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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON<br>Respondent,<br>v.<br>NATHAN SCOTT SMITH<br>Appellant. | No. 83187-9-I<br>DIVISION ONE<br>OPINION PUBLISHED IN PART |

HAZELRIGG, A.C.J. — Nathan Smith appeals from a conviction for rape of a child in the first degree. He seeks reversal based on the seating of a biased juror, an improper judicial comment on the evidence, admission of child hearsay, and admission of testimony by a child witness not competent to testify. We agree as to the first issue and reverse because a biased juror sat on Smith's jury.

## FACTS

In November 2018, Nathan Smith was temporarily living with K.G., with whom he had a relationship that was at times platonic and other times romantic, and her two children. One of the children, five-year-old H.H., disclosed to his father, T.H., that Smith "sucks [his] wiener." T.H. called K.G., who called the police. H.H. took part in a child forensic interview and a forensic medical examination at Dawson Place.[1]

[1] A child advocacy center.

The State charged Smith with one count of rape of a child in the first degree. Prior to trial, Smith asked the court to deem H.H. incompetent to testify and moved to exclude the out-of-court statements H.H. made to his parents and during the forensic interview as improper hearsay. After a hearing with testimony, the court found H.H. competent to testify and admitted his hearsay statements. The jury convicted Smith of rape of a child in the first degree.

Smith timely appealed.

## ANALYSIS

### I. For-Cause Challenges

Smith first assigns error to the trial court's denial of three motions to strike jurors for cause. During voir dire, Smith moved to strike jurors 6, 10, and 27 for cause: all three motions were denied. Defense counsel used peremptory challenges to excuse jurors 6 and 10, but, in doing so, exhausted his allotted peremptory challenges and was therefore unable to strike juror 27. Juror 27 sat on Smith's jury.

This court reviews a trial court's decision to deny a for-cause challenge for a manifest abuse of discretion. State v. Winborne, 4 Wn. App. 2d 147, 160, 420 P.3d 707 (2018). A court abuses its discretion if its decision is based on untenable grounds or is made for untenable reasons. State v. Sassen Van Elsloo, 191 Wn.2d 798, 807, 425 P.3d 807 (2018). "[W]e must keep in mind that the trial court has the advantage of observing a juror's demeanor and is therefore 'in the best position to determine a juror's ability to be fair and impartial.'" State v. Teninty, 17 Wn. App. 2d 957, 964, 489 P.3d 679 (2021) (quoting State v.

Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). Therefore, this court "will uphold a trial court's decision so long as it falls within the broad range of reasonable decisions." Id. Though the trial court has ample discretion, its ruling is "'subject to essential demands of fairness.'" State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020) (internal quotation marks omitted) (quoting Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)).

The accused has a federal and state constitutional right to be tried by a fair and impartial jury. State v. Slert, 186 Wn.2d 869, 877, 383 P.3d 466 (2016). Trial judges have an independent duty to protect that right by excusing jurors "who have actual or implied bias." Id. "Actual bias" is defined by statute as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Jurors may be dismissed for cause based on actual bias if their views would "'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.'" State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995) (internal quotation marks omitted) (quoting State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986)). However, "[a] trial court need not disqualify a juror with preconceived ideas if the juror can 'put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given by the court.'" State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987) (quoting State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407 (1986)). "Equivocal answers alone," or "a mere possibility of

bias," are "not sufficient to prove actual bias; rather, the record must demonstrate 'that there was a probability of actual bias.'" Sassen Van Elsloo, 191 Wn.2d at 808-09 (quoting Noltie, 116 Wn.2d at 838-39).

A. Jurors 6 and 10

As a preliminary matter, our State Supreme Court has recently held that "a 'defendant's rights are not violated simply because they had to use peremptory challenges to achieve an impartial jury.'" State v. Talbott, 200 Wn.2d 731, 739, 521 P.3d 948 (2022) (quoting State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001)). There is no federal or state constitutional right to exercise a peremptory challenge. State v. Booth, 24 Wn. App. 2d 586, 597, 608, 521 P.3d 196 (2022). Thus, there is no independent constitutional error based on the trial court's denial of Smith's for-cause challenges as to jurors 6 and 10 since any error would have been cured by the exercise of his peremptory challenges to remove them. However, the denial of these for-cause challenges forced Smith to exhaust his peremptory challenges to strike the jurors who had demonstrated bias, and prevented him from using one to strike juror 27.

Juror 6 "indicated some concern about [her] ability to be fair and impartial in a case of this nature" on her juror questionnaire. She explained that she has "a problem with PTSD" that manifests in memory lapses when she feels anxious or nervous. However, she did not believe it would be a problem unless "a defendant became emotional and had some sort of physical demonstration where he hit somebody or lost control of himself." She further stated that when she first heard the nature of the charged crime, she "felt very nauseated."

However, she later attested that she felt she could apply the presumption of innocence and that, after reflection, she "believe[d]" she could be fair and impartial. The court based its decision denying Smith's for-cause challenge on these statements of rehabilitation.

During group voir dire, when the venire was asked whether anyone "believe[d] strongly that a person who is not guilty is going to take the stand," juror 10 agreed. Juror 10 stated, "If you are innocent, why wouldn't you want to stand up and say so so everyone can hear you? That—it doesn't feel right to me." When the prosecutor asked juror 10 if she would be able to follow the court's instruction and not use the defendant's choice to not testify to influence her decision, she said "I am not sure. I am not sure. I just—I feel very strongly that the person is innocent, then I—it is hard for me to understand why an innocent person would not want to say to everyone, look, I didn't do that." Later, juror 10 was asked, "Would the Defendant not testifying for you make you think it is more likely he is guilty?" She responded, "I can't say that. Honestly I would think that, but I feel uncomfortable with someone not wanting to say that they didn't do it. I can't—I don't think it is automatically they are guilty, but I have a reaction to not wanting to say I didn't do that." She asserted, however, that she did not "think" any discomfort with the defendant not testifying would impact how she viewed the rest of the case. Again, it was this latter statement that prompted the denial of Smith's challenge for cause to juror 10.

