Court of Appeals Cause No. 86848-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

DE CHI TRAC,
Defendant-Appellant.

PETITION FOR REVIEW

Cassandra L. Stamm
Attorney for Appellant
1000 Second Avenue Suite 3140
Seattle, WA 98104
(206) 790-3741
WSBA No. 29265

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

A. IDENTITY OF PETITIONER

Defendant-Appellant De Chi Trac, by and through his attorney, Cassandra Stamm, hereby seeks review of the Court of Appeals' decision designated in Part B.

B. COURT OF APPEALS DECISION

Division I of the Court of Appeals affirmed Mr. Trac's conviction in an unpublished decision. *State v. Trac*, No. 86848-9-I (November 25, 2024). A copy of the decision is in the Appendix at pages A-1 through A-12.

In pertinent part, Division I refused to review the trial court's failure to inquire of and refusal to strike a juror for cause because Mr. Trac (a Vietnamese defendant who used a Vietnamese interpreter throughout trial) wisely used a peremptory challenge to remove the juror who, when questioned about racial bias wanted to add that he was a Vietnam era veteran, had engaged with Vietnamese refugees, and applied 'the American way' of taking care of people. App.

at A5-A7; VRP 343 line 12 – 344 line 14.

Division I's refusal to review Mr. Trac's claims concerning Potential Juror No. 4 ignores repeated and clear pronouncements from this Court that racial or ethnic bias have no place in our justice system; such biases undermine the very integrity of the judicial system; the impact of racism on our justice system is pernicious; all members of the legal community bear responsibility for addressing the same; and heightened standards of review should be applied to claims involving racial or ethnic bias.[1]

C. ISSUE PRESENTED FOR REVIEW

Whether a defendant can obtain appellate review of a trial court's failure to inquire of and denial of a for-cause challenge to a prospective juror based on racial or ethnic bias

1 *See, e.g., State v. Bagby,* 200 Wn.2d 777, 794 (2023) (plurality); *Henderson v. Thompson,* 200 Wn.2d 417, 432-33 (2022); *State v. Zamora,* 199 Wn.2d 698, 710-11 (2022); *State v. Berhe,* 193 Wn.2d 647, 657 (2018); App. at A13-A14 (Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020)).

where the juror has been excused with a peremptory challenge and the defendant has exhausted his peremptory challenges.

D. STATEMENT OF THE CASE

De Chi Trac is a sixty-three year old man currently serving a sentence of 140 months to life in prison on two counts of Rape of a Child in the First Degree. Mr. Trac has no prior convictions. Mr. Trac is Vietnamese. He has a Vietnamese surname. He used a Vietnamese interpreter throughout the trial. *See, e.g.*, VRP 70 line 12-13 (Court explaining to the venire, "we have interpreters who are assisting us. They are interpreting the Vietnamese language for Mr. Trac . . ."); CP 17; CP 90-91.

After two potential jurors brought up their service during the Vietnam War, defense counsel attempted to address the topic of race directly asking, "[o]n the topic of race, does anybody else have – have any concerns that my client being of a different race that might affect their perception of the

evidence or that the witnesses being of a different race might affect their perceptions of the evidence?" VRP 343 line 13-17. No potential jurors responded, so counsel then proceeded with another question directed expressly toward Potential Juror No. 4: "if my client did not take the stand and did not testify, would that affect your view of the defense?" VRP 343 line 18-20. Potential Juror No. 4 responded that this would affect his view of the defense. VRP 343 line 19-22. Then apparently in response to counsel's immediately previous question regarding racial bias, Potential Juror No. 4 indicated: "I also want to add I'm a Vietnam era veteran, did not deploy to Vietnam, but trained up for Vietnam, but I had – at the same time in 1973 I was part of or engaged with deploying Vietnamese refugees through the 25th Infantry Division in Hawaii. So I got to see how I was – how I was trained but also how I was able to also apply the American way of taking care of people." VRP 344 line 8-14. In full, Potential Juror No. 4's group voir dire

participation follows:

MR. KEEHAN: Thank you.

On the topic of race, does anybody else have -- have any concerns that my client being of a different race that might affect their perception of the evidence or that the witnesses being of a different race might affect their perceptions of the evidence?

Juror number four, if my client did not take the stand and did not testify, would that affect your view of the defense? If you only heard from the alleged victim and did not hear from the defendant.

JUROR 4: Yes. I would want to hear both sides.

MR. KEEHAN: And if you did not hear both sides do you think that would be -- it would be difficult for you to remain -- the court will instruct you about the Fifth Amendment, and do you have a concern that despite being instructed that the fact that the defendant has not testified cannot -- no presumptions against him can be made, do you have concerns that despite that instruction that you might still hold that against him?

JUROR 4: No, not -- I believe not.

MR. KEEHAN: Thank you.

