Supreme Court No. _____
COA NO. 84278-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

KAVEY POLLARD,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Kavey Pollard Sr. asks this Court to review the opinion of the Court of Appeals filed in his case on September 23, 2024. (Attached As Appendix 1-24).

B. ISSUES PRESENTED FOR REVIEW

The trial court improperly dismissed a person of color from the panel for expressing distrust of our judicial system and for expressing that he knew his susceptibility for groupthink could affect his ability to be fair and impartial. The excusal violated Mr. Pollard's right to a fair jury trial, guaranteed by article I, sections 21 and 22 and the Sixth and Fourteenth Amendments. Though the State did not present proof that Juror 71 was actually biased, the Court of Appeals held the trial court did not abuse its discretion for dismissing this juror for cause. The Court of Appeals'

opinion conflicts with this Court's decision in *State v. Smith*, ___Wn.3d___, 555 P.3d 850, 858 (2024). A juror who says they may go along with other jurors has not demonstrated a probability of bias because of his equivocal statements alone. The Court should review under RAP 13.4(b)(1) and reverse.

C. STATEMENT OF THE CASE

The facts leading to Mr. Pollard's arrest have been explained in the opening brief and are not germane to this petition. The State charged Mr. Pollard with possession of a stolen firearm and three counts of unlawful possession of a firearm in the second degree. CP 22-23.

1. During voir dire, the trial court excused Juror 71 for cause over the defense objections.

During jury selection, the State used a for cause challenge to exclude Juror 71; a Brown person who

immigrated to this country from India 20 years ago. RP 307, 309-10. In his questionnaire, Juror 71 indicated he was concerned he might not be fair and impartial. RP 274. When the prosecutor questioned him, Juror 71 explained: "Specifically, I have seen people in positions of authority and power abuse that power," and it left him feeling vulnerable and alone. *Id.* at 275. Juror 71 clarified that he holds law enforcement in the "highest regard" because they "risk their life to keep us safe." *Id.* But he was at a stage in life where he is a "little bit disappointed with people in power." *Id.*

The prosecution asked Juror 71, given his "negative experience" and his distrust of authority figures, whether he could set those feelings aside to consider police testimony and impartially follow the court's instructions. *Id.* at 275. Juror 71 answered:

"I'm not sure." However, Juror 71 showed he could be trusted to follow the court's instructions by pointing out: "ironically, I did follow the instructions which said, if you feel it's a 'may be' then you should err on the side of caution and answer 'yes.'" *Id.* at 275-76.

Juror 71 did not want to be misconstrued: "I want to make it clear it's not about trusting the law enforcement officers, it's about trusting the people behind them that are making those laws and rules." *Id.* at 276. He said he was aware his "pessimistic view" of authority figures could affect his judgment. *Id.* at 276.

Concerning his role as a juror, he said "obviously" when looking at the evidence he would weigh "if there is enough there." RP 276.

The prosecution moved to dismiss Juror 71 for cause. *Id.* Mr. Pollard asked Juror 71 whether he was

saying he was unable to follow the judge's instructions. *Id.* at 277. Juror 71 reiterated he held police in the "highest regard" and clarified that his comments were not about distrusting law enforcement. *Id.* In his personal and professional life, he came across people in positions of power and authority who claimed to be fair but were not. *Id.* He was consciously examining whether those experiences would compromise his ability to be fair and impartial. *Id.*

Mr. Pollard objected to removing Juror 71 for cause because he had not demonstrated any actual bias, had not stated he was unable to follow instructions, and had in fact demonstrated he follows instructions. *Id.* at 277.

The court further questioned Juror 71 outside the presence of the rest of the jury. *Id.* at 277-78. Juror 71 again said he could reasonably follow an objective

instruction like "Don't talk to anyone." *Id.* at 279. But he explained he was not sure he could follow a "qualitative" instruction like "Hey, don't be biased." *Id.* He explained there is no way of being "100 percent" sure one is not being biased. *Id.* Juror 71 put it simply: "That's the concern I have. Following instructions really depends on what the instruction is and how you can measure it." *Id.*

The trial court asked Juror 71:

> Is there anything that you've seen or heard so far about the charges, about the lawyers, and about Mr. Pollard that makes you think that your personal situation is likely to be triggered in a way that will make it difficult for you to be fair and impartial?

Id. at 280.

He said: "Not at the moment." *Id.*

Outside the presence of other jurors the Court asked to know more about Juror 71's "personal and professional experience" that he so far circumspectly

described at voir dire. *Id.* at 306. Juror 71 explained he lost a custody battle for his daughter in a recent divorce and he saw bias infecting the entire proceeding at all levels. *Id.* at 307, 309-10. In his professional life, he observed people in positions of authority "talk loudly" about equity and fairness, but favoritism abounds and minorities get treated unfairly. *Id.* at 307. Juror 71 wanted the court to know he "immigrated" to this country 20 years ago because he believed it was a just society. *Id.* But the more he lived here, the more he felt disillusioned; he has no allies and has been repeatedly hammered by those in authority in his professional life, who have penalized him for having a minority viewpoint. *Id.* at 308-09. Juror 71 said he was examining and expressing his "self-awareness" from his experiences that he tended to

just go with the "majority" to get over the "finish line" so as not to be the only minority view. *Id.* at 309.

The court thanked Juror 71 for his astute observation and self-awareness, then asked whether he could stand up to the other jurors if he held a minority view:

> **THE COURT:** Let me -- and -- and I appreciate your candor, and I think your astute observation about following Instructions, and some of the gray areas and complexities here. One of the things I thought I heard you say is that you have some concern really because of the trauma and impact you've experienced that, you know, at some point in time you might just go along to get along, and -- and agree with a verdict whether -- not -- not be willing to stand up and have the minority view, even if you're persuaded that it's different than the other jurors. Do I understand you correctly?
> **JUROR NUMBER 71:** That is one of the scenarios I worry about. Not the only scenario, but yes.

Id. at 311-12.

The State renewed its motion to strike for cause and Mr. Pollard renewed his objection. *Id.* at 312. Mr. Pollard argued Juror 71 merely examined whether he held any sort of bias which could compromise his ability to follow the court's instructions and concluded he could fairly weigh the evidence. *Id.* at 313. Mr. Pollard explained that our courts ask jurors to work through their own bias and follow the court's instructions to determine where they land on the issues. *Id.* at 314. This is precisely what Juror 71 was doing. *Id.* Therefore, Mr. Pollard argued, Juror 71 would be a "wonderful" juror who should not be dismissed for cause, as he demonstrated on the record that he is able to follow instructions and weigh the evidence. *Id.* at 314.

