Supreme Court No. _____
COA No. 39861-7-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

NATASHA JACKSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4(b), Natasha Jackson asks this Court to review the opinion of the Court of Appeals filed in her case on December 3, 2024. (Attached As Appendix 1-10).

B. ISSUES PRESENTED FOR REVIEW

1. A juror informed the defense after the verdict that at least two jurors knew the alleged victim, but did not disclose it during voir dire. When the jurors would not answer or return phone calls to the defense, the trial court did not investigate or inquire further. The Court of Appeals applied the wrong legal standard for deciding when a trial court has an independent obligation to inquire about jury misconduct. Should this Court take review to decide to the important constitutional question of the trial court's obligation to investigate whether juror misconduct deprived Ms.

Jackson of a fair and impartial jury? RAP 13.4(b)(1)-(4).

2. The right to a lawyer accrues as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest. The trial court violated CrR 3.1, the Sixth Amendent, and Article 1. Sec. 22 of the Washington Constitution, by not providing Ms. Jackson counsel at a bail hearing where, she appeared in jail clothes over video, the State overplayed her arrest record and criminal history, and argued against presumptive release and the court set bail she could not afford. The Court of Appeals ignored how the preliminary appearance without counsel eroded the presumption of innocence and rendered the entire proceeding unfair. Should this Court take review under RAP 13.4(b)(1)(2)(3) and (4)?

C. STATEMENT OF THE CASE

Ms. Jackson refers this Court to her statement of the case. Br. of Appellant at 5-13.

Several months after the incident, Police arrested Ms. Jackson, a Native American woman, and brought her before a judge for a first appearance. RP 7. Ms. Jackson appeared through video from the jail, in jail clothing, and without counsel. *Id*. At this first appearance, the court informed Ms. Jackson of the burglary and malicious mischief charges against her. RP 8. The Information the court read contained a second-degree malicious mischief charge under a prong that did not fit the facts of this case. RP 9. Ms. Jackson did not know to object when the prosecution claimed it was practically the "same crime" as what it should have charged. *Id*.

The court found Ms. Jackson was indigent and qualified for an attorney at public expense. *Id.* It inquired whether Ms. Jackson understood the charges, RP 10. Ms. Jackson said she understood the charges and that the crimes were punishable by imprisonment. *Id.* The court informed Ms. Jackson of her right to remain silent, the right to a court-appointed attorney, and asked her if she wanted an attorney appointed. RP 11. Ms. Jackson said she wanted a court-appointed counsel. *Id.* Only then did the court appointed counsel. *Id.*

While Ms. Jackson was still without counsel to assist her, the State asked the court to impose certain conditions of release including requiring Ms. Jackson to waive her right to extradition. RP 13.

Next, the prosecution claimed Ms. Jackson had a lengthy criminal history and mentioned her alleged

prior felony convictions one by one and their corresponding dates. RP 13-14. It alleged Ms. Jackson had a conviction for assault. RP 13. The prosecutor asserted Ms. Jackson had numerous arrest warrants, read each warrant and the corresponding dates into the record, and said there were a total of nine warrants. RP 13-14. The prosecutor said at the time police developed probable cause for the present charges they found Ms. Jackson "functionally passed out" in a trailer from drugs or alcohol. RP 14. The State argued because of the numerous warrants and "lengthy" criminal history Ms. Jackson was unlikely to appear in court when required and might commit another offense. RP 14-15. The State urged the court to set bail at $75,000. RP 14-15.