JUROR 4: But I also want to add I'm a Vietnam era veteran, did not deploy to Vietnam, but trained up for Vietnam, but I had -- at the same time in 1973 I was part of or engaged with deploying Vietnamese refugees through the 25th Infantry Division in Hawaii. So I got to see how I was -- how I was trained but also how I was able to also apply the American way of taking care of people.

Neither of the parties nor the Court followed up with any questions regarding the relevance of Potential Juror No. 4's history as a Vietnam era veteran, his engagement with Vietnamese refugees, or his views on the American way in Mr. Trac's case. *See,* VRP 344 line 15 – 354 line 9.

Mr. Trac moved to excuse Potential Juror No. 4 for cause based on his comments regarding his status and experience as a Vietnam veteran. VRP 360 line 3-11; CP 97. The State objected, indicating, "I don't think there's a sufficient record." VRP 360 line 13-14. The trial court agreed, reasoning, "I did not hear a sufficient basis to establish a cause excusal for number four." VRP 360 line 21-22.

Mr. Trac used the first of his six peremptory challenges to excuse Potential Juror No. 4. CP 97; CP 151. Mr. Trac exhausted his peremptory challenges. CP 151-54.

Following his conviction, Mr. Trac timely appealed in pertinent part raising the issue discussed herein. The state

argued that even if Prospective Juror No. 4's responses demonstrated racial or ethnic bias, the Court of Appeals "need not reach" this claim. Resp. Br. at 14; *see also, id.* at 19 ("Trac seems to argue that because he raises allegations of racial or ethnic bias, that should open the door to review. But even if those allegations were true, Trac still could not demonstrate prejudice here." (internal citation omitted)).

Mr. Trac's appeal was transferred from Division II to Division I for decision. Division I declined to review his claims concerning Prospective Juror No. 4 holding that because Mr. Trac used a peremptory challenge to remove this juror, he "cured any prejudice flowing from the court's allegedly erroneous rulings" and appellate review was therefore not warranted. App. at A5.

Mr. Trac now petitions this Court with an opportunity to recognize and address the harm that is caused when a minority defendant is forced to utilize one of only six of his peremptory

challenges to excuse a racially biased juror. To allow such claims to remain unaddressed is to forego an opportunity to administer the law in a way that brings greater racial justice to our system as a whole. This Court has previously lamented lost opportunities to do the same and should seize the opportunity here.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Whether a Defendant can Obtain Appellate Review of a Trial Court's Decisions Pertaining to an Allegedly Biased (Racially, Ethnically, or Otherwise) Prospective Juror Where the Juror has been Excused with a Peremptory Challenge and the Defendant has Exhausted his Peremptory Challenges is a Confused and Unsettled Area of Law.

The Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, section 22 of the Washington Constitution all aim to guarantee each criminal defendant the right to an impartial, unbiased, and unprejudiced jury.[2]

2 U.S. Const. amend. VI ("In all criminal prosecutions, the

A defendant who declines to remove a prospective juror with an available peremptory challenge generally has no right to appeal the seating of that juror.[3] Conversely, a defendant who is forced to exercise a peremptory challenge to prevent a biased juror from serving is generally said to have 'cured' any error and cannot obtain appellate relief even if he has exhausted his peremptory challenges.[4]

The rule that a defendant who exercises a peremptory challenge to remove a biased juror cannot thereafter raise an appellate challenge to the trial court's denial of a challenge to

---

accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .); U.S. Const. amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."); Wash. Const. art. I § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . .").

3 *State v. Talbott,* 200 Wn.2d 731, 732 (2022) ("we must decide whether a party who declines to remove a prospective juror with an available peremptory challenge has the right to appeal the seating of that juror. The answer is no.").

4 *See, e.g., State v. Munzanreder,* 199 Wn. App. 162, 179 (2017); *citing, State v. Fire,* 145 Wn.2d 152, 164-65 (2001).

excuse the juror for cause derives from this Court's 2001 opinion *State v. Fire* concluding:[5]

> if a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

In *State v. Talbott,* a 2022 opinion, this Court seemed to call *Fire* into question. The *Talbott* Court noted "confusion and uncertainty in this area of the law" and took the:[6]

> opportunity to clarify that a party who does not exhaust their peremptory challenges and accepts the jury panel cannot appeal the seating of a particular juror. Our holding is limited to the facts in this case, and we express no opinion on the analysis that applies where a party exhausts their peremptory challenges and objects to the jury panel.

Based on the rule articulated more than twenty years ago in *Fire,* Division I held Mr. Trac had no appellate recourse even

---

5 *Fire,* 145 Wn.2d at 166.