After the trial court denied both of Smith's for-cause challenges, he exhausted his remaining peremptory challenges to strike jurors 6 and 10.

B. Juror 27

Because Smith had exhausted his peremptories, juror 27 was empaneled after the court denied his for-cause challenge. Juror 27 stated she had a hardship related to serving. She explained that she works "in a small bakery" with only six employees and, therefore, it would be difficult for her coworkers to cover her work, adding that she thought she "would advocate for my coworkers and let you know it is a hardship for my job." Juror 27 further asserted that she would either need to use vacation time or not receive pay for the duration of the trial, which would disrupt her plan for a future vacation either by depleting the leave time she had accrued or reducing her finances. When the prosecutor asked whether she would be substantially distracted by this situation, she stated "probably not, although I will probably work all weekend, but I don't know."

Juror 27 additionally answered on her questionnaire that someone close to her had been a victim of sexual violence. The prosecutor and juror 27 had the following exchange:

> Q. Either way you answered on your questionnaire something about that situation that would make you feel you could not be fair and impartial; is that correct?
> A. I will try my best. I think so.

Defense counsel then asked:

> Q. So you said you would try your best. How do you think it would affect you?
> A. Just since the—innocent until proven guilty. It is just hard when it is a child to just focus on the evidence, but I—I don't know.
> Q. Do you think you would be more likely to assume that a child is telling the truth just because it is a child?
> A. But I will try not to, you know, keep aware of my own conscious bias.

> Q. You said it would be part of your presumed innocent. Are you worried you wouldn't be able to do that?
> A. I think I can.
> Q. Do you think you can? This is a situation where I will just use an example. If your significant other goes, are you going to be paid for the time away and they said, I think I can, would you be satisfied with that answer?
> A. No.
> Q. Okay. So you want to be sure, right? So this is one of those instances we need to be sure, so are you—are you sure it wouldn't affect your ability to presume the Defendant?
> A. Yeah.

Defense counsel continued:

> Q. And then my only other question is, so if you were told that your—you are on the jury and that the verdict has to be unanimous, and let's say you are the only person who disagrees with the rest of the group, everybody else is going guilty or not guilty, would you be tempted in order to finish deliberations so you could get back to work to change your vote to whatever the rest of the group thinks, even if you personally didn't feel that way?
> A. 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.
> Q. Okay. Is that just something that you would do no matter what, or would that be related to you trying to get back to work?
> A. Probably both or—yeah. I mean, I am not a confrontational person. I don't think I would, like, fight really hard if I, like, was on the fence about it.
> Q. Okay. Thank you. No further questions.

During group voir dire, when asked if Smith not testifying would "point in favor of guilty," juror 27 stated that it "logically seems like if you are innocent, you want to go up and tell your story about what happened." She asserted she would think it was "slightly more likely" that Smith was guilty if he chose not to testify. The court interjected, informing the venire that defendants have the constitutional right not to testify, and that if Smith chose to exercise that right, it could not be used against him in any way. Defense counsel then asked juror 27 if that

instruction would change her mind and she replied that it would, as she "didn't know that before. So that would put it at neutral, like him not testifying would not make me think he is more guilty." (Emphasis added.)

During individual and group voir dire, juror 27 was unable to commit to applying the presumption of innocence. 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," juror 27 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." (Emphasis added.) As defense counsel noted at oral argument before this court, being "on the fence" directly implicates proof beyond a reasonable doubt—if a juror is on the fence, the State has necessarily failed to satisfy its burden to prove the elements beyond a reasonable doubt.[2] Simply "agree[ing] with everyone" when "on the fence," meaning that the State has failed to meet its burden, contradicts the unequivocal instructions on the law and deliberation process. This was a clear statement that juror 27 either did not understand her obligations under the law or was unable to follow them; possibly both. The court instructed the jury that "[e]ach of you must decide the case for yourself," and "[y]ou should not . . . surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict."

[2] Wash. Ct. of Appeals oral argument, State v. Smith, No. 83187-9-I (June 13, 2023), at 18 min., 28 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023061186.

This inability to commit to applying the presumption of innocence was reiterated during group voir dire. Juror 27 initially stated that she would think it was "slightly more likely" that Smith was guilty if he chose not to testify. When the court corrected her on the law, she stated, "So that would put it at neutral." (Emphasis added.) Neutral is not the presumption of innocence; our system expressly tips the scales of justice entirely in favor of the accused in this regard by directing that "[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt." RCW 10.58.020. Jurors are explicitly and carefully instructed pursuant to pattern jury instructions that this "presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (5th ed. 2021). "[T]he presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty." Coffin v. United States, 156 U.S. 432, 458-59, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Juror 27 was required by law to presume Smith innocent unless the State demonstrated, beyond a reasonable doubt, that he was guilty of the crime. She was required to apply the presumption of innocence and follow the court's instructions throughout deliberations, and hold to her honest belief and verdict even in the face of disagreement from other jurors.

There is nothing neutral about the presumption of innocence. Even after correction from the trial court, juror 27 did not understand her duty as a juror and demonstrated an inability to serve as the law requires. Jurors who exhibit prejudice by being unwilling or unable to follow the law or participate in deliberations are unfit to serve on the jury. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). "[A] jury should be composed of jurors who 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'" Franklin v. Anderson, 434 F.3d 412, 427 (6th Cir. 2006) (quoting Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)). "Jurors who cannot apply the law," including those who cannot apply the burden of proof because they fail to understand it, "are not impartial." Id. at 427-28 (citing Wainwright v. Witt, 469 U.S. 412, 423, 195 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). While the State argues that Smith asks for a jury of individuals "made of unyielding steel," Smith simply asks for a jury made up of individuals who are able to follow the court's instructions and to afford him the constitutional protections to which he is entitled.