The trial court concluded that under CrR 3.2 given Ms. Jackson's warrant history in previous cases

and the "proliferation" of cases in a short time, it was likely that if Ms. Jackson was released without posting of bond, she may commit additional crimes or she would fail to appear for hearings as required. RP 15-16. The court set bond at $75,000. *Id.* The trial court reminded Ms. Jackson she must waive the right to contest extradition if she bails out. *Id.* Ms. Jackson begged the Court for release on personal recognizance or reduced bail and promised to attend court when required. RP 17. The court said: "I've made my decision . . . That's it." *Id.*

At arraignment a few days later, Ms. Jackson appeared in person with counsel and in civilian clothes. RP 19. The trial court again informed Ms. Jackson of the charges, that the burglary was a strike offense, apprised her of her rights, and accepted her "not guilty" plea. RP 19. Ms. Jackson, through counsel,

pointed out that the prosecution's previous request for bail when she was unrepresented had stated she had nine active warrants for her arrest. RP 21. But Ms. Jackson had no warrants in the past four years. RP 21. If released on personal recognizance she said she would stay with her father or her aunt and provided their addresses. RP 21. She requested the court to lower bail or release her on personal recognizance. RP 21-22.

The prosecution vehemently opposed reducing bail and urged the court to consider her convictions and warrants, even though they were years old. RP 22. The State claimed Ms. Jackson had convictions for violent offenses, but Ms. Jackson only had a single fourth-degree misdemeanor conviction from 2013. RP 13. And the warrants the State had been emphasizing

were not active, most had been quashed, and all were years old. *Id.*

The trial court agreed to reduce bail but only to $50,000. RP 25. It acknowledged Ms. Jackson had no recent history of failing to appear and her criminal history was years old. RP 25. Even as the court on two subsequent occasions pushed back trial dates, it again refused to reduce bail. RP 61-62.

Following trial, the jury returned a guilty verdict. RP 326.

After the verdict, an anonymous juror left a phone message for defense counsel that said:

> There were two jurors on the Natasha Jackson case today who did not disclose that they knew the victim of the burglary. I don't know who else to turn to, but I want you to know that there may have been a miscarriage of justice on one of your clients, Natasha Jackson.

RP 334.

Defense counsel asked the court for permission to investigate the possible juror misconduct and to release juror information for defense counsel to facilitate the investigation. RP 335. The prosecution opposed the motion. RP 335-36. The trial court allowed defense counsel access to the phone numbers of two jurors and to call them. RP 343. However, neither juror returned defense counsel's calls. RP 355. And when defense counsel informed the court the jurors had not responded, the court took no further action.

D. ARGUMENTS WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals applied the wrong legal standard for deciding when a trial court has an independent obligation to inquire about jury misconduct.

a. The trial court has an independent duty to investigate and root out jury misconduct.

The Due Process Clause of the Fourteenth Amendment and the jury trial right of the Sixth Amendment entitle a criminal defendant to a fair trial by an impartial jury. *Patton v. Yount*, 467 U.S. 1025, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); U.S. Const. amends. XIV, VI. A trial judge must be watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. *State v. Berhe*, 193 Wn.2d 647, 668, 444 P.3d 1172 (2019); *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

A court must fully investigate where it learns that a juror may have been subjected to extraneous sources of information or influence, or discovers that a juror did not reveal facts pertinent to a tainted or prejudiced jury process. *State v. Winborne*, 4 Wn. App. 2d 147, 420 P.3d 707 (2018); *Remmer v. United States*,

347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954). A proper investigation into allegations of juror misconduct ensures that bias was not a factor that seeped into the jury's deliberations, violates these constitutional rights. *Berhe*, 193 Wn.2d at 668; *State v. Cho*, 108 Wn. App. 315, 327, 329, 30 P.3d 496 (2014).

Under Washington law, a juror must be excused for either "actual" or "implied" bias. RCW 4.44.170.Actual bias is the existence of a state of mind on the part of the juror which prevents him or her from trying the issue impartially. RCW 4.44.170(2). Implied bias is conclusively established from a juror's direct or indirect relationship or connection to either the parties, the proceeding or the matter at issue. RCW 4.44.170(1); *see State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). RCW 4.44.180 provides four bases for a challenge for implied bias: consanguinity to

a party, certain relationships to a party such as landlord and tenant, having served as a juror in a case with substantially the same facts, and having an interest in the event of the action or the principal question.