6 *Talbott,* 200 Wn.2d at 732 (emphasis added).

though the bias at issue derived from his race or ethnicity. App. at A7. This decision leaves the trial courts with completely unreviewable discretion to not even inquire about such racial or ethnic bias once it has been raised by a potential juror's testimony and to deny challenges for cause without any possibility for appellate review so long as the defendant then sensibly exercises a peremptory challenge to remove the juror.

2. A Defendant who Alleges Racial or Ethnic Bias of a Prospective Juror Should be Able to Obtain Appellate Review of a Trial Court's Decisions Pertaining Thereto Even When the Juror has been Excused With a Peremptory Challenge Where the Defendant has Exhausted his Peremptory Challenges.

While all "forms of improper bias pose challenges to the trial process . . . there is a sound basis to treat *racial* bias with added precaution."[7] The Fourteenth Amendment to the United States Constitution and article I section 3 of the Washington

7 *Zamora,* 199 Wn.2d at 709-11 (emphasis in original); *quoting, Peña-Rodriguez v. Colorado,* 580 U.S. 206, 225 (2017).

Constitution mandate such additional protections.[8]

General Rule 37 intentionally upended existing constitutional law to impose additional safeguards in the jury selection process to protect the right to an impartial jury selected in a manner that is free of racial or ethnic bias, intentional and conscious or otherwise.[9] Where racial or ethnic bias of a potential juror against a defendant is at issue, it is incumbent on the trial courts to protect the defendant's right to a fair trial.[10] In the voir dire context, the exclusion of potential

---

8 *Zamora,* 199 Wn.2d at 709 (a defendant who fails to timely object to prosecutorial misconduct must generally establish that the improper conduct was so flagrant and ill-intentioned that a jury instruction could not have cured the resulting prejudice; a different analysis applies when the allegation is that a prosecutor's misconduct implicated racial bias), *citing, State v. Monday,* 171 Wn.2d 667, 680 (2011). *See also, Peña-Rodriguez,* 580 U.S. at 225 (it is generally true that the courts will not examine the particulars of a jury's deliberative process to impeach their verdict; a different rule applies where the allegation is that a jury's deliberation was marred by racial stereotypes or animus).

9 *Zamora,* 199 Wn.2d at 712; *citing, e.g., State v. Jefferson*, 192 Wn.2d 225 (2018) (plurality opinion); GR 37.

10 *Zamora,* 199 Wn.2d at 717.

jurors has been a particular focus in the analysis.[11] But it is also "clear that our criminal legal system perpetuates institutional biases against defendants who are racial or ethnic minorities, not just jurors."[12]

Divisions I and II of our Court of Appeals have applied GR 37 to reverse criminal convictions when an objective observer could conclude that the state exercised peremptory challenges based on the defendant's race or ethnicity.[13] In *State v. Walton,* the state exercised peremptory challenges on prospective jurors who appeared to be White and expressed distrust of law enforcement during Walton's (a Black man's) trial.[14] The jurors were excused over Walton's objections.[15] Emphasizing the broad goal of eliminating racial and ethnic

11 *State v. Harrison,* 26 Wn. App. 2d 575, 585-86 (2023) (Lee, J. concurring).
12 *Id.*; *citing,* Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 2 (June 4, 2020).
13 *State v. Walton,* 29 Wn. App. 2d 789 (2024); *State v. Gutierrez,* 22 Wn. App. 2d 815, 815-19 (2022).
14 *Walton,* 29 Wn. App. 2d at 803-11.
15 *Id.* at 805, 809.

bias,[16] Division I reversed Walton's conviction.[17] Similarly, in *State v. Harrison,* Division II reviewed and reversed a conviction where "the State chose to remove every juror who exhibited an awareness of racial justice issues when a Black defendant was on trial."[18]

Division III has taken an additional step, reversing a conviction in *State v. Gutierrez* where a potential juror expressed ethnic bias despite the fact that the defendant neither moved to strike the potential juror for cause nor exercised a peremptory challenge to prevent the juror from serving.[19]

---

16 *See, id.* at 799-800 ("The explicit purpose of the rule [GR 37] is broad: to eliminate the unfair exclusion of prospective jurors based on race or ethnicity . . . . The rule rationally and clearly aims to broadly remove dismissal based on race and ethnicity, including views about the same, from the use of peremptory challenges." (internal citation and quotations omitted)).

17 *See, id.* at 811.

18 *State v. Harrison,* 26 Wn. App. 2d 575 (2023) (reversing where "the State chose to remove every juror who exhibited an awareness of racial justice issues when a Black defendant was on trial.").

19 *State v. Gutierrez,* 22 Wn. App. 2d 815, 815-19 (2022).

