200 Wn.2d at 53 (quoting *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019)).

In exceptional cases, a conclusive presumption of implied bias will be drawn when a prospective juror deliberately withholds information during voir dire to increase their chance of being seated on a jury. *Id.* at 54. The prejudicial effect of nondisclosure may be heightened where the juror later injects the nondisclosed information into jury deliberations. *Id.*

B. *Juror 11 Was Not Actually Biased*

Before the trial court heard additional evidence about juror 11's participation in a radio show, it ruled there was no evidence of actual bias by juror 11. Westbrook now asserts that the supplemental findings show juror 11 was actually biased because juror 11, in a radio show episode that aired over a year prior to the trial, made a comment that convicted "child molesters"

should not be released from prison as part of the governor's response to COVID-19. Br. of Appellant at 18. We disagree.

To prove juror 11 should have been disqualified for actual bias, Westbrook must demonstrate "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). In a challenge for actual bias, the challenged juror's expressed opinion or appearance of a formed opinion alone is insufficient to sustain the challenge. RCW 4.44.190. "[T]he court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190. The trial court ruled Westbrook did not meet his burden.

On the entire record presented, Westbrook does not show that the trial court abused its discretion. Juror 11's statement on the radio show episode expressed an opinion on individuals convicted of and serving sentences for non-violent offenses—particularly third degree child molestation—and whether they should be released early as part of the governor's plan to address the COVID-19 outbreak. But at that time, Westbrook had not been convicted of and had not been serving a sentence for any offense, let alone a non-violent child sex offense. Because Juror 11's radio show comment was about those who had been convicted, not simply accused, of sex offenses, it was unrelated to Westbrook's circumstances. Moreover, Westbrook fails to make an affirmative showing of prejudice and does not show a substantial likelihood that such prejudice affected the verdict. *Lupastean*, 200 Wn.2d at 54. Thus, the trial court did not err in concluding that there was no evidence of actual bias by juror 11, and nothing in the supplemental findings undermines that conclusion.

C. *Juror 11 Was Not Impliedly Biased*

Westbrook contends juror 11 was impliedly biased because juror 11 and the elected prosecutor were "partners in the business of getting [juror 11] elected and in discussing legislation and other governmental activities" and were also "partners in broadcasting that information to the public and answering the public's call-questions during their radio appearances." Br. of Appellant at 16-17. We disagree.

Implied bias is defined in RCW 4.44.180(2), which includes in relevant part that a "challenge for implied bias may be taken" where a juror and a party "[stand] in the relation of . . . a partner in business with [ ] a party." The trial court ruled Westbrook did not meet his burden of showing juror 11 and the elected prosecutor were partners in business.

While juror 11 and the elected prosecutor engaged in political discussions on a local radio show, and the elected prosecutor endorsed juror 11's campaign for city council in 2015 and donated nominal amounts of money to two of juror 11's campaigns, these activities do not rise to the level of business partners. The record does not show that they owned the radio show together nor does Westbrook demonstrate that nominal campaign contributions and endorsements necessarily lead to the conclusion that the involved parties are business partners. Though the supplemental findings regarding the radio show and political activities demonstrate more interaction between juror 11 and the elected prosecutor than the court and litigants were previously aware of, these instances still do not establish that juror 11 and the elected prosecutor were business partners under RCW 4.44.180(2).

Westbrook contends that this is an exceptional case because juror 11 and the elected prosecutor are "licensed members of the Washington State Bar Association with knowledge of the

purpose of voir dire and their duty of candor to the tribunal," they engaged in political acitivites together, and they shared the "same opinions about the criminal justice system." Br. of Appellant at 20. While it is true that in exceptional cases courts may conclusively presume implied bias from the juror's factual circumstances, we do not find exceptional circumstances here that would warrant the application of the Sixth Amendment doctrine of implied bias.

Westbrook does not establish that juror 11 should have been disqualified for implied bias, and he does not otherwise establish that juror 11's nondisclosure prejudiced his right to a fair trial. No fact or inference arises that juror 11 wanted to serve on Westbrook's jury or realized that his likelihood of being able to serve would decrease if he disclosed that he knew the elected prosecutor and to what extent he knew the elected prosecutor. *See Lupastean*, 200 Wn.2d at 54. Furthermore, there is no indication in the record that juror 11 relayed the details of his relationship with the elected prosecutor to the other jurors during deliberations or that juror 11's relationship with the elected prosecutor affected the jury's verdict. *See Id.*

Westbrook contends that juror 11 intentionally failed to disclose his relationship with the elected prosecutor, which should lead to a presumption of implied bias. However, Westbrook does not establish that juror 11 withheld information in response to questions asked of him during voir dire. Juror 11 answered the questions posed in voir dire. No one asked juror 11 if he knew the elected prosecutor, and while the court asked the jury panel if there was any other reason why a juror "absolutely cannot be fair and impartial in this case," it is apparent that juror 11 did not think he absolutely could not be fair and impartial in Westbrook's case. RP at 70. Notably, the jury returned acquittals on two of the charges.