In *Colombo*, an example of implied bias, the court discovered after the guilty verdict that one of the jurors had a brother-in-law who was a government attorney. She allegedly told another juror that she did not mention it "because she wanted to sit on the case." *United States v. Colombo*, 869 F.2d 149, 150 (2d Cir.1989) Such misconduct, the court observed, is "inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court." *Colombo*, 869 F.2d at 151–52.

Moreover, the Court of Appeals has said the trial court must exercise its independent obligation to ensure that a particular juror is not seated, where a statement of obvious bias is never followed by further information that establishes rehabilitation. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869. Seating a biased juror violates the right to an unbiased jury. *Id.* (*citing State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).).

A trial judge has an independent obligation to protect the right to an unbiased jury, regardless of inaction by counsel or the defendant. *Irby*, 187 Wn. App. at 193. "Both RCW 2.36.110[2] and CrR 6.4(c)(1)[3] create a mandatory duty to dismiss an unfit juror even in the absence of a challenge." *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016).

b. The court had a duty to investigate juror misconduct. The evidence post-verdict indicated at least two juror had not volunteered they knew the alleged victim.

Here, all jurors swore in voir dire to answer truthfully all the questions regarding their qualifications to serve as jurors. RP 78. After the verdict, it became apparent that at least two jurors knew the alleged victim personally but hid that relevant fact from the court and the parties. Once the court knew that, the court had an obligation to investigate.

In *Cho*, a juror withheld the fact that he was a retired police officer during jury selection. 108 Wn. App. at 327-331. The juror had never specifically been asked the precise question of whether he used to be an officer, and he may have sincerely believed he could be fair nonetheless. *Id.* But the circumstances strongly suggested the juror did not faithfully adhere to a basic

duty to be forthright during the jury selection process. *Id.* at 330-31. The appellate court reasoned the better approach was to remand for further findings after an evidentiary hearing in which the parties could present additional testimony to illuminate the juror's answers on voir dire as well as the statements he allegedly made to defense counsel after the verdict. *Id.* at 329. The court remanded for the trial court to have an opportunity to consider the issue of implied bias. *Id.*

Under Washington case law, a determination of actual or implied juror bias cannot be harmless. *Irby*, 187 Wn. App. at 193. Doubts regarding bias must be resolved against the juror. *Cho*, 108 Wn. App. at 315.

Due process required the court, once it aware of a possible source of bias, to determine the circumstances, the impact thereof on the juror. *Winborne*, 4 Wn. App. 2d at 160-61 (*citing Remmer*.).

The court was obligated to protect Ms. Jackson's Sixth and Fourteenth Amendment Due Process rights to a fair trial throughout the entire proceedings. *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014). The court failed to do so when it did not conduct an independent investigation to into the alleged jurors' bias. It did not identify which jurors knew Mr. Kunzer. It did not determine whether or not the the alleged bias compromised Ms. Jackson's right to a fair jury trial. *Winborne*, 4 Wn. App.2d at 160-61.

Defense counsel called the two phone numbers the trial court allowed. The efforts to investigate did not resolve the claim of misconduct/bias because of the jurors' refusal to respond. That failure to respond could not end the inquiry. The court had a duty to investigate and ensure that Ms. Jackson received a fair trial.

In short, by not conducting an independent inquiry the court failed to adequately protect Ms. Jackson's constitutional rights to a fair and impartial jury. *Berhe*, at 661-64.

c. The Court of Appeals' opinion conflicts with this Court's precedent and fails to vindicate Ms. Jackson's right to an unbiased jury.

Contrary *Cho*, the Court of Appeals erred in excusing the trial court from performing its legal obligation to jealously protect Ms. Jackson's right to a fair jury trial.

Review is warranted to resolve the conflict between this Court's precedents and the opinion in this case, RAP 13.4(b)(1), to address this significant constitutional issue, RAP 13.4(b)(3), and because the issue one of substantial public interest, RAP 13.4(b)(4).

2. This Court should accept review because the Court of Appeals ignored how the preliminary appearance without counsel eroded the presumption of innocence and rendered the entire proceeding unfair.