Absent the elements of racial or ethnic bias, these failures would have been fatal to these claim since a defendant who declines to remove a prospective juror with an available peremptory challenge generally has no right to appeal the seating of that juror.[20] But Division III applied a different rule in light of the nature of the bias alleged.[21] Division III held specifically that the trial court abused its discretion by failing to either inquire further or excuse a juror who voiced questions about a Hispanic defendant's immigration status.[22] Asking whether an objective observer (who is aware of implicit, institutional, and unconscious biases in addition to purposeful discrimination) could view the prospective juror as racially or ethnically biased, Division III held that if the prospective juror's "comments permit an inference of implicit ethnic bias," the trial court abused "its discretion by failing to inquire further or

20 *Talbott,* 200 Wn.2d at 732.
21 *Gutierrez*, 22 Wn. App. 2d at 825-26.
22 *Id.* at 826.

excuse the juror" and reversal was required.[23]

As a Vietnamese defendant, Mr. Trac was confronted with racial or ethnic bias from several jurors who served during the Vietnam War. By failing to further inquire about Prospective Juror No. 4's comments and then refusing to grant Mr. Trac's challenge to this juror for cause, the trial court saddled Mr. Trac with a burden not faced by non-minority defendants. Mr. Trac was forced to either use one of only six peremptory challenges to excuse Potential Juror No. 4 or to allow him to be seated and thereafter seek appellate review. Imposition of such a burden should not be permitted. Allowing appellate review is the only way to effectively require that trial courts either inquire or exclude for cause any prospective juror if an objective observer could view the prospective juror's voir dire responses as indicative of racial or ethnic bias against the defendant.

---

23 *Id.* at 821-23.

Prospective Juror No. 4's response indicated at the very least that he himself was aware of the potential for his own implicit or unconscious bias to infect the proceedings. An objective observer (aware of implicit, institutional, and unconscious biases in addition to purposeful discrimination) could certainly view Potential Juror No. 4's comments as indicative of racial or ethnic bias against Mr. Trac.

Prospective Juror No. 4 did not volunteer the fact of his Vietnam-era military service in a vacuum. *See,* VRP 343 line 2-17. Rather, he offered these comments in response to a direct question about whether race might affect his perception of the evidence against this obviously Vietnamese defendant. *See,* VRP 343 line 13-17. Several other prospective jurors also responded to a substantially identical question, not to discuss their military service in general but to particularly discuss their service in or during the Vietnam war and the negative feelings they developed towards Vietnamese persons as a result. *See,*

VRP 340 line 6 – 343 line 11.

It was in this context that Prospective Juror No. 4 felt compelled to disclose that he was a Vietnam-era veteran who trained up for Vietnam during the conflict. VRP 343 line 13 – 344 line 14. In his explanation, Prospective Juror No. 4 appears to contrast the 'American way' of taking care of people with that of the (non-refugee) Vietnamese:

> I also want to add I'm a Vietnam era veteran, did not deploy to Vietnam, but trained up for Vietnam, but I had – at the same time in 1973 I was part of or engaged with deploying Vietnamese refugees through the 25th Infantry Division in Hawaii. So I got to see how I was – how I was trained but also how I was able to also apply the American way of taking care of people.

VRP 344 line 8-14.

The state argued below that Prospective Juror No. 4 was merely voicing his "positive experience." Reps. Br. at 11; *citing,* VRP 360 line 16. This argument illogically interprets these comments out of context in a way that strips them of all meaning. This prospective juror was not asked whether he had

any military experience. He was not asked whether he had any notable experiences with Vietnamese people. He was asked if he had any concerns that Mr. Trac being of a different race might affect his perception of the evidence. VRP 343 line 13-17. In response to *this question,* this prospective juror wanted to add that he was a Vietnam-era veteran. VRP 344 line 8-9.

Certainly this prospective juror did not describe his experience with or opinions of Vietnamese as uniformly or even generally positive. For those with first-hand experience, the Vietnam War can be a "highly emotional subject" at best.[24] Prospective Juror No. 4 referenced his experience with Vietnamese refugees—people fleeing Vietnam for fear of persecution when the United States lost the war and withdrew from Vietnam. According to the United States' Army's "After Action Report" concerning these refugees, they were "fleeing

24 *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 518 (1969) (recognizing the "highly emotional subject of the Vietnam war").

from the fear of an imminent 'bloodbath,'"[25] -- a mass execution at the hands of the victors, i.e. the Vietnamese. The idea that a veteran trained by the US Army during the Vietnam war would necessarily develop an exclusively positive view of Vietnamese people is just not objectively reasonable.

Knowing all this, Division I simply refused to review Mr. Trac's claims concerning Prospective Juror No. 4. Division I reasoned that Mr. Trac had 'cured' any error concerning this juror by using one of his exhausted peremptory challenges to exclude him. Putting the burden of curing the error on a minority defendant where a potential juror expresses racial or ethnic bias and the trial court refuses to inquire or excuse the juror for cause is antithetical to this Court's prior pronouncements concerning the pernicious impact of racism on

---

25 Operations and Readiness Directorate Office, Deputy Chief of Staff for Operations and Plans, *"Department of the Army After Action Report Operations New Life/New Arrivals,"* I-A-3 (1977) (available online at: http://cgsc.contentdm.oclc.org/cdm/ref/collection/p4013coll11/id/1278/).

our justice system and the courts' responsibility for addressing the same.