Under RCW 2.36.110, a trial judge has the duty to excuse jurors who have "manifested unfitness . . . by reason of conduct or practices incompatible with proper and efficient jury service." While the trial court "must be careful not to interfere with a defendant's strategic decisions regarding jury selection,"[3] it carries the independent obligation to protect the fundamental right of the accused to a fair and impartial jury. Slert, 186 Wn.2d at 877. The court may not abdicate its independent duty out of a concern for defense counsel's strategy.

[3] State v. Lawler, 194 Wn. App. 275, 288, 374 P.3d 278 (2016).

The dissent seeks to distinguish the testimony of juror 27 from that of the jurors in State v. Gonzales[4] and State v. Irby.[5] Dissent at 2-3. 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, 278-9, 45 P.3d 205 (2002), overruled on other grounds by State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022). In Irby, the juror stated, "I'm a little concerned because I did work for the government, Child Protective Services, I'm more inclined towards the prosecution I guess," and, "I would like to say he's guilty." 187 Wn. App. 183, 190, 347 P.3d 1103 (2015). Juror 27's statements here, like those in Gonzales and Irby, reflect a likelihood of actual bias.

The dissent simultaneously focuses too narrowly on some of juror 27's statements, takes her statements out of context, applies other statements overbroadly in an attempt to rehabilitate different problematic assertions, and adds words that she did not speak. The analysis contained therein is erroneous because it fails to conduct a careful read of juror 27's testimony and apply the law to her full statements, not just certain words from separate sentences, in the context they were given. For example, the dissent focuses on the words "probably," "may" and "think" rather than reading juror's 27 statements as a whole and in response to precise questions from the attorneys. Juror 27 stated that only "[i]f [she] was a 100 percent very confident" would she not change her "vote

[4] State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), overruled on other grounds by State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022).

[5] State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015).

to whatever the rest of the group thinks." In contrast, if she "was like, I believe this evidence, or whatever, but I am kind of like, on the fence, then I may agree with everyone." While juror 27 noted what she "may" do if she was "on the fence," she explicitly contrasted that with the scenario where she would hold steadfast to her vote: if she was "100 percent very confident" in her vote. In the context of juror 27's statements collectively, this reflects a probability of actual bias.

The dissent likewise erroneously cherry-picks juror 27's statements regarding the potential impact of her experience with sexual violence and then seeks to use them to immunize her separate, later statements that indicate bias. We agree that juror 27 unequivocally stated that she would be able to apply the presumption of innocence and would "try [her] best" to be fair and impartial despite her experience with sexual violence. But, the dissent makes a misguided attempt to take this statement and utilize it to prospectively rehabilitate juror 27 for statements made after this particular discussion ended. Juror 27's contention that she would "try [her] best" to be fair and impartial in a case involving allegations of sexual assault, despite her experience with sexual violence, does not immunize her later statements that demonstrated a probability of bias on other bases.

Similarly, the dissent asserts that "when juror 27 is undecided—that is, when she is 'kind of, like, on the fence'—her answers in voir dire confirm that she is willing to re-examine her opinion based upon further review of the evidence in deliberations with her fellow jurors." Dissent at 5. But, this adds words that are

simply not in the record. As previously established, the question asked by counsel was "would you be tempted in order to finish deliberations so you could get back to work to change your vote to whatever the rest of the group thinks, even if you personally didn't feel that way?" Juror 27 was not asked whether she would "re-examine her opinion based upon further review of the evidence in deliberations with her fellow jurors," as suggested by the dissent, she was asked whether she would change her vote "to whatever the rest of the group thinks." This is a critical distinction, particularly in such a fact-based inquiry. Our inquiry is not rooted in what appellate judges believe a juror intended, but in the words the juror actually spoke in response to the question as it was posed.

Finally, while we agree that our standard of review is deferential to the trial judge, we will not accept the dissent's invitation to apply this deference as "a rubber stamp." Gonzales, 111 Wn. App. at 281 (holding that "appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp" (quoting State v. Fire, 100 Wn. App. 722, 729, 998 P.2d 362 (2000), rev'd, 145 Wn.2d 152, 34 P.3d 1218 (2001)). Based on an attentive reading of juror 27's statements, in the context of all her statements as well as each question asked, the trial court manifestly abused its discretion in denying Smith's motion to strike juror 27 for cause. It reasoned that juror 27 "not [being] a confrontational person," was not a basis to excuse her for cause. This reasoning is untenable in light of the evidence in the record that shows juror 27 repeatedly demonstrated a probability that she could not apply the presumption of innocence or follow the court's instructions, particularly when

framed through the lens of her initial reluctance to serve due to work and financial concerns as demonstrated by her request for a hardship dismissal. "If the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (internal quotation marks omitted) (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)). The presence of a biased juror is per se prejudicial and requires reversal for a new trial. Id. We reverse.

Because the other issues Smith raises on appeal are capable of repetition in the event the State elects to re-try him, we reach the merits of the remaining assignments of error. The panel has determined that the remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. See RCW 2.06.040.

II. Comment on the Evidence

Smith argues that the trial court judge improperly commented on the evidence by issuing a Petrich[6] instruction as well as changing the language in the "to convict" instruction to reflect multiple dates. Smith further contends that the instructions were improper because they were unsupported by the evidence presented at trial. The State avers that the judge did not comment on the evidence, but merely took reasonable measures to ensure jury unanimity because the evidence referenced multiple acts that could support the criminal charge at issue.