Both the state and federal constitutions guarantee the right to counsel for all "critical stages" of a criminal proceeding. *City of Tacoma v. Heater*, 67 Wn.2d 733,737-8, 409 P.2d 867 (1966); *State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009); U.S. Const. Amend. VI; Amend. XIV; Art. 1, § 22. The right to counsel attaches under the Sixth Amendment at a defendant's "first appearance before a judicial officer" where "a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *State v. Heng,* 2 Wn.3d 384, 389, 539 P.3d 13 (2023).

Under CrR 3.1,"[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken

into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." CrR 3.1(b)(1). This rule-based right extends to "all criminal proceedings" and requires counsel at "every stage of the proceeding." CrR 3.1(a), (b)(2)(A). Defendants must have counsel present at their first preliminary appearance before a judge unless it is simply not feasible for some extraordinary reason. *Heng*, 2 Wn.3d at 390.

A person facing criminal charges needs counsel at their first preliminary appearance to protect their constitutional rights while the court decides bail and other important questions. *See Coleman v. Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (plurality portion) (highlighting the importance of counsel to argue for procedural safeguards like "early psychiatric examination or bail"). Bail hearings "are

frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged." *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004).

CrR 3.2 provides the rule for pretrial release. Under the rule, except in death penalty or life without parole cases, there is a presumption not just of pretrial release but of release without conditions, on "personal recognizance." *Butler v. Kato*, 137 Wn. App. 515, 521, 154 P.3d 259 (2007); CrR 3.2(a).

Article 1, § 20 provides for a right to bail "by sufficient sureties" for all cases except those involving a capital crime or the possibility of life without parole. *State v. Barton*, 181 Wn.2d 148, 152-53, 331 P.3d 50 (2014).

At the first appearance Ms. Jackson's rule-based and constitutional right to counsel attached. CrR

3.1(b)(1); *Heng*, 2 Wn.3d at 389; *State v. Charlton*, 2 Wn.3d 421, 428, 538 P.3d 1289, 1292–93 (2023). Ms. Jackson was entitled to have counsel present at her first appearance where she was informed of her right to remain silent, right to counsel, waiver of extradition, and had bail set at $75,000. *Id*. Counsel would have been helpful in avoiding any cash-bail setting, and avoiding the irreparable corrosion of the presumption of innocence that followed Ms. Jackson from this first appearance throughout the entire proceedings.[1]

In sum, the Court of Appeals erred in concluding there was no structural error. It also erred in concluding there was no constitutional error.

a. The Court of Appeals wrongly concluded Ms. Jackson's first appearance was not a critical stage contrary to this Court's precedent.

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[1] Ms. Jackson's entire proceeding was before one judge, who presides over two judicial districts. RP 57.

In *Heng*, after concluding that denial of counsel was error, this Court reduced the question to whether it should automatically reverse for structural error or whether constitutional harmlessness standard applied.

In determining whether automatic reversal is required, the Court decides whether this preliminary hearing was a critical stage of the prosecution. *Heng*, 2 Wn.3d at 391-92. If so, the failure to have Ms. Jackson's counsel present was structural error requiring automatic reversal. *Id.* (*citing Heddrick*, 166 Wn.2d at 910, 910 n.9).

Here, Ms. Jackson's first appearance without counsel in jail attire,[2] when the court informed her of

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[2] The right to a fair trial protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution entitles a defendant to appear at "every court appearance," including nonjury proceedings, "'free from all bonds or shackles except in

the charges, asked her to waive her right to extradition, and set bail she could not afford was structural error.