3. **Whether the Appellate Courts may Review the Failure to Inquire of or Exclude a Prospective Juror Whom an Objective Observer Could View as Racially or Ethnically Biased Presents a Significant Question of Constitutional Law and is of Substantial Public Interest.**

This Court should accept a criminal defendant's petition for review that presents a significant question of law under the Constitution of the State of Washington or of the United States or involves an issue of substantial public interest. RAP 13.4(b)(3)-(4).

Division I's refusal to review Mr. Trac's claims concerning Potential Juror No. 4 sets a dangerous precedent. By countenancing the trial court's failure to inquire or refusal to excuse for cause a juror who an objective observer would conclude is racially or ethnically biased against a non-White defendant because that defendant has wisely chosen to exercise a peremptory challenge to remove the juror, the Court abrogates

its critical responsibility address the pernicious impact of racism in our criminal justice system. There is few issues of more substantial public interest. These questions present significant questions concerning due process and equal protection under the Fourteenth Amendment to the United States Constitution as well as Article I, sections 3 and 14 of the Washington state Constitution.

F. CONCLUSION

At least when the bias at issue concerns race or ethnicity, appellate review of a defendant's claims concerning the handling of a prospective juror should be available even if the juror is ultimately removed with a peremptory challenge. Due process does not allow foreclosure of appellate review where racial or ethnic bias is involved. This Court should grant review of Mr. Trac's claims concerning the trial court's failure to further inquire regarding Prospective Juror No. 4's comments regarding race or ethnicity and the trial court's failure to excuse

this juror for cause.

This document contains 3379 words exclusive of its cover and tables.

December 25, 2024. Respectfully submitted,

/s/ Cassandra Stamm

Signature
Cassandra Stamm
Attorney for De Chi Trac
WSBA No. 29265

CERTIFICATE OF SERVICE

I hereby certify that on December 25, 2024, I electronically filed this Opening Brief via the Washington State Appellate Courts' Secure Portal which will serve the same on opposing counsel. I also served a copy of this Opening Brief on the petitioner, De Chi Trac, via regular U.S. mail postage prepaid to De Chi Trac, DOC No. 438258, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

/s/ Cassandra Stamm
Signature
Cassandra Stamm
Attorney for De Chi Trac
WSBA No. 29265

APPENDIX

FILED
11/25/2024
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. DE CHI TRAC, Appellant.	No. 86848-9-I UNPUBLISHED OPINION

BOWMAN, J. — De Chi Trac appeals his jury convictions for two counts of rape of a child in the first degree. He argues that the trial court erred by refusing to dismiss several jurors for cause and that the convictions amount to double jeopardy. Because Trac cured any potential prejudice by striking the alleged biased jurors using his peremptory challenges and it was manifestly apparent to the jury that the State did not seek to impose multiple punishments for the same act, we affirm.

FACTS

In May 2020, 15-year-old C.N. reported to police that when she was around 10 or 11 years old, Trac orally raped her on two separate occasions. C.N. described Trac as a friend of her father who frequently visited their home.

C.N. testified that she did not remember exactly how old she was when the assaults occurred, but she remembered that it was "during that time that [her] dad hung out with [Trac] the most." She said that the first incident occurred in her parents' bedroom. Trac found C.N. in their bedroom and asked if she wanted

to "see something fun." He then raped her on the floor. The second incident occurred "a couple months" later when C.N.'s father was helping Trac paint a house. One day, C.N. went with her father to the house. Trac volunteered to take her to McDonald's because she was "really hungry." He then drove C.N. to a remote part of the neighborhood and raped her in the back seat of his car. Trac told C.N. "not to tell anyone" what happened.

At first, C.N. did not fully appreciate what Trac had done to her. And Trac also began spending less time around her house. So, C.N. did not disclose the assaults. But a few years later, Trac started spending more time around her house again. And as C.N. got older, she began to realize that Trac had raped her. C.N. told her parents about the incidents, and they called the police.

In July 2020, the State charged Trac with two counts of rape of a child in the first degree. The information alleged that the incidents occurred between July 10, 2015 and July 9, 2016. After the State gathered more information, it amended the charging period to between July 10, 2013 and July 9, 2016. The case went to trial in June 2023.