The trial court dismissed Juror 71 for cause on the basis that, while he might possibly be a "wonderful

juror," something might happen at trial that would make him an inappropriate juror. *Id.* at 315.

2. The jury returned a guilty verdict.

Following trial, the jury convicted Mr. Pollard of Count I, possession of a stolen firearm, and Counts II and III, second degree unlawful possession of a firearm. 5/19/22 RP 747, However, the jury could not agree on the last count of second degree possession of a firearm. *Id.* at 746-47. The trial court dismissed the count on which the jury hung with prejudice. CP 71.

Mr. Pollard, among other issues on appeal, challenged the improper exclusion of Juror 71 for cause. Br. of Appellant at 31-33. The Court of Appeals affirmed, finding that the trial court did not abuse its discretion in holding that Juror 71 exhibited actual bias and was unfit to serve. Slip. Op at 11-12. Mr. Pollard seeks review of the Court of Appeals' opinion

because it misconstrues Juror 71 responses and because the Court of Appeals applied its reasoning in Smith. But the Supreme Court reversed *Smith*: It took the opposite view based on these same facts.

D. ARGUMENT

This Court should accept review because the Court of Appeals' opinion misconstrues the record and conflicts with this Court's opinion in *Smith*.

a. A court may not excuse a juror for cause unless a party proves actual bias.

In determining whether a juror has evidenced bias against a substantive right of a party so as to mandate excusing that juror, the trial court "must be satisfied, from all the circumstances, that the juror cannot disregard [their bias] and try the issue impartially." *State v. Booth*, 24 Wn. App. 2d 586, 596, 521 P.3d 196 (2022) (quoting RCW 4.44.190).

Washington State has long held that "equivocal statements" alone do not mean that the juror is actually biased. *State v. Noltie*, 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991); *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 808-09, 425 P.3d 807 (2018). The possibility of bias evidenced in equivocal statements does not demand removal; rather, removal is required only where the record evidences a probability of bias. While a party may challenge a biased juror for cause under RCW 4.44.190, a court may not grant the challenge unless the party establishes actual bias "by proof." *Noltie*, 116 Wn.2d at 838.

A judge may not strike jurors from a case based on their opinions unless they are unqualified to serve because they cannot disregard preexisting opinions and try the case impartially. *State v. Teninty*, 17 Wn. App.

2d 957, 962, 489 P.3d 679, *rev. denied*, 497 P.3d 385 (2021); RCW 4.44.170(2).

"Equivocal answers alone are not sufficient to establish actual bias warranting dismissal of a potential juror." *Sassen Van Elsloo*, 191 Wn.2d at 808-09 (*citing Noltie*, 116 Wn.2d at 839). Moreover, "a mere possibility of bias is not sufficient to prove actual bias." *Id.* at 809. If "a juror with preconceived ideas can set them aside" and try the case fairly, the challenging party has not proved actual bias sufficient to exclude the juror. *Id.* Moreover, a juror may not be dismissed based on a lawyer's or judge's racial bias. *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013); GR 37.

A juror who initially expresses a certain bias may be rehabilitated by further inquiry showing they are capable of unbiased decision making regarding the

case. *State v. Gonzales*, 111 Wn. App. 276, 281, 45 P.3d 205 (2002). If the juror affirmatively declares the ability to remain impartial, the juror does not exhibit the necessary actual bias rendering them unqualified under RCW 4.44.170(2). *Id.*

b. The trial court improperly struck Juror 71 for expressing distrust of the judicial system and for acknowledging that groupthink could affect his decision-making.

As a matter of law, negative experiences with the police and a distrust of police do not constitute actual bias sufficient to exclude a juror. GR 37(h). This logic applies in equal force to negative experiences with the legal system and questioning the fairness of our justice system. Indeed, such reasons for exclusion are presumptively invalid even for a peremptory challenge, because they have historically been "associated with improper discrimination in jury selection." *Id.*

As with peremptory challenges, "massive racial disparities also pervade the use of challenges for cause." Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion And The American Jury*, 118 Mich. L. Rev. 785, 785 (2020). One reason is that courts exclude for cause non-White jurors who have "negative views of law enforcement." *Id.* at 806. Because racial bias permeates our legal system—including police stops, searches, and arrests—this basis for juror exclusion is doubly discriminatory. *See Task Force 2.0, Race and Washington's Criminal Justice System*: 2021 Report to the Washington Supreme Court[1].

This Court was aware of this problem when it adopted GR 37(h). At a symposium on jury diversity,

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[1] Available at: https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center.

the Court heard from a Black Washington citizen who had been excluded from a jury for expressing distrust and negative experiences with police as a woman of color.[2] The excluded juror described the negative experiences that led her to distrust police, and expressed her disappointment at being excluded from jury service for that reason. *Id.* She explained that while she had "preconceived notions" about the police and did not "trust the police," she was "an adult" and could of course "be fair." *Id.* By relating her experience to the Court, she hoped to help ensure that "the law of fair justice is actually fair for everyone." *Id.* The law is not fair for everyone if jurors are excluded based on their distrust of police, given the historical and current

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[2] *See* https://tvw.org/video/washington-state-supreme-courtminority-justice-commission-symposium-2017051090/?eventID=2017051090, starting at approximately 2 hours and 10 minutes.

issues of racial discrimination and bias in policing. *See* GR 37.

Juror 71 expressed similar sentiments of general distrust of our judicial system. He recounted his negative experiences with the justice system and how bias infected all levels and denied him a fair trial. If jurors are excluded based on their distrust of our judicial process, given the historical and current issues of racial discrimination and bias in policing and systemic overrepresentation of Blacks in the legal system, the law cannot and will not be fair for everyone.

The presumption of innocence requires jurors to approach the prosecution's case with skepticism and give the accused the benefit of the doubt. *See State v. Venegas*, 155 Wn. App. 507, 524-25, 228 P.3d 813 (2010). This presumption is the "bedrock upon which

the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Being leery of police, or leery of the fairness of our justice system, does not render a person biased or unqualified to serve when the person affirmatively assures the court of her ability to listen to the witnesses and evaluate their testimony in court and weigh the evidence. This skepticism reflects the presumption of innocence that jurors must apply in all cases.