The Court of Appeals misapplied this Court's holding in *Heng*. This Court in Heng ruled that "a critical stage is one where a 'defendant's rights were lost, defenses were waived, privileges were claimed or waived, or in which the outcome of the case was otherwise substantially affected.' *" Heng , 2 Wn.3d at 394* (internal quotation marks omitted) *(quoting Heddrick, 166 Wn.2d at 910 n.9* . But here, the Court

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extraordinary circumstances.'" *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020) (*quoting State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (plurality opinion).). Such practices, such as visible physical restraints on a defendant, or parading a defendant in prison garb, are constitutionally prohibited unless the trial court makes a reasoned and supported determination that the practice is justified "by an essential state interest" that is "specific to [the] particular trial." *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012, 161 L. Ed. 2d 953 (2005).

of Appeals did not analyze the facts of this case. Because it believed Ms. Jackson "did not lose any rights, waive any defenses or privileges, or give up the opportunity to challenge the judge's bail decision," it wrongly concluded that the bail hearing was not a critical stage App. 8.

Here, contrary to the opinion, at her first appearance, Ms. Jackson lost the presumption of innocence, waived her right to extradition, and seemingly lost her right to a fair trial. *See* App. 8. Ms. Jackson was forced to appear alone from the jail in jail attire. RP 7. Though the court found Ms. Jackson indigent, and said it would appoint her counsel, while still unrepresented and in jail attire, the prosecutor portrayed Ms. Jackson as a dangerous, drug addict on a crime spree, who would keep committing property crimes unless the court imposed very high bail. RP 17,

25, 57. The unfair portrayal of Ms. Jackson eroded the presumption of innocence before the only judge in the county, and led the court to require very high bail. RP 57. Ms. Jackson could not shake the presumption of dangerousness throughout the entire proceeding including sentencing. Contrary to the ruling of the Court of Appeals' Ms. Jackson's first appearance was a critical stage because she lost the presumption of innocence, she waived extradition rights.

In addition, under CrR 3.2 and Article 1, § 20, Ms. Jackson was presumptively entitled to release with no conditions. *See State v. Rose*, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008). Ignoring that presumption, the prosecution urged the court to view Ms. Jackson as a dangerous drug addict who would commit property crimes and violent offenses if released. And it worked. The court imposed bail everyone knew Ms. Jackson

could not afford. In subsequent hearings, the court remained preoccupied with Ms. Jackson's perceived dangerousness and preoccupied she would commit violent offenses if released. The subsequent refusal to release Ms. Jackson on personal recognizance explicitly expressed the court's belief she would commit a violent offense if released. And later at sentencing the prosecution hammered the same theme to secure the highest sentence possible. RP 17, 24, 49.

Contrary to the ruling of the Court of Appeals, Ms. Jackson's bail hearing was "critical stage" of the proceedings. App. 8. Denial of counsel at this stage was "structural error," which compels reversal with no requirement of showing [further] prejudice. *Heddrick*, 166 Wn.2d at 910.

b. *Moreover, the Court of Appeals botched the constitutional error analysis.*

Our courts place a heavy burden on the State to "deter ... conduct" that "undermines the principle of equal justice and is so repugnant to the concept of an impartial trial that its very existence demands that appellate courts set appropriate standards to deter such conduct." *Heng*, 2 Wn.3d at 395.

The Court of Appeals incorrectly ruled that the constitutional error was harmless beyond a reasonable doubt. App. 9. The appearance without counsel irreparably prejudiced Ms. Jackson at her bail hearing where she appeared alone in jail attire without counsel to defend her rights. *Heater*, 67 Wn.2d at 735. The prosecution portrayed her as a dangerous, drug addict who would commit violent offenses. Ms. Jackson could not dislodge this unfair casting. It permeated this

case, and its scepter followed Ms. Jackson throughout until sentencing.

The Court of Appeals ignored how the State paraded Ms. Jackson alone and in jail attire and how the prosecution took advantage to unfairly potray Ms. Jackson as a dangerous, drug addict, on a crime spree, and unfairly overstated the number of warrants and convictions. RP 17; App. 8-9.

The Court of Appeals disregarded Ms. Jackson's showing of irreparable prejudice App. 8-9. The prosecution repeatedly portrayed Ms. Jackson in this way because it knew once the court presumed her dangerous it would tip the scale in the prosecution's favor. And it did. This error was not harmless. RP 17. The record shows the court presumed Ms. Jackson as dangerous and set bail Ms. Jackson could not afford. Ms. Jackson languished in jail throughout the

pendency of the proceedings. RP 17, 24, 49. For instance, fourth-degree assault is not a violent offense. The Court used Ms. Jackson's fourth-degree assault from 2013 as a basis to set bail she could not afford and entered a finding that she was likely to commit a violent offense if released. RP 13, 24, 49.