Also, Westbrook does not assign error to the trial court's finding that "[t]here is no evidence to suggest any action by [the elected prosecutor], [juror 11] or other representatives of the state was undertaken in bad faith or sought to gain an unfair advantage." CP at 271. RAP 10.3(g) requires a separate assignment of error for each finding of fact a party is challenging. Unchallenged findings of fact of verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

The elected prosecutor had no direct involvement in Westbrook's trial nor any contact with juror 11 during his service as a juror. Furthermore, because it is not apparent that juror 11 deliberately concealed material information, later injected such information into juror deliberations, or otherwise failed to disclose information that was requested during jury selection, Westbrook fails to show that juror 11's unrequested nondisclosure was prejudicial to his right to a fair trial. Without an affirmative showing of prejudice, the trial court properly concluded Westbrook did not show implied bias by juror 11 and denied his motion for a new trial. The trial court did not abuse its discretion in doing so.

II. Evidence of Flight

Westbrook argues the trial court erred when it admitted prejudicial evidence of Westbrook's flight to California. We agree but hold that the erroneous admission of evidence of Westbrook's flight did not prejudice Westbrook and was therefore harmless error.

A. *Legal Principles*

"Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" *State v. Freeburg*, 105 Wn.

App. 492, 497, 20 P.3d 984 (2001) (quoting *State v. Nichols,* 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). Evidence of flight includes evidence of actual flight, concealment, resistance to arrest, assumption of a false name, and related conduct if it allows a reasonable inference of consciousness of guilt of the crime charged. *Id.* at 497-98. An inference of consciousness of guilt "must be substantial and real, not speculative, conjectural, or fanciful." *Id.* at 498 (footnote omitted).

In determining the probative value of flight evidence as circumstantial evidence of guilt, we analyze

> the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Id.; *see also State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (2010).

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). A trial court abuses its discretion if no reasonable person would adopt the same conclusion reached by the trial court. *Id.* at 59. Abuse of discretion also occurs if the trial court utilizes the incorrect legal standard or depends on unsupported facts in reaching its decision. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

If an erroneous admission of evidence does not result in prejudice to the defendant, such error is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (quoting *State v. Tharp*, 96 Wn.2d

591, 599, 637 P.2d 961 (1981)). If the improperly admitted evidence is of minor significance compared to the overwhelming evidence as a whole, its admission constitutes harmless error. *Id.*

B. *Admission of Evidence of Westbrook's Flight Was Harmless Error*

Assuming without deciding that the trial court erred by admitting evidence of flight, its admission did not result in prejudice to Westbrook, and as a result, is not grounds for reversal. Had the jury not heard evidence of Westbrook's flight to California, there was still overwhelming evidence for the jury to convict Westbrook of child rape, child molestation, and assault charges. ALA identified Westbrook as the perpetrator of the charged crimes; ALA testified to her age and numerous inappropriate sexual encounters with Westbrook to which she did not consent; ALA's mother testified that Westbrook expressed to her that he wanted to teach ALA how to have sex and wanted to have sex with ALA; one stain test from ALA's sheets showed "very strong support" for the inclusion of Westbrook's DNA; and another stain test from ALA's sheets detected Westbrook's sperm cells. AJA established sufficient facts to support the assault charge. Thus, Westbrook cannot show prejudice. Based on the evidence presented, it is not reasonably probable that the outcome of the trial would have differed had the flight evidence not been admitted.

We hold that the allegedly erroneous admission of evidence of Westbrook's flight did not prejudice Westbrook and, therefore, was harmless error.

III. LEGAL FINANCIAL OBLIGATION

Westbrook argues this court should strike the VPA because the trial court found he was indigent at the time of sentencing. We agree.

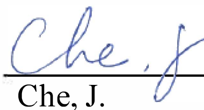
The amended RCW 7.68.035(4) requires that no VPA be imposed if the trial court finds at the time of sentencing that the defendant is indigent as defined in RCW 10.01.160(3). The amended RCW 7.68.035(4) applies to Westbrook because this case is on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

At sentencing, the trial court found Westbrook was indigent at the time of his first appearance, that this had not changed at sentencing, and that he was unable to pay legal financial obligations. Because the trial court found at sentencing that Westbrook was indigent and this case is on direct appeal, we remand to the trial court to strike the VPA.

CONCLUSION

We affirm Westbrook's convictions but remand for the trial court to strike the VPA.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Che, J.

We concur:

Lee, J.

Veljacic, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57160-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Sara Beigh
[sara.beigh@lewiscountywa.gov]
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Lewis County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 25, 2024

WASHINGTON APPELLATE PROJECT

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