During jury selection, Trac moved to strike for cause jurors 4, 27, and 60. Those jurors all expressed to the court their personal experiences with sexual assault. Juror 4's stepdaughter was a victim of sexual assault. Juror 27 had a personal history of sexual abuse.[1] And juror 60 was a victim of childhood sexual abuse. All three potential jurors told the court that their experiences would not

[1] Juror 27 also told the court she was acquainted with the lead detective in the case.

interfere with their ability to serve on the jury or keep an open mind. The court denied all three motions.

Later, defense counsel questioned other potential jurors about their service in the Vietnam War and whether it would impact their ability to impartially serve on the jury, given that Trac is Vietnamese and using an interpreter. Juror 4 did not respond to those questions. Counsel then asked the jury if anyone had concerns with the defendant "being of a different race." No jurors responded to the question.

Defense counsel then began questioning juror 4 about how he would view Trac's choice not to testify. In response, juror 4 did not answer the question. Instead, he referred back to the question about Trac being Vietnamese. He told counsel, "I also want to add I'm a Vietnam era veteran, did not deploy to Vietnam, but trained up for Vietnam . . . . So I got to see how I was . . . trained but also how I was able to also apply the American way of taking care of people." Defense counsel did not question juror 4 about the statement and resumed questioning other jurors about Trac not testifying.

Trac then again moved to excuse juror 4 for cause based on his statement about being a "Vietnam era veteran." The court denied the motion. At the end of voir dire, Trac used three of his six peremptory challenges to strike jurors 4, 27, and 60 from his jury panel.

At the close of trial, Trac asked the court to instruct the jury that to convict him, it must find that the acts supporting the two charges are "separate and distinct" from each other. The court declined to give the instruction with the

"separate and distinct" language. Instead, it provided the jury two nearly identical to-convict instructions for each count that outlined the elements of rape of a child in the first degree and referred to the same charging period. And it instructed the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." The jury found Trac guilty of both counts of first degree rape of a child.

Trac appeals.

ANALYSIS

Trac argues that the trial court erred by refusing to strike for cause three potential jurors and that the jury's convictions for two counts of first degree child rape amount to double jeopardy.

1. For-Cause Challenges

Trac argues that the trial court abused its discretion by failing to excuse potential jurors 4, 27, and 60 for cause. The State argues that we should not reach the issue because Trac cured any potential prejudice by using his peremptory challenges to remove the alleged biased jurors from his jury panel. We agree with the State.

Defendants have a federal and state constitutional right to an impartial jury. *State v. Munzanreder*, 199 Wn. App. 162, 174, 398 P.3d 1160 (2017). A jury is not impartial if an actually biased juror sits on a defendant's panel. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020). But when a defendant uses a peremptory challenge to remove an alleged biased juror, they

cure any potential constitutional violation. *Munzanreder*, 199 Wn. App. at 179 (citing *State v. Yates*, 161 Wn.2d 714, 746, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)).

Here, Trac alleges that the trial court erred by refusing to dismiss for cause three biased jurors. But Trac used peremptory challenges to remove all three of the jurors. As a result, none of the alleged biased jurors sat on Trac's jury panel. Because Trac cured any prejudice flowing from the court's alleged erroneous rulings, appellate review is not warranted.

Still, Trac argues that *State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022),[2] and *State v. Smith*, 27 Wn. App. 2d 838, 534 P.3d 402 (2023),[3] leave room for the possibility that a defendant in his circumstance can seek appellate review despite using peremptory challenges to cure any prejudice. But neither case support his argument.

In *Talbott*, the defendant moved to excuse a prospective juror for cause. 200 Wn.2d at 735. The trial court denied the motion, and the defendant did not use a peremptory challenge to remove the alleged biased juror, exhaust his peremptory challenges on other jurors, or object to the jury panel. *Id.* at 735-36. Instead, he affirmatively accepted the jury panel, which included the challenged juror. *Id.* at 736. Our Supreme Court determined the defendant waived his challenge to the trial court's ruling because he failed to exercise a peremptory challenge to eliminate the biased juror and affirmatively accepted the panel. *Id.*

---

[2] *Review denied*, 3 Wn.3d 1008, 551 P.3d 442 (2024).

[3] *Reversed on other grounds*, ___ Wn.3d ___, 555 P.3d 850 (2024).

at 747-48. In doing so, the court limited its holding to the facts of the case and "express[ed] no opinion on the analysis that applies where a party exhausts their peremptory challenges and objects to the jury panel." *Id.* at 732.

In context, it is clear that the *Talbott* court's language refers to a situation where a party objects to a panel that includes an alleged bias juror as a result of the party exhausting all their peremptory challenges on other jurors. But here, Trac successfully used his peremptory challenges to strike the jurors at issue, so no biased juror sat on his panel. And in any event, the record shows that like the defendant in *Talbott*, Trac did not object to the jury panel. Trac's reliance on *Talbott* is misplaced.