When Ms. Jackson came to court with counsel, the prosecution changed its tune and acknowledged it had overemphasized juvenile felony convictions and arrest warrants that were are no longer counted or were dismissed. RP 23-24;CP 23; RP 24. The convictions and warrants were years in the past. RP 24. But the damage was done.

For instance, the court modified bail from $50,000 to $35,000 and reasoned $35,000 was not unduly burdensome while acknowledging Ms. Jackson could not afford it. RP 49-51. In addition, although the court

rescheduled trial one month to another, to another, it denied Ms. Jackson release on personal recognizance and refused to set bail Ms. Jackson could afford. RP 44, 59. The court would not even allow Ms. Jackson to be released for necessary dental treatment. RP 29.

Once high bail was set, the court measured future requests for bail reductions from this improper anchor position. The court's future decisions were by high bail premised on the prejudicial first appearance without counsel. And nothing could dislodge the presumption of dangerousness. RP 25.

It also telling that the State's closing repeated the portrayal of Ms. Jackson as dangerous, drug addict who was basically "comatose" when she was arrested. RP 45, 292, 355. At sentencing, the State hammered the same theme and argued that police found Ms. Jackson "catatonic" when the arrested her. RP 355.

The State kept up with overplaying her 2017 robbery offense. RP 355. But notably, at sentencing, the "lengthy" criminal history the State referred to at her first appearance was not so "lengthy" as it had led the court to believe. RP 355.

Contrary to the opinion, the State did not prove this deprivation of counsel at the bail hearing was harmless beyond a reasonable doubt. The Court of Appeals' decision paints over how Ms. Jackson lost, waived and was denied her fundamental right to counsel and it denied him a fair trial. This Court should review and vindicated Ms. Jackson's right to counsel under RAP 13.4(b)(2), (3) and (4).

F. CONCLUSION

Ms. Jackson requests the Court to grant review and reverse her burglary conviction with prejudice.

This brief complies with RAP 18.17 and contains 4,985 words.

DATED this 31st day of December 2024.

Respectfully submitted,

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APPENDICES

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

STATE OF WASHINGTON, Respondent, v. NATASHA MAE JACKSON, Appellant.	)))))))))	No. 39861-7-III UNPUBLISHED OPINION

PENNELL, J. — Natasha Jackson appeals her convictions for first degree burglary and second degree malicious mischief. We affirm.

FACTS

Robert Kunzer arrived at his Klickitat County residence to discover his home had been ransacked and burglarized. In addition to property damage, numerous items were missing. Among them was a muzzleloader rifle.

Mr. Kunzer's home was equipped with a video surveillance system. The system captured Natasha Jackson breaking into his home, along with two accomplices. A law enforcement investigation revealed property belonging to Mr. Kunzer at a residence associated with Ms. Jackson. However, Mr. Kunzer's rifle was never recovered. The State

charged Ms. Jackson with first degree burglary while armed with a deadly weapon and second degree malicious mischief.

Ms. Jackson was arrested several months after the burglary, at which point she appeared in court for a preliminary hearing. She was not accompanied by an attorney. The court advised Ms. Jackson of her rights, appointed counsel, and set bail.

Ms. Jackson appeared with counsel for the remainder of her court proceedings. Counsel was able to lower Ms. Jackson's bail from $75,000 to $35,000, but Ms. Jackson remained in custody as she was never able to post the required amounts. At trial, the State presented testimony from Mr. Kunzer and two law enforcement officers. The jury convicted Ms. Jackson as charged.