In *Smith*, the juror in question was unable to commit to applying the presumption of innocence. *State v. Smith*, 27 Wn. App. 2d 838, 846, 534 P.3d 402 (2023). When asked whether, if she disagreed with everyone else in the jury, she would be tempted to "change [her] vote to whatever the rest of the group thinks, even if [she] personally didn't feel that way," answered she would not, and stated, "*If I was a 100*

percent very confident, then no. But if I was like, I believe this evidence, or whatever, but I am kind of like, on the fence, then I may agree with everyone." *Id.* (Emphasis added.) The *Smith* court noted that if a juror is on the fence, the State has necessarily failed to satisfy its burden to prove the elements beyond a reasonable doubt and simply "agree[ing] with everyone" when "on the fence," contradicted the unequivocal instructions on the law and deliberation process. *Id.*

But this Court reversed after holding that a juror who says they may go along with other jurors has not demonstrated a probability of bias.

Unlike *Smith*, in *Gonzales*, the juror stated, " 'I would have a very difficult time deciding against what the police officer says,' " and even if instructed to presume the defendant innocent, the juror testified " 'I

don't know if I could keep those separate. I don't think—I don't know if I could.' " 111 Wn. App. 276, 278-79, 45 P.3d 205 (2002). There, the Court of Appeals held that the juror was actually biased and excusable for cause. *Id.*

Here, like *Smith* and unlike *Gonzales*, the juror's answers do not establish actual bias. The expression of hesitancy or reservations about aspects of jury service do not constitute evidence of actual bias requiring excusal. *See State v. Phillips*, 6 Wn. App.2d 651, 664-66, 431 P.3d 1056 (2018) (internal citation omitted) (distinguishing between a juror who says he cannot be fair and one who "expresses reservations"). Rather, reservations might show mere honesty, uncertainty, and self-awareness. There is no mandate that prospective jurors affirmatively express unequivocal

commitment to impartiality to be seated. *State v. Lawler*, 194 Wn. App. 275, 287, 374 P.3d 278 (2016).

Here, Juror 71 did not say he would be unable to put aside any predispositions and try the matter. Instead, Juror 71 said he would set aside his preconceived ideas because "obviously" when looking at the evidence he would weigh "if there is enough there." 275-76; 313-14.

A juror's expression of general distrust of our system of justice, based on his negative experiences, does not alone demonstrate bias. On the contrary, a juror's affirmative expression of self-awareness of his tendency to allow the majority's groupthink to compromise his ability to be fair and impartial demonstrates the juror is not actually biased.

Mr. Pollard objected to removing Juror Number 71 for cause because nothing in the record

unequivocally demonstrated actual bias and the juror had in fact demonstrated he follows instructions. *Id.* at 277.

Mr. Pollard argued Juror 71 was examining himself to discover whether he harbored any bias that could prevent him from following the court's instructions. *Id.* His awareness of his own bias made him a good juror and he demonstrated he would follow the court's instruction and carefully weigh the evidence. *Id.* at 313. The trial court asked the potential jurors to consider their own biases, and provide assurances they can follow the court's instructions and fairly determine the case. *Id.* at 314. Juror 71 did just that. Juror 71 would have been a "wonderful" juror, and he should not have been dismissed for cause, as he demonstrated on the record

he is able to follow instructions and weigh the evidence. *Id.* at 314.

The court improperly excused Juror 71 for cause over defense objection. 5/11/22 RP 312-15. Juror 71 he said he would set aside his preconceived ideas because "obviously" when looking at the evidence he would weigh "if there is enough there." RP 275-76; 313-14.

In short, the State showed nothing beyond the mere possibility of prejudice on the part of Juror 71. *State v. Birch*, 151 Wn. App. 504, 513, 213 P.3d 63 (2009).

The State argued that it was not dismissing Juror 71 for any other reason such as his ethnicity or minority views but because he was not sure he could be fair and impartial.

But here, the real reason the prosecutor struck Juror 71 is probably because of his perspective as a

person of color. Juror 71 made the prosecution uncomfortable because he said he experienced discrimination and impermissible bias at all levels of his divorce and custody proceedings. But Brown and Black jurors may not be excluded based on an assumption that they will be unable to impartially consider the State's case against a Black defendant. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Juror 71 was excluded for impermissible reasons.

It appears the real reason Juror 71, a minority was struck for expressing skepticism of the criminal justice system. *See State v. Listoe*, 15 Wn. App. 2d 308, 322, 475 P.3d 534 (2020) (the challenged juror had expressed some skepticism of the criminal justice system, which "echo justifications for exclusion from a

jury that have historically been associated with discrimination").

c. The Court of Appeals ignored this Court's opinions holding that equivocal statements alone do not prove actual bias.

The Court of Appeals affirmed and held that Juror 71 was actually biased because he never expressed "unconditional confidence" in his ability to deliberate fairly and follow the trial court's instructions. Slip. Op. at 13. This Court rejected this same reasoning in *Smith*, 555 P.3d at 858, an opinion in which it reversed the Court of Appeals—it took the opposite view based on these same facts.

First, importantly, the Court of Appeals applies *State v. Smith*, 27 Wn. App. 2d 838, 847, 850, 534 P.3d 402 (2023) to the facts of Mr. Pollard's case. Slip. Op. at 12-13. The Court of Appeals correctly holds that the facts of this case are analogous to *Smith*, 27 Wn. App.

2d at 847, 850; *Id.* But this Court reversed the Court of Appeals' opinion in *Smith*.

Based on its own logic in *Smith*, the Court of Appeals holds that Juror 71's unequivocal statements demonstrated "actual bias" against the State. The Court of Appeals then concludes the trial court did not abuse its discretion by dismissing Juror 71 for cause. Slip. Op. at 12-13. The Court of Appeals reasons, like the juror in *Smith*, Juror 71 never expressed "unconditional confidence" in his ability to deliberate fairly and follow the trial court's instructions. Slip. Op. at 13. This reasoning is unsound.