[6] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

The Washington State Constitution prohibits judges from commenting on evidence. CONST. art. IV, § 16. We review whether a jury instruction is an improper comment on the evidence de novo. State v. Mansour, 14 Wn. App. 2d 323, 329, 470 P.3d 543 (2020). Additionally, it is error for the trial court to give an instruction not supported by the evidence. State v. Phillips, 9 Wn. App. 2d 368, 383, 444 P.3d 51 (2019).

Judges may not convey personal feelings regarding the merits of a case nor resolve matters of fact. Mansour, 14 Wn. App. 2d at 329-31. However, so long as a jury instruction does no more than accurately state the relevant law, it does not constitute a comment on the evidence. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). When deciding whether a judicial comment requires reversal, we apply a two-step analysis. State v. Bass, 18 Wn. App. 2d 760, 802, 491 P.3d 988 (2021), review denied, 198 Wn.2d 1034 (2022). First, we look at the facts of the case to determine whether the trial court's conduct amounted to a comment on the evidence. Id. Second, if we hold the trial court's conduct to be improper, the comment is presumed prejudicial and the State bears the burden to establish that "'the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.'" Id. at 803 (quoting State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006)).

A. Petrich Instruction

The first facet of Smith's argument addresses the court's issuance of a Petrich instruction. In order to ensure a defendant's right to jury unanimity is preserved, State v. Petrich requires the trial court to properly instruct a jury when

there is evidence of multiple distinct acts and the State has not clearly elected the acts it asserts support the charged crime(s). 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Smith concedes that the Petrich instruction provided to the jury here is an accurate statement of the law, but argues that it was improper for the court to issue an instruction unsupported by evidence. He contends that the instruction confused the jury, and that the wording of the instruction implied there was more evidence than the State actually presented by stating there was evidence of criminal conduct on multiple dates. Alternatively, Smith asserts that even if the evidence adduced at trial demonstrated multiple acts, the prosecutor clearly elected the act upon which the State relied to support its single charged crime. By issuing the Petrich instruction, Smith argues, the court "undermined" the State's election, further confusing the jury.

Smith mischaracterizes portions of the record by overstating the clarity of both the testimony and the prosecution's election. During K.G.'s testimony, she stated that T.H. called her because H.H. had told him "'Nathan sucks my wiener all the time.'" K.G. later spoke to H.H. and testified that he repeated the same statement to her; "[H.H.] said, Nathan sucks my wiener all the time." K.G. also said Smith spent time alone with H.H. on several occasions when she went to the store, and that one night she woke up and saw Smith coming out of H.H.'s bedroom. She testified, "I know I did leave him alone with him when I went to the store. I know I did leave him alone another day when I was working. It was just random times." K.G. also discussed an occasion where H.H. was "standing in the hallway area withdrawn" after Smith told her H.H. had been "hiding in the

closet." All of these remarks by K.G. could be reasonably interpreted by the jury as evidence of additional distinct acts, particularly as H.H. hid from Smith both on the day referenced by K.G., and on the day that Smith purportedly "sucked [his] wiener."[7]

Furthermore, the court did not undermine the State's election since the prosecutor began his closing argument by referencing the various events in K.G.'s testimony:

> You recall [K.G.]'s testimony about a time where she received a call from Mr. Smith saying [H.H.] won't come out of the closet. You recall she came home and he acted differently, was behaving differently. . . . you recall the testimony that there was an incident where Mr. Smith was seen coming out of her [children's] bedroom in the middle of the night without an apparent explanation.

Since the events referenced by the prosecutor took place on different days, the State's closing argument undermines Smith's contention that the prosecutor made a clear election to the jury. Moreover, the Petrich instruction would not have caused additional confusion because the jury already heard K.G.'s testimony and the prosecutor's closing argument that referenced events on different days.

Again, in order to ensure a defendant's right to jury unanimity is preserved, Petrich instructions must be issued when there is evidence of multiple distinct acts, in absence of a clear election. 101 Wn.2d at 572. K.G.'s testimony establishes the possibility of multiple distinct acts. Further, the State expressly referenced this evidence in closing argument. As the instruction was an accurate

[7] Smith argues in briefing that the instruction "gave credence to the mother's unsupported musings." However, K.G.'s sworn testimony was evidence presented to the jury for its consideration. As such, the trial court's actions were prudent to ensure unanimity.

statement of law, relevant to the evidence presented in this case, the trial court did not err in issuing the Petrich instruction. Accordingly, under Bass, this was not a comment on the evidence and we need not proceed to the second step of the inquiry.

B. Modified "To Convict" Instruction

Smith contends that the trial court further commented on the evidence by changing jury instruction 6, the "to convict" instruction, by adding "on one or more dates," because doing so implied evidence of multiple acts when the evidence at trial did not support such a conclusion. The original "to convict" instruction stated: "That from on or about March 1, 2018 to on or about August 31, 2018, the defendant had sexual intercourse with [H.H.]." The court modified the instruction to read: "That on one or more date(s) from on or about March 1, 2018 to on or about November 26, 2018, the defendant had sexual intercourse with [H.H]." (Emphasis added.)

The State argues the trial court's change to the "to convict" instruction was sufficiently supported by evidence at trial. The State compares the challenged instruction to the one informing the jury that it must find that the act took place in the state of Washington. Such a directive is not an expression by the court that it believes the act took place in Washington; only a statement of an element of the crime. Similarly, the State avers that the changed "to convict" instruction was not an expression by the court of the truth of any evidence since it did not take a position on whether the act had occurred at all; it only noted an element the State was required to prove beyond a reasonable doubt.