Approximately one hour after the jury returned its verdict, counsel learned of an anonymous voicemail message that appears to have been intended for Ms. Jackson's attorney.[1] The message stated as follows:

> [T]here is something that I have to tell you. There were two jurors on the Natasha Jackson case today who did not disclose that they knew the victim of the burglary. I don't know who else to turn to, but I want you to know that there may have been a miscarriage of justice on one of your clients, Natasha Jackson.

[1] The voicemail message was left with a local attorney whose name resembled that of Ms. Jackson's attorney. The local attorney forwarded the message to the prosecutor.

Rep. of Proc. (July 14, 2023) at 334.

The parties brought the voice message to the attention of the court. Ms. Jackson's attorney believed the message might have been left by one of the jurors and suggested two possible names. The State's attorney disagreed that the message appeared to have been left by one of the jurors, instead raising the concern that it might have been left by Ms. Jackson's brother. The court decided to release phone contact information for the two jurors identified by Ms. Jackson's attorney and directed the parties to work together to make follow-up phone calls. Counsel for Ms. Jackson and the State attempted to call the jurors, but were unsuccessful. No further action was taken.

Ms. Jackson received a total sentence of 41 months. She timely appeals.

ANALYSIS

Ms. Jackson makes three arguments on appeal: (1) insufficient evidence supports her first degree burglary conviction, (2) the trial court violated her right to a fair and impartial jury by conducting an inadequate investigation into potential juror bias, and (3) the trial court violated her right to counsel by holding the bail hearing without counsel. We reject these arguments and address each in turn.

Sufficiency of the evidence

In assessing sufficiency of the evidence, we "view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Circumstantial evidence is considered to be as reliable as direct evidence." *State v. Stewart*, 141 Wn. App. 791, 795, 174 P.3d 111 (2007).

Ms. Jackson contends the State presented insufficient evidence that she or an accomplice was "armed with a deadly weapon" as required for first degree burglary. RCW 9A.52.020(1)(a). Ms. Jackson recognizes that evidence of the missing rifle tended to show that either she or one of her accomplices had possessed the weapon and removed it from Mr. Kunzer's residence. But she argues that under *State v. Brown* this is not sufficient because first degree burglary requires evidence the firearm was "easily accessible and readily available for use." 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

Ms. Jackson misreads *Brown*. The facts in *Brown* were unusual in that the firearm giving rise to the first degree burglary charge was never taken from the residence.

Instead, the homeowner merely discovered that the weapon had been moved from a closet to the top of a bed. According to *Brown*, these circumstances were insufficient to show the defendant had been armed for purposes of first degree burglary. *Id.* at 432. *Brown* specifically did not address whether a first degree burglary charge could be sustained based on evidence that a firearm had been removed from the home. *Id.* at 434 n.4.

As explained in *State v. Hernandez*, 172 Wn. App. 537, 290 P.3d 1052 (2012), *Brown*'s analysis is limited to its facts. When a firearm is removed from a residence during a burglary, *Brown* does not apply. Instead, the defendant will be considered armed for purposes of first degree burglary, regardless of whether the firearm was loaded or the defendant exhibited a willingness to use the firearm. *Id.* at 543-44.

This case falls under *Hernandez*, not *Brown*. Although there was no direct evidence linking Ms. Jackson or her accomplices with Mr. Kunzer's rifle, the circumstantial evidence showed that either Ms. Jackson or one of her accomplices had taken the rifle from Mr. Kunzer's home. This was sufficient to justify Ms. Jackson's first degree burglary conviction.

Investigation of juror bias

Judges have an ongoing duty to investigate allegations of juror bias and "to excuse jurors who are found to be unfit." *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). "A presumption of bias arises when a juror deliberately withholds material information in order to be seated on a jury." *State v. Cho*, 108 Wn. App. 315, 317, 30 P.3d 496 (2001). Our courts grant trial judges "broad discretion" to investigate issues pertaining to juror bias. *Elmore*, 155 Wn.2d at 773.

Ms. Jackson claims the trial court abused its discretion when it failed to conduct an investigation of juror bias beyond what was requested by the parties. We disagree.