Second, factually the opinion misconstrues Juror 71's responses to make it convenient to affirm. Slip. Op. at 11-12. The Court of Appeals supposes Juror 71 could not be rehabilitated because he "steadfastly" and "repeatedly indicated that his ability to be fair and

impartial was conditioned on whether or not something came up during trial that related to his own negative experiences." Slip. Op. at 11-12. But the record, as explained above, does not show that Juror 71 actually conditioned his ability to remain fair and impartial on his own negative experience—this misconstrues the record. Juror 71's responses and the opinion's quotations of his responses show the Court of Appeal's error. *See* Slip. Op. at 5-8; RP 275-280; 307-311.

More importantly, the Court of Appeals has missed the fact that in ***Smith***, this Court considered those same facts and reached the opposite result. This Court accepted review of the Court of Appeals' decision in *Smith* and rejected the very logic the opinion relies on to affirm Mr. Pollard's conviction. *Smith*, 555 P.3d

at 858.[3] Based on the same facts, this Court reversed the Court of Appeals' decision and held that the prospective juror made statements that cast some doubt on her ability to hold the State to its burden of proof, but these statements were equivocal. *Id.* The Court reasoned that "equivocations suggesting a mere possibility of bias are not, on their own, sufficient to demonstrate a probability of actual bias." *Id.* Which is the crux of Mr. Pollard's claim: the trial court misunderstood this nuance of the law in dismissing Juror 71 for cause.

This Court's decision that reversed the Court of Appeals reasoning in *Smith* controls. Contrary to the Court of Appeals' opinion, Juror 71's equivocal

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[3] The Supreme Court reversed the Court of Appeals' incorrect decision in *Smith* on September 12, and the opinion in Mr. Pollard's case was issued on September 23.

responses suggested a "mere possibility" of bias, which is not sufficient to demonstrate a probability of actual bias. *Smith*, 555 P.3d at 858.

E. CONCLUSION

The Court should grant review because the court erroneously excluded a juror for cause. RAP 13.4(b)(1).

This brief complies with RAP 18.7 and contains 4,426 words.

DATED this 16th day of October 2024.

Respectfully submitted,

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APPENDICES

FILED
9/23/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KAVEY JUMON POLLARD SR., Appellant.	DIVISION ONE No. 84278-1-I UNPUBLISHED OPINION

DWYER, J. — Kavey Pollard appeals from the judgment and sentence entered on the jury's verdicts convicting him of possession of a stolen firearm and two counts of unlawful possession of a firearm in the second degree. Pollard contends that the trial court erred by granting the State's motion to excuse a certain juror for cause and that outrageous government misconduct requires dismissal. He also seeks reversal of his convictions for reasons set forth in a statement of additional grounds. We affirm Pollard's convictions, but remand for the trial court to strike the requirement that he pay a victim penalty assessment (VPA) from Pollard's judgment and sentence.

I

In May 2021, Detective Adam Berns of the Bellevue Police Department Special Operations Group was assigned to monitor social media platforms for evidence of illegal activity. To accomplish this task, Berns created multiple fictitious profiles on different social media platforms such as Facebook,

Instagram, Twitter, and Snapchat using a "random name, random picture." He then sent friend requests to whatever users were suggested to him by the social media platforms. Some people accepted Berns's friend requests and others did not. Berns would then search through the photo and video content posted by the individuals in his "friends" lists.

On May 21, 2021, Berns observed a video posted to a Snapchat account on his friends list named "kpurkonnect."[1] Snapchat is a social media platform that allows users to post photos and videos to their personal "story" for 24 hours before disappearing. The video depicted a man, who was later identified as Pollard, sitting in a car with a pistol on his lap. Based on his experience, Berns could see that there was live ammunition in the gun because the magazine was made of transparent material. The presence of the gun drew Berns's attention to that account. A stamp on the video showed that it had been posted 21 hours previously.

Berns subsequently observed a video posted to the "kpurkonnect" account showing an individual holding a gun and moving it back and forth to show a red dot through the mounted sight. The video had been posted 14 hours before Berns viewed it. Two hours earlier, "kpurconnect" posted a video showing a person walking through the inside of an apartment building and pointing out patches on the walls where he said bullet holes had been painted over. Berns also observed a video posted to the "kpurconnect" account bearing the captions "Bellevue" and "May 26, 2021" in which the person recording was sitting in a car

[1] Pollard later changed the name of his Snapchat account to "kpurconnect1."

in the parking lot and recording a dark SUV with tinted windows parked nearby. A few minutes later "kpurconnect" posted videos showing the same SUV with the caption "You a Cop?" and a video showing the SUV driving away.

Berns recognized a building in the background of the video as the Sophia Way Shelter in Bellevue, which is adjacent to the 3040 Bellevue Way Apartments. Berns, who was aware that other detectives in his unit were conducting an unrelated surveillance operation in that area, contacted those detectives and learned that they had observed someone sitting nearby in a Dodge Charger. The Charger was registered to Pollard. Pollard's driver's license photograph matched the man Berns had observed in the May 21 "kpurconnect" video.

A database search revealed that a no-contact order prohibited Pollard from possessing, controlling, or owning firearms. Based on the court order and the Snapchat videos, Berns believed that Pollard had illegally possessed a gun. Berns then called the manager of the 3040 Bellevue Way Apartments, identified himself as a police officer, and asked whether they had heard of Pollard. The apartment manager informed Berns that Pollard worked there as a facilities manager and provided him with Pollard's address on file, 5000 Renton Avenue South in Seattle. The address matched the address on Pollard's driver's license and vehicle registration.

On June 1, 2021, Berns surveilled the Renton Avenue South address in an unmarked car to confirm Pollard's presence. Berns then obtained a search warrant for that address and for Pollard's car, as well as an arrest warrant for

Pollard. On June 9, 2021, police initiated a traffic stop and arrested Pollard while other officers served the search warrant at the Renton Avenue South house. When informed that police had observed him displaying a firearm on social media, Pollard stated that he rarely uses social media and does not own any firearms. Pollard also stated that he lives with his mother at a different address in Seattle and visits the Renton Avenue South address "maybe once in a blue moon."