Instructions that merely mention facts are categorically different from those that resolve disputed issues of fact. In State v. Becker, the question of whether or not the Youth Education Program (YEP) was a school was an issue for the jury because the resolution of that fact could support a sentencing enhancement. 132 Wn.2d 54, 65, 935 P.2d 1321 (1997). The special verdict form asked the jury whether the defendants were within 1,000 feet of school grounds: "to-wit: Youth Employment Education Program School." Id. at 64. The court held that the special verdict form identified YEP as a school, a disputed fact, "effectively removing a disputed issue of fact from the jury's consideration," and relieving the State of its burden. Id. at 65. In contrast, the instruction at issue here did not resolve a disputed issue of fact. Rather, the instruction informed the jury it had to determine whether the State had met its burden to prove that element. Whether or not the act took place within that date range remained an issue of fact for the State to prove and for the jury to resolve.

Moreover, the "to convict" instruction as modified was supported by evidence. K.G.'s testimony referenced acts taking place on multiple dates that supported the "to convict" instruction. See Section II.A, supra. As such, the court did not inappropriately imply multiple acts had taken place. The trial court did not err in changing the "to convict" instruction to conform to the evidence presented because the jury instruction did no more than set out relevant law to the case at hand and, therefore, was not a comment on the evidence. Since the trial court did not err, we need not reach the issue of prejudice under the Bass test.

III. Competency of Child Witness

Smith next assigns error to the trial court's ruling that H.H. was competent to testify. "We afford significant deference to the trial judge's competency determination, and we may disturb such a ruling only upon a finding of manifest abuse of discretion." State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011). "'There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.'" State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (quoting State v. Borland, 57 Wn. App. 7, 11, 786 P.2d 810 (1990)). The trial judge has the benefit of seeing the witness live, while "[t]he competency of a youthful witness is not easily reflected in a written record." Id.

All witnesses are competent to testify unless they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2), accord CrR 6.12(c)(2). The party challenging the competency of the witness bears the burden of proof by a preponderance of the evidence. Brousseau, 172 Wn.2d at 341-42. In 1967, our State Supreme Court developed a five-factor test for child witness competency. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). After the legislature amended RCW 5.60.050 in 1986, the Supreme Court held that a child witness's competency is analyzed under the RCW 5.60.050 framework, while the Allen factors guide the trial court's assessment. State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010). The five factors from Allen are whether the child demonstrates:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

70 Wn.2d at 692. Inconsistencies in testimony are not sufficient to find a child witness incompetent to testify; rather, inconsistency "goes to the child's credibility and not to admissibility." Woods, 154 Wn.2d at 621.

Here, Smith argues the court erred when it found all the Allen factors were satisfied and concluded H.H. was competent to testify. He contends all five factors are lacking, largely relying on H.H.'s inconsistent statements and later claims that he could not remember events. At a defense interview two weeks before trial, the investigator asked H.H., "Is there anything about Nathan that you want to tell us?" H.H. responded, "I don't know," and that he "d[id]n't remember." The investigator also asked, "Is it something that you don't want to talk about?" And H.H. responded, "Mm-hmm." H.H. told the investigator that his mom told him what to say at the interview, but that he forgot what she told him. At the pretrial hearing, H.H. testified that he did not remember telling the defense that he did not remember the incident.

As to the first Allen factor, Smith contends H.H.'s statements demonstrate H.H. "either did not understand his obligation to speak the truth, was not capable of telling the truth, or did not remember what the truth was." At the pretrial hearing, H.H. was asked if "anybody [told] you that you have to say something bad about Nathan?" to which he answered, "No." He also stated that he had

promised to tell the truth each time he spoke to an adult about the incident and that he had in fact told the truth each time. He affirmed that he understood he had to tell the truth at the hearing. H.H.'s inconsistent statements go to his credibility rather than his understanding of his obligation to tell the truth; he testified that he understood he had to tell the truth at the pretrial hearing, that he had promised to tell the truth at previous interviews, and that he had told the truth previously. This is sufficient to support the first Allen factor.

Turning to the second Allen factor, Smith argues H.H. was unable to "perceive and relay events accurately." However, Smith cites no portion of the record to support the contention that "[H.H] was unable to offer details about the incident, made inconsistent statements, and was unable to remember." H.H. had sufficient capacity to disclose to his father that "Nathan sucks my wiener." When his mother reminded him that "private areas are for you only and nobody should be touching them or putting their mouths on them," H.H. had sufficient capacity to immediately disclose "Nathan sucks my wiener all the time," including the detail that it happened when K.G. was at the store. During the forensic interview with Gina Coslett, H.H. stated that he knew where his "wiener" was located on his body and what it was used for. As the trial court noted, H.H. was also able to identify photographs of the apartment where the incident took place, and the names of his school and daycare provider at the time. Smith contends this is insufficient, but does not argue what necessary details are missing to demonstrate sufficient capacity. The record supports the finding that H.H. had

sufficient mental capacity to receive an accurate impression of the incident. The second Allen factor is met.

With regard to the third Allen factor, Smith contends H.H. "demonstrated insufficient memory to retain an independent recollection of events." He again points to H.H.'s statement at the defense interview that he did not remember the incident. However, H.H. demonstrated an independent recollection of events by disclosing the incident to his father and mother, to Coslett in a forensic interview, and by recounting the details of the event at the pretrial hearing. His description of the incident was also consistent, each time he disclosed, he stated that Nathan had "sucked my wiener" or "sucked my private part," that it took place in the home when his mother and sister were at the store, and that it happened multiple times. This adequately reflects an independent recollection; the statements at the defense interview go to the weight rather than the admissibility of H.H.'s testimony. Thus, there is sufficient evidence to support the third Allen factor.