In *Smith*, the defendant moved to strike three jurors for cause. 27 Wn. App. 2d at 841. The trial court denied the motions. *Id.* The defendant then used peremptory challenges to strike two of the jurors but exhausted his peremptory challenges and could not strike the third. *Id.* at 841-42. So, that juror sat on the defendant's jury panel. *Id.* at 842. The defendant appealed, challenging the trial court's denial of his for-cause motions. *Id.* at 841-42. We reviewed the court's denial of his for-cause challenge as it related to the juror he could not strike. *Id.* at 843. But we refused to review his challenges to the court's rulings related to the jurors the defendant struck. *Id.* Nothing in *Smith* suggests that Trac is entitled to appellate review when no biased juror sat on his panel.

Finally, citing *State v. Gutierrez*, 22 Wn. App. 2d 815, 513 P.3d 812 (2022), Trac argues that we should apply a special rule when racial bias is at issue, as he alleges was the case with juror 4. In *Gutierrez*, Division Three found

constitutional error because a juror expressed racial bias during voir dire. *Id.* at 825-26. The court chose to address the issue on appeal even though counsel did not move to strike or use a peremptory challenge to remove the juror. *Id.* at 819-20. But, unlike the circumstances here, the biased juror at issue in that case actually sat on the defendant's jury panel. *Id.* at 819. So, *Gutierrez* does not suggest that when race is at issue, we should review a defendant's for-cause challenge regardless of whether the juror sits on the panel.

Because Trac's use of peremptory strikes cured any potential prejudice, we do not review the trial court's rulings rejecting Trac's motions to strike for cause.

2. Double Jeopardy

Trac argues that the trial court's failure to instruct the jury that they must find separate and distinct acts to support each count of first degree rape of a child violated his right to be free from double jeopardy. The State argues that no double jeopardy violation occurred because it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. We agree with the State.

We review double jeopardy claims de novo. *State v. Arndt*, 194 Wn.2d 784, 815, 453 P.3d 696 (2019). A court violates a defendant's right to be free from double jeopardy when it imposes multiple punishments for the "same offense." *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). In an effort to avoid multiple punishments for the same offense, the court must instruct a jury that to convict a defendant charged with multiple counts of the same crime, it

must determine that each crime involved facts "separate and distinct" from the other. *See State v. Mutch*, 171 Wn.2d 646, 662-63, 254 P.3d 803 (2011). It is not enough to instruct the jury only that it must decide each count separately and that its verdict on one count should not control its verdict on any other count. *Id.*

Still, flawed jury instructions create only a "possibility of a double jeopardy violation." *Mutch*, 171 Wn.2d at 663. If, viewing the record as a whole, it is " '*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act," no double jeopardy violation occurs. *Id.* at 664[4] (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)[5]).

In *Mutch*, a jury convicted the defendant of five counts of rape. 171 Wn.2d at 652. The court read to the jury five "nearly identical" to-convict instructions that included the same charging period. *Id.* at 662. The court also instructed the jury that " '[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.' " *Id.*[6] Mutch appealed the verdicts, arguing the jury instructions were vague and allowed for the possibility of five convictions based on one act. *Id.*

Our Supreme Court agreed that the jury instructions were flawed because they failed to explain to the jury that a "separate and distinct" act must support each count. *Mutch*, 171 Wn.2d at 663. Still, the court concluded that it must look

---

[4] Alteration in original.

[5] *Mutch* abrogated *Berg* on other grounds.

[6] Alteration in original.

beyond the jury instructions to determine whether an actual double jeopardy violation occurred. *Id.* at 664. So, it looked to "the entire trial record" to consider whether it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. *Id.*

A review of the record showed that the victim testified about five separate incidents of rape. *Mutch*, 171 Wn.2d at 665. And in its arguments, the State discussed and distinguished all five acts. *Id.* Finally, the defense did not argue that there was insufficient evidence for any of the rapes. *Id.* Instead, he argued that the victim consented. *Id.* Based on the entire record, the court held that despite the deficient jury instructions, it was manifestly apparent to the jury that each count of rape represented a separate act and no double jeopardy violation occurred. *Id.* at 665-66.

Our Supreme Court applied the same test in *State v. Peña Fuentes*, 179 Wn.2d 808, 318 P.2d 257 (2014). In that case, a jury convicted the defendant of one count of first degree rape of a child and two counts of first degree child molestation that occurred over about 35 months. *Id.* at 823. The jury instructions for the rape charges did not include an instruction that the conduct must have occurred on separate and distinct occasions from the molestation charges. *Id.* But in closing argument, the State identified the specific acts that supported each charge. *Id.* at 825. And it detailed the alleged conduct supporting each count and distinguished them by time and place. *Id.* Further, the defendant did not challenge the number of acts or whether the acts overlapped. *Id.* Instead, he challenged only the witness' credibility. *Id.* Based on the entire record, our

Supreme Court again found that while the instructions were improper, it was manifestly apparent that the jury convicted the defendant based on separate and distinct acts. *Id.*

This case is like *Mutch* and *Peña Fuentes*. The trial court erred when it did not instruct the jury that it must rely on "separate and distinct" acts for each count of child rape. But the record shows it was manifestly apparent to the jury that each count represented a separate act.