Chantel McClure, who was at the residence when the warrant was served and who was listed on the lease, told police that she and Pollard were in a relationship and that he lived there with her. Investigators discovered three guns and ammunition in the main bedroom of the Renton Avenue South home. One was a loaded Smith & Wesson 9mm pistol with a transparent magazine and a red dot laser sight mounted on top, which was found on top of a nightstand. Although the serial number had been tampered with, Berns was able to determine that the gun had been reported stolen in 2020. On top of the same nightstand, investigators recovered loose ammunition and pieces of mail bearing Pollard's name and the Renton Avenue South address. They also found a driver's license bearing Pollard's information in the top drawer, along with men's underwear. Investigators also found a loaded Micro Draco AK-47 pistol at the top of the bedroom closet and a .40 Stoeger Cougar pistol on the bedroom floor next to the TV stand.

Police test-fired all three guns found in the bedroom and determined that they were in working order. A fingerprint matching Pollard's left middle finger

was found on the AK-47 pistol. A palm print matching Pollard was found on the magazine of the Cougar pistol, and a latent print found on the same magazine matched Pollard's right thumb.

The State charged Pollard by amended information with one count of possessing a stolen firearm for the Smith & Wesson and three counts of unlawful possession of a firearm in the second degree, one for each firearm found at the Renton Avenue South address.

The trial court conducted jury selection remotely, with Pollard's agreement. Seven potential jurors chose to appear in person. After administering a questionnaire, the court excused some potential jurors for hardship or for cause and scheduled the remaining jurors in panels of numerical order for voir dire.

During voir dire, the prosecutor noted that juror 71 expressed "some concerns regarding being fair and impartial" on his jury questionnaire. Juror 71 explained that he had negative experiences in his past that made him distrustful of "people in positions of authority and power [who] abuse that power." When the prosecutor asked juror 71 if he would be able to set those feelings aside to impartially consider the testimony and follow the court's instructions even though police officers and judges are "authority figures," juror 71 responded "I'm not sure. . . . [I]t is a maybe for me."

The State challenged juror 71 for cause. In response to further questioning from Pollard, juror 71 reiterated that he was "not sure if . . . something that's relatable in this case to my experience would impair my

judgment." Pollard objected to removing juror 71 for cause on the ground that he had not stated that he was unable to follow instructions.

The court then engaged in the following colloquy with juror 71:

> THE COURT: . . . So, it sounds like you've been through some very difficult circumstances recently, and they have to do with an authority figure who purportedly is fair -- not being fair, and it having some really adverse consequences for you that you have really strong feelings about, and that you're worried that those strong feelings may cause you to, depending on exactly what came out at trial -- but if it sort of related to your particular situation, you're concerned that you might not be able to sort of just focus on the evidence, and the facts, and the law in this case. Is that -- am I understanding you correctly?
>
> JUROR NUMBER 71: Correct.
>
> THE COURT: Okay. Knowing what you know, and it -- it sounds like you would try, to but you're just worried you would not be able to, that because -- it sounds like your personal recent experience is really deeply impactful for you, that you're just worried that in -- in a sense, something might trigger that, and if it did, then it would be hard for you to just follow the direction -- Instructions, and follow the evidence. Is -- is that right?
>
> JUROR NUMBER 71: Yeah. And if I may, you know, following Instruction -- if an Instruction is, "Don't talk to anyone", it's a specific Instruction that you can follow. But if somebody says, "Hey, don't be biased", it's a qualitative Instruction. At the given moment, how are -- how am I supposed to know, yes, I will follow that Instruction hundred percent? And how would I even know after the judgment that I did follow that Instruction hundred percent? That's the concern I have. Following Instructions really depends on what the Instruction is and how you can measure it.
>
> THE COURT: All right. Is there anything that you've seen or heard so far about the charges, about the lawyers, and about Mr. Pollard that makes you think that your personal situation is likely to be triggered in a way that will make it difficult for you to be fair and impartial?
>
> JUROR NUMBER 71: Not at this moment. But I'll be honest with you, even sitting here right now and -- and expressing my feelings in front of two lawyers and a Judge is making me very

> uncomfortable. And so, the part of, you know, sitting in a Courtroom -- it is my first time, so I'm sure there -- all first timers have some anxiety, so I -- I wouldn't deny that. But so far I haven't heard anything where I would be able to tell you yes, now I'm sure whether I'll be fair, or no, I -- I won't be fair. I'm still unsure.
>
> THE COURT: All right.
>
> JUROR NUMBER 71: So, I'm still at that same point.

The court individually asked juror 71 to further describe the experiences that made him concerned he might not be able to be impartial. Juror 71 responded that it was "not a single isolated situation," but "multiple situations" in his personal and professional life where he observed "people in positions of authority" displaying "favoritism" and treating a "small set of people unfairly." He said he immigrated to this country 20 years ago largely "because of the law and order" but "it's a repeated hammering . . . where I see people in authority just going [scot-] free." Juror 71 also revealed that he had lost custody of his daughter in court and that he has "seen bias at every level . . . in that experience." Juror 71 said he saw people taking "the path of least resistance" and so he thought "maybe that's the way to go." Thus, his "first impression" upon coming to court was to "not care" whether the right decision was made but rather to go with "whatever gets this case sorted out quickly." He further stated that because he has been "penalized for having a minority opinion at work," he might decide to "just . . . get it over the finish line" even if he disagreed with the other jurors. Juror 71 also expressed concern that if he was "able to relate to anything in the case" it could "be a trigger point" influencing his decision. In response to a

follow-up question from Pollard as to whether juror 71's biases would impact his ability to serve as a juror, juror 71 admitted that "it depends on the Instruction."

The court then asked juror 71 whether he was concerned that, as a result of the "trauma and impact" he had experienced, "at some point in time you might just go along to get along . . . and agree with a verdict . . . [and] not be willing to stand up and have the minority view, even if you're persuaded that it's different than the other jurors." Juror 71 responded, "[t]hat is one of the scenarios I worry about. Not the only scenario, but yes."

The State renewed its motion to strike potential juror 71 for cause, given that "he just doesn't know if he can be fair and impartial, and it depends on how the facts of the case turn out." In opposing the motion, Pollard argued that juror 71 would make a "wonderful juror" and that his "processing" of the court's questions shows he is able to follow instructions. The trial court excused juror 71 for cause, reasoning as follows:

> I think [juror 71] said – it's not really just about following instructions, it['s] also about an ability to be fair and impartial. And he just stated repeatedly that he fears that something could come up that would not allow him to do that, and for that reason, although I think he might possibly be a wonderful juror, something might happen that might make him be an inappropriate juror. And he was clear enough about that concern that I do find that there is cause for excusing him, and I am going to excuse him for cause.