Finally, Smith analyzes the fourth and fifth Allen factors together. He asserts that H.H.'s "nonresponsive answers and claimed inability to remember" demonstrate a limited capacity to discuss the incident or understand simple questions about it. Smith notes that H.H. told the defense attorney and investigator he did not remember the incident and, during an assessment with a forensic nurse examiner, he stated that no one "had ever touched his private areas." At the hearing, H.H. was able to remember telling his father "something about Nathan" when asked, and responded, "He sucked my private part." During

the interview with Coslett, H.H. could remember when the incident occurred, what both he and Smith were wearing, that the sexual contact happened three times, that he hid in response and said stop, and that his "wiener . . . [g]ot wet from [Smith's] mouth," and it was "[k]ind of gross." At the pretrial hearing, H.H. testified that the incident took place when he was five years old, and, when asked how he hid under the bed with so many toys present, explained that he pushed his toys out of the way in order to fit under his bed during the incident. These statements are sufficient to demonstrate that H.H. had the capacity to express his memory of the incident and to understand simple questions about it. Substantial evidence supports the court's findings on the fourth and fifth Allen factors.

The trial court did not abuse its discretion when it concluded H.H. was competent to testify as a witness under RCW 5.60.050(2) and the Allen factors.

IV. Child Hearsay

Finally, Smith argues the trial court erred in admitting H.H.'s out-of-court statements to his father, mother, and forensic interviewer Coslett. He asserts that, even if H.H. was competent to testify, admitting the hearsay statements was improper because the statements were unreliable. RCW 9A.44.120(1) provides a statutory basis for admitting otherwise inadmissible hearsay if the statement is made by a child under the age of 10, describes sexual contact that involves the child, has "sufficient indicia of reliability," and the child testifies at the proceedings. We review a court's conclusion that statements fall within this

exception for a manifest abuse of discretion. Woods, 154 Wn.2d at 623. Smith challenges only the reliability prong of the statute.

Washington courts apply the nine-factor Ryan[8] test to analyze reliability. Id. The factors are:

> (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement.

Id. "No single factor is decisive; rather, reliability is based on an overall evaluation of the factors." State v. C.M.B., 130 Wn. App. 841, 849, 125 P.3d 211 (2005). Here, Smith asserts that only some of the Ryan factors were not met. His argument focuses on the spontaneity of statements and the remoteness of the possibility of faulty memory.

First, regarding factor four, spontaneity of statements, Washington courts apply a broad definition of "spontaneous." State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991). "[S]o long as the questions are not leading or suggestive" based on the entire context of the statement, a child's answer to a question is still a spontaneous statement. Id. In C.M.B., where the mother asked the child "[y]ou didn't touch each other in a bad way, did you?", this court held that the child's statements in response to questions from his mother were spontaneous because "the mother did not ask questions that suggested any

[8] State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

particular conduct" and the child's "statements were quite specific in their description of the abuse." 130 Wn. App. at 849. In State v. Henderson, this court held a child's statements were spontaneous where the child "volunteered the information that her father stuck his fingers in her vagina when [police] asked [her] why it hurt her when her father touched her vagina." 48 Wn. App. 543, 550, 740 P.2d 329 (1987). According to the court, the detective's "question was neither leading nor suggestive. Thus, the statement qualifies as 'spontaneous.'" Id.

H.H.'s out-of-court statements are similar to the statements made in C.M.B. and Henderson. H.H. first made a statement to his father while they were watching cartoons. T.H. noticed H.H. "kept adjusting himself and moving himself around," and, after being told to stop, H.H. "said, Nathan had sucked his wiener." T.H. called K.G. and reported what H.H. had said. Later that day, K.G. "said to both my kids that I just want to remind you guys that nobody should be touching your privates or putting their mouths on them . . . that your privates . . . are for you only." H.H. then "chimed in and said, Nathan sucks my wiener all the time." In December 2018, Coslett conducted a forensic interview of H.H. where he again made statements about the sexual contact. As Coslett went over ground rules, and explained that H.H. must correct any mistakes she made during the interview, H.H. stated, "Last time when my mom and [sister] were at home . . . Nathan sucked on my wiener." All of these statements were volunteered and none were given in response to leading or suggestive questions. Even the mother's statement to H.H. that "nobody should be touching your privates or

putting their mouths on them" is less suggestive than the mother's question in C.M.B. See 130 Wn. App. at 849 (mother asked, "You didn't touch each other in a bad way, did you?"). The statements are also less suggestive than those in Henderson, where the police asked a child "why it hurt her when her father touched her vagina." 48 Wn. App. at 550. The court did not abuse its discretion when it concluded that this factor supported the reliability of H.H.'s hearsay statements.

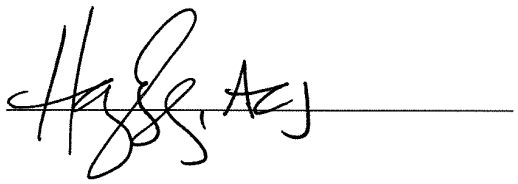
Turning to factor eight, the remoteness of the possibility that the child's recollection was faulty, Smith argues the court "improperly dismissed as remote the possibility that [H.H.'s] memory was faulty." "Regardless of when the incident took place, the jury evaluates a child's recollection by observing the manner in which the child recounts the events, the child's memory regarding other events . . . and the child's demeanor." Woods, 154 Wn.2d at 624. For example, "[i]n Young, the record indicated that the child had a normal memory and ability to perceive, which satisfied factor eight." Id. (citing 62 Wn. App. at 902).

At a defense interview two weeks before trial, when asked if there was anything he wanted to say about Nathan, H.H. stated he could not remember what happened. At the pretrial hearing, H.H. testified he could not remember telling the defense that he did not recall what happened. However, he was able to remember after defense counsel played a recording of the interview. The court found that H.H.'s statements "were reliable under the time, content and circumstances when made" and, although H.H. "was unable to respond to questions then in a manner that might satisfy all adults, he was nevertheless able

to give critical, and the [c]ourt asserts, credible details that support the [c]ourt's conclusion that the statements are reliable." The court specifically relied on H.H.'s "ability to relay a sensory memory" as evidence of reliable memory when Coslett asked how it felt "when Nathan sucked your wiener," and H.H. responded "it made me wet . . . It was kind of gross."