Ms. Jackson's argument rests on the flawed assertion that the trial court "knew" "at least two jurors knew the alleged victim personally but hid that relevant fact from the court and the parties." Br. of Appellant at 24. Contrary to Ms. Jackson's assertion, there is no competent evidence in the record that any of the jurors knew the victim, let alone evidence that the jurors hid this information from the court. The only information regarding bias was an anonymous phone call. Outside of corroborating circumstances, this type of information is not considered reliable. *See State v. Lesnick*, 84 Wn.2d 940, 943, 530 P.2d 243 (1975). Given the lack of reliable evidence, it was not an abuse of

discretion for the trial court to refrain from conducting an independent and unrequested investigation into possible juror bias.

Right to counsel

A defendant charged with a crime has the right to assistance of counsel at all court hearings. *State v. Heng*, 2 Wn.3d 384, 388-89, 539 P.3d 13 (2023). "[C]ounsel 'shall' be provided 'as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is criminally charged.'" *Id.* (quoting CrR 3.1(b)(1)). The requirement to provide counsel applies, regardless of whether a court hearing is an initial appearance. The failure to provide counsel at an initial or preliminary hearing is an error that not only violates court rules, but also constitutional protections. *Id.* at 394-95.

Ms. Jackson correctly argues that the State's failure to provide counsel at her preliminary hearing was constitutional error. The only question is whether she is entitled to a remedy. If the preliminary hearing constituted a "critical stage of the prosecution," then the failure to provide counsel will be deemed a "structural error requiring automatic reversal." *Id.* at 392. But if the hearing was not at a critical stage, then reversal turns on application of the constitutional harmless error test.

As was true in *Heng*, the failure to provide counsel at Ms. Jackson's preliminary hearing does not require automatic reversal because the hearing was not at a critical stage

of the prosecution. "[A] critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or where the outcome of the case was otherwise substantially affected." *Id.* at 394. A hearing where a judge simply "appoint[s] counsel, set[s] bail, and . . . enter[s] a not guilty plea" does not meet this standard—at least when the defendant does not "lose [the] ability to challenge bail." *Id.* at 395. Like *Heng*, Ms. Jackson's preliminary hearing involved the appointment of counsel and a preliminary bail decision. She did not lose any rights, waive any defenses or privileges, or give up the opportunity to challenge the judge's bail decision. *Heng* mandates that we reject Ms. Jackson's claim of structural error.

Because the preliminary hearing was not at a critical stage of the prosecution, we turn to the constitutional harmless error test. Under this analysis, reversal is required unless the State can demonstrate "beyond a reasonable doubt" that the absence of counsel "did not contribute to the verdict." *Id.*

Ms. Jackson argues that the State cannot establish harmless error because the deprivation of counsel at her preliminary appearance caused the trial judge to become inalterably biased against her. This argument is not well taken. Judges are presumed to act with "honesty and integrity." *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). Ms. Jackson cites no evidence to overcome this presumption. Rather, she relies

entirely on speculation. This is not sufficient to preclude the State from meeting its burden. *See State v. Bennett*, 161 Wn.2d 303, 309, 165 P.3d 1241 (2007) (proof beyond a reasonable doubt "'does not require proof that overcomes *every possible doubt*'"); *United States v. Mikhel*, 889 F.3d 1003, 1033 (9th Cir. 2018) ("[A] 'reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation.'" (quoting NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 3.5 (2010 ed.)))

Putting aside Ms. Jackson's meritless argument regarding judicial bias, we find the violation of the right to counsel harmless beyond a reasonable doubt. Ms. Jackson's guilty verdict was rendered by a jury, not a judge. There is no indication that the jury was aware of what happened at Ms. Jackson's preliminary hearing or that the outcome of the preliminary hearing had an impact on trial. Furthermore, the trial evidence overwhelmingly supported the jury's verdict. The surveillance video linked Ms. Jackson to the burglary and stolen property was located at a residence associated with Ms. Jackson. As was true in *Heng*, the absence of counsel at Ms. Jackson's preliminary hearing was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Cooney, J.

WASHINGTON APPELLATE PROJECT

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