At trial, Detective Berns and other witnesses for the State testified as described above. Pollard and McClure testified that Pollard did not live at the Renton Avenue South address and only stopped by for social visits. McClure further stated that several other people occasionally stayed there, including her ex-boyfriend, her cousin, and her brother. Pollard and McClure also testified that

Pollard had permission to use McClure's address as his mailing address and to store his AK-47 pistol there pending restoration of his firearm rights. Pollard admitted owning the AK-47 pistol but denied owning the other two firearms found at the Renton Avenue South address. Pollard also admitted that he was the individual depicted in the Snapchat video holding a firearm but claimed it was an old image that someone else posted to his account.

Ultimately, the jury found Pollard guilty of possession of a stolen firearm and unlawful possession of a firearm in the second degree as charged in counts 2 and 3. The jury could not reach a verdict as to unlawful possession of a firearm as charged in count 4, so the court dismissed that charge with prejudice. At sentencing, the court imposed standard range sentences totaling eight months and authorized electronic home detention. As part of Pollard's judgment and sentence, the trial court imposed the then-mandatory $500 VPA.

Pollard appeals.

II

Pollard contends that the trial court erred by excusing juror 71 for cause. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both guarantee a criminal defendant the right to trial by an impartial jury. To protect this constitutional right, "the trial court will excuse a juror for cause if the juror's views would preclude or substantially hinder the juror in the performance of his or her duties in accordance with the trial court's instructions and the jurors' oath." State v.

Lawler, 194 Wn. App. 275, 281, 374 P.3d 278 (2016). "The right to an impartial jury applies to both the prosecution and the defense." State v. Teninty, 17 Wn. App. 2d 957, 963, 489 P.3d 679 (2021) (citing State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005)).

Either party may challenge a prospective juror for cause based on actual bias. RCW 4.44.130; .170(2). A juror demonstrates actual bias when the juror exhibits "'a state of mind . . . 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.'" State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020) (alteration in original) (quoting RCW 4.44.170(2)). The challenging party must establish actual bias "by proof." State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). To sustain a challenge based on actual bias, "the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; State v. Griepsma, 17 Wn. App. 2d 606, 612, 490 P.3d 239 (2021).

On the other hand, "[e]quivocal answers alone are not sufficient to establish actual bias warranting dismissal of a potential juror." State v. Sassen Van Elsloo, 191 Wn.2d 798, 808-09, 425 P.3d 807 (2018)). The question for the trial court is "whether a juror with preconceived ideas can set them aside." Noltie, 116 Wn.2d at 839.[2] "If the court has only a 'statement of partiality without

[2] Noltie continues to properly state the law with respect to for cause challenges. State v. Smith, No. 102402-9, slip op. at 14 (Wash. Sept. 12, 2024), http://www.courts.wa.gov/opinions/pdf/1024029.pdf.

a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004). But "[w]hen the juror has expressed reservations but agrees they can set those aside to be fair and impartial, it is within the trial court's discretion to allow that juror to remain." State v. Phillips, 6 Wn. App. 2d 651, 666, 431 P.3d 1056 (2018).

The trial court is in the best position to evaluate a juror's ability to be fair and impartial because it can assess the juror's "tone of voice, facial expressions, body language, or other forms of nonverbal communication when making . . . statements." Lawler, 194 Wn. App. at 287. Accordingly, we review a trial court's decision regarding whether to discharge a juror for abuse of discretion. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Pollard suggests that the real reason potential juror 71 was struck from the jury was that he is a person of color who expressed skepticism of the criminal justice system. He contends that juror 71's answers were merely equivocal and that juror 71's awareness of his own bias demonstrated his ability to follow the court's instructions and weigh the evidence. But the record does not support this interpretation of events. To the contrary, juror 71 never expressed confidence in his ability to put aside his personal feelings and try the issue impartially. Instead, juror 71 repeatedly indicated that his ability to be fair and impartial was conditioned on whether or not something came up during trial that related to his

own negative experiences. And he steadfastly maintained this position despite the trial court's rehabilitation efforts. Given that juror 71 was unable to assure the trial court that his verdict would not be influenced by bias based on past experiences, the court did not abuse its discretion granting the State's motion to dismiss juror 71 for cause.

Pollard likens his case to State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982), but that case is distinguishable. In Gosser, a potential juror who was a former law enforcement officer initially indicated that he would tend to find the testimony of a police officer more credible than that of an accused person. Upon further questioning, however, the potential juror clarified "that he had an open mind as to the issue of guilt" and would not automatically believe the testimony of a witness merely because the witness was a police officer. Gosser, 33 Wn. App. at 434. Noting that the trial court was in a better position to evaluate and interpret the juror's responses than was a reviewing court, the appellate court held that the trial court did not abuse its discretion in denying a challenge for cause. Gosser, 33 Wn. App. at 434. Here, in contrast, juror 71 repeatedly stated that his ability to deliberate fairly and follow the court's instructions was conditional on the evidence presented and the instructions eventually given.

Pollard's case is more akin to two cases he seeks to distinguish, State v. Smith, 27 Wn. App. 2d 838, 534 P.3d 402 (2023), review granted, 2 Wn.3d 1011, 540 P.3d 775 (2024), and State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2022), overruled on other grounds by State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022). In Smith, we held that a potential juror should have been excused

for cause where she stated that if she was "'on the fence'" she might just go along with the other jurors during deliberations, and that only "'[i]f [she] was a 100 percent very confident'" would she not change her "'vote to whatever the rest of the group thinks.'" 27 Wn. App. 2d at 847, 850 (alterations in original). In Gonzales, a prospective juror candidly admitted that she would "'have a very difficult time'" disbelieving a police officer's testimony and "did not know if she could presume Gonzales innocent in the face of officer testimony indicating guilt." 111 Wn. App. at 278, 281. Given that the prospective juror never expressed confidence in her ability to deliberate fairly and the trial court made no attempt at rehabilitation, we held that the trial court erred in rejecting the defendant's challenge for cause. Gonzales, 111 Wn. App. at 282. Here, like the jurors in Smith and Gonzales, juror 71 never expressed unconditional confidence in his ability to deliberate fairly and follow the trial court's instructions.