During the hearing, H.H. could remember disclosing to his father and to his mother, disclosing to Coslett (and that she had a dog), and could remember the sexual contact. While H.H. could not remember details on several occasions, for purposes of admission under the child hearsay statute, this goes to his credibility rather than the reliability of the out-of-court statements. H.H. was able to demonstrate a sufficiently normal memory and ability to perceive. There is sufficient indicia of reliability to admit the statements under the totality of the factors. The trial court did not abuse its discretion in admitting H.H.'s hearsay statements under RCW 9A.44.120(1).

Reversed.



I CONCUR:

*State v. Smith*, No. 83187-9-I

FELDMAN, J. — In *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991), our Supreme Court squarely held that "equivocal answers alone do not require a juror to be removed when challenged for cause." Because the majority's analysis and holding regarding juror 27 conflicts with this central holding in *Noltie*, I respectfully dissent on that point, which is the sole basis for reversal. In all other respects, I concur.

In *Noltie*, our Supreme Court concluded that the trial court did not abuse its discretion by denying a challenge to a prospective juror for cause after she expressed discomfort about listening to a young victim of alleged sexual abuse and stated that it would be difficult for her to be impartial. *Id.* at 836. When the prospective juror was asked if she would want a person like her on the jury, she responded, "No, I don't think so . . . I don't know. I don't know. It is just, I guess children, I don't know." *Id.* (internal quotation marks omitted). When defense counsel asked the prospective juror whether it was a possibility or a probability that she would lean in favor of the State, she replied that it was a "possibility." *Id.* at 837 (internal quotation marks omitted). Affirming the trial court, the Supreme Court held that the prospective juror's responses did not show a probability of actual bias, but at most demonstrated a possibility of prejudice. *Id.* at 838-39.

This court recently discussed and applied *Noltie* in *State v. Peña Salvador*, 17 Wn. App. 2d 769, 487 P.3d 923 (2021), *overruled on other grounds by State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022). The defendant in *Peña Salvador* was charged with child molestation and rape of a child. *Id.* at

774-75. When a prospective juror was asked if he could be impartial, he responded, "I don't know." *Id.* at 774. Defense counsel then asked, "are you telling me that you think that you would be biased against my client?" The prospective juror responded, "I'm afraid I might be . . . and I'm just being honest with you." *Id*. When asked again if he could be fair and impartial, the prospective juror responded, "I think so." *Id.*at 776. Defense counsel moved to excuse the prospective juror for cause, and the trial court denied the motion. *Id.* This court affirmed, holding that the prospective juror's "equivocal statements are not sufficient to establish more than a mere possibility of actual bias, and Peña Salvador has not shown that the trial court abused its discretion in denying his motion to remove the juror for cause." *Id.* at 786.

This court has also identified *unequivocal* statements that require a trial court to excuse a prospective juror for cause. In *State v. Gonzales*, a prospective juror "not only admitted that she would have a 'very difficult' time disbelieving a police officer, she admitted she was not sure she could afford Gonzales the presumption of innocence if an officer testified." 111 Wn. App. 276, 282, 45 P.3d 205 (2002), *overruled on other grounds by State v. Talbott*. Similarly, *in State v. Irby*, a prospective juror indicated that she was "more inclined towards the prosecution" because she had worked for Child Protective Services and, when asked whether that experience would affect her ability to be fair and impartial, she responded, "I would like to say he's guilty." 187 Wn. App. 183, 190, 347 P.3d 1103 (2015). In both cases, this court held that the trial court

was required to excuse the prospective juror for cause. *Gonzales*, 111 Wn. App. at 282; *Irby*, 187 Wn. App. at 196.

The juror statements at issue here are similar to the equivocal statements in *Noltie* and *Peña Salvador* and unlike the unequivocal statements in *Gonzales* and *Irby*. When juror 27 was examined separately regarding her concern that it would be an undue hardship for her to serve as a juror, she was asked the following questions and gave the following answers:

> Q. And then my only other question is, so if you were told that your -- you are on the jury and that the verdict has to be unanimous, and let's say you are the only person who disagrees with the rest of the group, everybody else is going guilty or not guilty, would you be tempted in order to finish deliberations so you could get back to work to change your vote to whatever the rest of the group thinks, even if you personally didn't feel that way?
>
> A. If I was . . . 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.
>
> Q. Okay. Is that just something that you would do no matter what, or would that be related to you trying to get back to work?
>
> A. Probably both or -- yeah. I mean, I am not a confrontational person. I don't think I would, like, fight really hard if I, like, was on the fence about it.

As in *Noltie* and *Peña Salvador* and unlike *Gonzales* and *Irby*, these are equivocal statements regarding what juror 27 "may" do, what she "probably" believes, and what she doesn't "think" she would do.

Indeed, juror 27's statements are significantly more equivocal than those in *Noltie* and *Peña Salvador*. Despite describing herself as "not a confrontational person," juror 27 indicated that if she was "100 percent very confident," then she would not change her vote to whatever the rest of the group thinks "if [she]

personally didn't feel that way." Juror 27 is thus both confrontational and not confrontational. That, by itself, is equivocal. Juror 27 also described her nonconfrontational nature in equivocal terms. When juror 27 is "kind of, like . . . on the fence," she stated that she "may agree with everyone"—not that she definitely or probably would agree with everyone, only that she *may*. Likewise, because juror 27 is "not a confrontational person," she *doesn't think* she would "fight really hard" if she was on the fence. So in this specific circumstance, juror 27 may fight hard but doesn't think she would fight "really hard" in support of her indecision. As *Noltie* and *Peña Salvador* confirm, such equivocal statements—expressed in terms of possibility and not probability—do not require a trial court to excuse a prospective juror for cause.