Throughout the trial, the State was clear that there were two separate incidents that occurred on different dates in two separate locations. The State told the jury in its opening statement, "The defendant raped [C.N.] twice. The first time was at her house." And the second incident occurred "[s]ometime later on a different day" in Trac's car when they went to McDonald's. Then, during direct examination, C.N. testified in detail about two distinct acts that occurred on different dates in different locations. She testified about the first incident in her parent's bedroom and then about the second act that occurred a few months later in Trac's car.

Further, in closing argument, the State separately discussed and described the "two incidences" as "the first rape that was at [C.N.'s] house" and "the rape that occurred when they were going to McDonald's." The State also referred to "count one, which happened at her house, and count two, which happened in a neighborhood somewhere around . . . Olympia." Finally, like the defendant in *Peña Fuentes*, Trac's defense focused on C.N.'s credibility, not the number of rapes or whether they overlapped.

On this record, it was manifestly apparent to the jury that the State sought convictions for two counts of rape based on separate and distinct acts that occurred at different times and in different locations.

Trac argues that it was not manifestly apparent to the jury that the State was relying on separate acts because the State "collapsed" both counts in its closing argument. Trac points to one statement made by the State at the end of its closing argument and one made during rebuttal.

First, after discussing C.N.'s testimony about each of the separate incidents and addressing Trac's arguments about her credibility, the State told the jury in closing that "after hearing all of the evidence, seeing the witnesses, seeing the documents, [and] making your own assessments of their credibility," the State has "proved these elements, each and every one, beyond a reasonable doubt," that "the defendant had sexual intercourse with [C.N.] by licking her vagina in both count one and count two." And in rebuttal, after again describing for the jury the two separate incidents on which the State relied, it told the jury:

> [I]f you have an abiding belief in the truth of the charge after reviewing all the evidence that the defendant raped [C.N.], then the [S]tate has proved it beyond a reasonable doubt. And so the [S]tate asks you again to find the defendant guilty of two counts of rape of a child in the first degree.

We do not find Trac's argument persuasive. First, C.N. testified that in each incident, Trac orally raped her. The prosecutor's comment in closing explained to the jury that each of those acts amounts to sexual intercourse sufficient to convict Trac of both count one and count two. And while the State referred in rebuttal to an abiding belief in the truth of "the charge" to support "two

counts" of rape, it is clear in context that the prosecutor was explaining the State's burden necessary to prove each count of child rape. In the context of the record as a whole, these two isolated statements do not suggest that the State sought two convictions for child rape based on the same act.

Because the record shows it was manifestly apparent to the jury that the State sought convictions for two counts of child rape based on two separate and distinct acts, no double jeopardy violation occurred.

We affirm Trac's convictions.

Brunner, J.

WE CONCUR:

Díaz, J.

Mann, J.

The Supreme Court

State of Washington

June 4, 2020

Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community.

The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

As judges, we must recognize the role we have played in devaluing black lives. This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong—but we can recognize our ability to do better in the future. We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a *justice* system must operate. Too often in the legal profession, we feel bound by tradition and the way things have "always" been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.

Finally, as individuals, we must recognize that systemic racial injustice against black Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions—every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.

As we lean in to do this hard and necessary work, may we also remember to support our black colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.

We go by the title of "Justice" and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.

Sincerely,

Debra L. Stephens,
Chief Justice

Charles W. Johnson,
Justice

Barbara A. Madsen,
Justice

Susan Owens, Justice

Steven C. González,
Justice

Sheryl Gordon McCloud,
Justice

Mary I. Yu, Justice

Raquel Montoya-Lewis,
Justice

G. Helen Whitener, Justice

LAW OFFICES OF CASSANDRA STAMM, PLLC

December 25, 2024 - 12:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86848-9
Appellate Court Case Title:	State of Washington, Respondent v. De Chi Trac, Appellant
Superior Court Case Number:	20-1-00912-5

The following documents have been uploaded:

- 868489_Petition_for_Review_20241225122007D1754991_6008.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petn for Rev.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- joseph.jackson@co.thurston.wa.us

Comments:

Sender Name: Cassandra Stamm - Email: casey@seattlecriminalattorney.com
Address:
1000 2ND AVE STE 3140
SEATTLE, WA, 98104-1046
Phone: 206-264-8586

Note: The Filing Id is 20241225122007D1754991