Next, Pollard cites to General Rule 37 in support of the proposition that "negative experiences with the police and a distrust of police do not constitute actual bias sufficient to exclude a juror" as a matter of law. Br. of Appellant at 29. "Under GR 37, a judge must deny a party's attempt to remove a juror without cause (known as a peremptory challenge) if an objective observer *could* view race or ethnicity as *a* factor in the attempted removal." State v. Lahman, 17 Wn. App. 2d 925, 928, 488 P.3d 881 (2021). "A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror." CrR 6.4(e)(1). "[R]ace can subconsciously motivate a peremptory challenge that the attorney genuinely believes is race-neutral." State

v. Saintcalle, 178 Wn.2d 34, 87-88, 309 P.3d 326 (2013), abrogated by State v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017). "[E]xpressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling" is one of seven presumptively invalid reasons to exercise a peremptory challenge under GR 37(h)(ii).

Here, however, the prosecutor challenged juror 71 for cause. Unlike a peremptory challenge for which no reason need be given, a challenge for cause based on actual bias requires proof that the juror cannot try the case impartially. RCW 4.44.190. "Safeguarding jury impartiality means a juror suffering from actual bias may be excluded from service, regardless of race or the reasons for the bias." Teninty, 17 Wn. App. 2d at 963-64. Thus, "if the party requesting a strike proves the proposed juror holds a bias that impairs the juror's ability to fairly and impartially decide the case, the strike should be sustained regardless of the juror's race or disparate impact concerns." Teninty, 17 Wn. App. 2d at 964. As discussed above, the trial court properly concluded that juror 71's actual bias warranted his dismissal from the jury. We decline Pollard's invitation to analogize the analysis applicable to peremptory challenges to the for-cause challenge at issue in his case.

Pollard further asserts that the erroneous dismissal of juror 71 prejudiced his constitutional right to a fair trial by excluding most, if not all, people of color from the jury panel that was ultimately seated in his case. We disagree. As noted above, the trial court did not abuse its discretion in dismissing juror 71 based on actual bias. In any case, erroneous dismissal of a potential juror for

cause does not automatically violate a defendant's constitutional rights to an impartial jury. Sassen Van Elsloo, 191 Wn.2d at 816. This is so because no party acquires a vested right to have a particular member of the panel sit on the jury until that juror has been accepted and sworn. Sassen Van Elsloo, 191 Wn.2d at 816. Moreover, erroneously dismissing a potential juror for cause does not result in a biased juror being impaneled, as we presume that the replacement juror is impartial. Sassen Van Elsloo, 191 Wn.2d at 816.

Pollard does not claim that any of the impaneled jurors were biased. Rather, he suggests that several other potential jurors of color may have been excluded for improper reasons, such as race or for expressing suspicion of law enforcement. But the record shows that these other potential jurors were not seated because the jury was empaneled before their numbers were reached, or, in the case of one potential juror, for hardship. Pollard's arguments to the contrary are based on speculation and conjecture. Pollard's right to a fair trial was not denied by the exclusion of a biased juror.

III

A

For the first time on appeal, Pollard argues that the police investigation in this case constituted outrageous governmental misconduct in violation of his Fourteenth Amendment right to due process. The State counters that the record is not sufficiently developed to review this claim. We agree with the State.

"[T]he conduct of law enforcement . . . may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial

processes to obtain a conviction.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)); U.S. CONST. amend XIV. However, "'[d]ismissal based on outrageous conduct is reserved for only the most egregious circumstances.'" State v. Solomon, 3 Wn. App. 2d 895, 902, 419 P.3d 436 (2018) (quoting Lively, 130 Wn.2d at 20).

Whether the State engaged in outrageous conduct violating due process is evaluated based on the "'totality of the circumstances.'" Lively, 130 Wn.2d at 21 (quoting United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981)). In making this determination, trial courts assess the following five factors: (1) "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity," (2) "whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation," (3) "whether the government controls the criminal activity or simply allows for the criminal activity to occur," (4) "whether the police motive was to prevent crime or protect the public," and (5) "whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice." Lively, 130 Wn.2d at 22 (quoting People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (1978)).

A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). It is well established that to raise a claim for the first time on appeal, "the trial record must be sufficient to determine the merits of the claim." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (citing State

v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). "Otherwise the error is not 'manifest.'" State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014). Thus, the question of whether we can review a claim of outrageous governmental misconduct for the first time on appeal depends on whether the record is sufficiently developed for us to determine that due process violations warrant dismissal. See Solomon, 3 Wn. App. 2d at 903 ("[a] violation of due process must be determined as a matter of law and it is the trial court which makes the findings of fact related to that decision" (alteration in original) (quoting Lively, 130 Wn.2d at 24)).

In Lively, our Supreme Court reversed the defendant's conviction based on a claim of governmental misconduct raised for the first time on appeal. 130 Wn.2d at 27. Based on the uncontested evidence presented at trial and the uncontested findings of fact entered by the trial court, the Supreme Court concluded that the government's conduct was so outrageous that it violated principles of due process as a matter of law. Lively, 130 Wn.2d at 22-27. "Thus, although the record in Lively did not include a trial court determination of whether the State engaged in outrageous misconduct, the undisputed evidence of misconduct of record therein allowed the Lively court to resolve the due process issue without the necessity of setting forth the applicable appellate standard of review." Solomon, 3 Wn. App. 2d at 905.

Shortly after Lively was decided, our Supreme Court was again asked to consider an outrageous law enforcement misconduct claim raised for the first time on appeal. State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997).

Contrasting the record in Lively, the Supreme Court concluded that "the record we have been furnished does not permit us to reach a determination that the police acted in such an outrageous manner that due process considerations dictate dismissal of the charge against Valentine." Valentine, 132 Wn.2d at 23. Significantly, the Lively court was able to rely on undisputed evidence, whereas the outrageous behavior alleged in Valentine was contested by both parties. Valentine, 132 Wn.2d at 23. "The Valentine court thus emphasized that an appellate court should neither weigh the underlying facts nor resolve factual disputes prior to determining an outrageous governmental misconduct claim." Solomon, 3 Wn. App. 2d at 906. "[S]uch tasks are properly reserved to the trial court." Solomon, 3 Wn. App. 2d at 906.

Here, as in Valentine, Pollard's governmental misconduct claim is based almost entirely on facts unsupported by the record and contested by the State. Evaluating this claim would require us to resolve the parties' factual disputes, a task which we cannot undertake. Pollard's governmental misconduct claim fails because it is unreviewable.

B

Pollard also argues that the police misconduct in his case was so outrageous as to warrant dismissal under CrR 8.3(b). CrR 8.3(b) provides that "[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

Pollard did not move for dismissal under CrR 8.3(b) in the trial court. He cannot raise this rule-based claim of error for the first time on appeal. RAP 2.5(a). See also State v. Kone, 165 Wn. App. 420, 434-35, 266 P.3d 916 (2011) (defendant could not argue for the first time on appeal that the trial court should have granted his CrR 8.3(b) motion to dismiss due to purported CrR 3.3 time-to-trial violations); State v. Nowinski, 124 Wn. App. 617, 630, 102 P.3d 840 (2004) (holding that CrR 8.3(b) argument not presented to the trial court would not be considered as a basis for dismissal on appeal); State v. Basra, 10 Wn. App. 2d 279, 286, 448 P.3d 107 (2019) (a criminal prosecution is no longer ongoing postjudgment and therefore is not subject to an untimely motion to dismiss under CrR 8.3(b)). We decline to review Pollard's CrR 8.3(b) claim.

IV

Pollard contends that he is entitled to relief from the VPA imposed pursuant to his convictions. In 2023, the legislature added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). See LAWS OF 2023, ch. 449, § 1. The amended version of RCW 7.68.035 applies to cases on direct appeal. See State v. Ellis, 27 Wn. App. 2d 1, 17, 530 P.3d 1048 (2023). The State does not dispute that Pollard is indigent and does not object to Pollard's request. We accept the State's concession and remand for the trial court to strike the VPA from Pollard's judgment and sentence.

V

Pollard raises several claims in a pro se statement of additional grounds for review filed pursuant to RAP 10.10. None of these additional claims demonstrate an entitlement to appellate relief.

Pollard first asserts that the State did not present sufficient evidence to support his convictions for unlawful possession of a firearm because it failed to establish that he had actual or constructive possession of the firearms. We disagree.

Evidence is sufficient to support a conviction if it permits any reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt when viewed in the light most favorable to the State. State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Circumstantial and direct evidence are equally reliable in this context. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

Former RCW 9.41.040(2)(a)(iii) (2020) provides that "[a] person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm . . . [d]uring any period of time that the person is subject to a court order" that meets certain statutory criteria. The State must also prove knowing

possession of the firearm. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

Possession may be actual or constructive. State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010). Actual possession means personal custody or actual physical possession. State v. Manion, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). "[C]onstructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). In determining dominion and control, the court considers the totality of the circumstances and does not view any single factor as dispositive. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995).

Here, the record contained sufficient evidence that Pollard actively or constructively possessed the firearms at issue. Pollard put the Renton Avenue South address on his driver's license and vehicle registration, and it was the address on file with his employer. Police observed Pollard coming and going from that address, and Pollard admitted that he sometimes stayed there. Mail addressed to Pollard at the Renton Avenue South address was found in the same bedroom where the guns were recovered, along with Pollard's driver's license and men's underwear. Pollard admitted that he owned the AK-47 pistol, which bore his fingerprint. And Pollard was seen holding what appeared to be the Smith & Wesson pistol in a video posted to his Snapchat account. Pollard and McClure offered testimony that conflicted with the State's witnesses and evidence. But we must "defer to the fact finder on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence." State v. Ague-Masters, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). Viewed in the light most favorable to the State, the evidence was sufficient to support Pollard's convictions beyond a reasonable doubt.

Pollard next contends that the jury instructions were "not detailed enough for a constructive possession case to be accurate." Statement of Additional Grounds at 1. In particular, he claims that the jury instructions did not specify the type of possession case and did not contain enough detail regarding the factors needed to prove actual and constructive possession. He also asserts that the jury instructions must have confused the jury because the instructions on each of the three unlawful possession charges was identical, yet the jury convicted on only two of the three charges.

Jury instructions are sufficient if they correctly state the law, are not misleading, and permit the parties to argue their theories of the case. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012). Juries are presumed to follow the court's instructions. State v. Jackson, 145 Wn. App. 814, 824, 187 P.3d 321 (2008). Here, instructions 15, 16, and 17, the "to convict" instructions, required the State to prove beyond a reasonable doubt that Pollard "knowingly owned a firearm or knowingly had a firearm in his possession or under his control." Instruction 13 correctly defined actual possession and constructive possession and informed the jury to "consider all the relevant circumstances in the case" in deciding whether Pollard had dominion and control over the firearms. In so doing, the jury convicted Pollard of unlawfully

possessing the Smith & Wesson and the AK-47, but was unable to reach a verdict as to the Cougar. The jury instructions accurately stated the law and were not confusing or misleading.

Pollard next asserts that he received ineffective assistance of counsel. This is so, he contends, because his attorney did not challenge the search warrant, did not utilize Pollard's proposed cross-examination questions, and did not object to what Pollard characterizes as misleading jury instructions or provide the court with sufficiently detailed instructions.

A successful claim of ineffective assistance of counsel requires a defendant to establish both objectively deficient performance and resulting prejudice. State v. Emery, 174 Wn.2d 741, 754-55, 278 P.3d 653 (2012). Pollard does not explain why he believes counsel should have challenged the search warrant. Nor does he provide a list of questions he believes counsel should have asked on cross-examination. Pollard has not sufficiently identified the nature of these alleged errors to permit appellate review. See RAP 10.10(c) (appellate court will not consider statement of additional grounds for review unless it informs the court of the nature and occurrence of alleged errors).

Pollard's challenge to the jury instructions is sufficiently developed for review. However, as discussed above, the jury instructions correctly stated the law and were not misleading, so counsel was not ineffective for failing to object to them. Pollard's ineffective assistance of counsel claim fails. Accordingly, none of Pollard's additional grounds warrant appellate relief.

Affirmed in part, reversed in part, and remanded.

WE CONCUR:

Díaz, J.

Colum, 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** under **Case No. 84278-1-I**, 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:

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Date: October 16, 2024

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