Notwithstanding the equivocal nature of juror 27's statements, the majority concludes that "juror 27 either did not understand her obligations under the law or was unable to follow them; possibly both." The record does not support that conclusion. Consistent with WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.04, at 32 (5th ed. 2021) (WPIC), the trial court instructed the jury as follows:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

As can be seen, WPIC 1.04 reflects a necessary duality: jurors *should* re-examine their views based upon further review of the evidence and the court's instructions but *should not* surrender an honest belief about the evidence *solely* because of the opinions of fellow jurors. Stated another way, the instruction requires jurors to be both persuasible and independent.

Juror 27's statements are wholly consistent with WPIC 1.04. If and when juror 27 has an honest belief about the evidence—that is, when she is "100 percent very confident"—her answers in voir dire confirm that she will not surrender that belief about the value or significance of evidence solely because of the opinions of her fellow jurors. But when juror 27 is undecided—that is, when she is "kind of, like, on the fence"—her answers in voir dire confirm that she is willing to re-examine her opinion based upon further review of the evidence in deliberations with her fellow jurors. These statements confirm that juror 27 was able to understand and follow her obligations under the law, including the specific instructions in WPIC 1.04.

Nor did juror 27 unequivocally state or imply that she would not follow the trial court's instructions regarding the State's burden of proof or the presumption of innocence. Contrary to the majority's assertion, juror 27's use of the phrase "on the fence" did not implicate or undermine the State's burden to prove guilt beyond a reasonable doubt. Defense counsel was asking juror 27 whether she would change her vote to whatever the rest of the jury thinks even if she personally didn't feel that way. In that context, juror 27 used the phrase "on the fence" to describe a circumstance where she was unsure (undecided) as to

whether the State had or had not proven guilt beyond a reasonable doubt: perhaps the State had done so or perhaps it had not done so, and juror 27 was undecided. And when juror 27 said, "So that would put it at neutral," she explained precisely what she meant: "like him not testifying would not make me think he is more guilty." Because Smith not testifying would not make juror 27 think he is more guilty—and would instead "put it at neutral"—the presumption of innocence would continue through trial, just as WPIC 4.01 and RCW 10.58.020 require. In both respects, juror 27 did not unequivocally state that she would ignore or otherwise fail to follow the trial court's jury instructions.

Indeed, far from disavowing her obligations under the law, juror 27 unambiguously confirmed that she would be fair and impartial. Because Juror 27 indicated on her juror questionnaire that someone close to her had been a victim of sexual violence, the prosecutor asked her the following question about her prior experience: "you answered on your questionnaire something about that situation that would make you feel you could not be fair and impartial; is that correct?" Juror 27 responded, "I will try my best. I think so." Presumably dissatisfied with juror 27's equivocal answer, defense counsel followed up by asking several additional questions regarding the presumption of innocence and elicited the following answers:

> Q. So you said you would try your best. How do you think it would affect you?
>
> A. Just since the -- innocent until proven guilty. It is just hard when it is a child to just focus on the evidence, but I -- I don't know.
>
> Q. Do you think you would be more likely to assume that a child is telling the truth just because it is a child?

A. But I will try not to, you know, keep aware of my own conscious bias.

Q. You said it would be part of your presumed innocent. Are you worried you wouldn't be able to do that?

A. I think I can.

Q. Do you think you can? This is a situation where I will just use an example. If your significant other goes, are you going to be paid for the time away and they said, I think I can, would you be satisfied with that answer?

A. No.

Q. Okay. So you want to be sure, right? *So this is one of those instances we need to be sure, so are you -- are you sure it wouldn't affect your ability to presume the Defendant?*

A. *Yeah*.

(Emphasis added.) In sharp contrast to her equivocal statements regarding her non-confrontational nature, juror 27 *unequivocally* stated that she would be fair and impartial and that her prior experience with sexual violence would not affect her ability to presume that Smith is innocent until proven guilty. On this record, the trial court was not required to excuse juror 27 for cause.

Lastly, the standard of review regarding this issue is highly deferential—and for good reason. As noted in *Nolte*, "Washington cases have consistently held that the denial of a challenge for cause lies within the discretion of the trial court and will not constitute reversible error absent a manifest abuse of that discretion." 116 Wn.2d at 838. The Supreme Court explained the need for substantial deference to a trial court's decision on juror fitness and bias as follows:

> Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror's ability to be fair and impartial. It

> is the trial court that can observe the demeanor of the juror and evaluate and interpret the responses.
>
> > Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The supreme court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.
>
> 14 L[ewis H]. Orland & K[arl] Tegland, Wash[ington] Prac[tice:] Trial Practice § 202, at 332 (4th ed. 1986).

*Nolte*, 116 Wn.2d at 839. In *Peña Salvador*, this court similarly recognized that "[t]he trial court is in the best position to determine a juror's ability to be fair and impartial because it can observe the juror's demeanor and evaluate and interpret their responses during voir dire." 17 Wn. App. 2d 784.

Here too, the trial court was able to observe juror 27's demeanor and evaluate and interpret her responses. When juror 27 indicated, "If I was . . . 100 percent very confident, then no," was she confident or hesitant in her answer? In comparison, what was her demeanor when she said, "I am not a confrontational person. I don't think I would, like, fight really hard if I, like, was on the fence about it"? And how confident was juror 27 when she unequivocally assured defense

counsel, in response to repeated questions, that she would be fair and impartial. As our Supreme Court noted in *Noltie*, these "are all matters that do not appear in the transcribed record of the questions and answers" but "are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror." 116 Wn.2d at 839 (internal quotation marks omitted). After listening to juror 27's answers and observing her demeanor, the trial court concluded that "a juror who has responded as she has is not in this Court's estimation anything that would warrant excusing her for cause." Applying the controlling standard of review, we should reverse the trial court's decision and remand for a new trial only if it clearly appears that the court manifestly abused its discretion. Because nothing here that satisfies that demanding standard, I respectfully dissent.

Feldman, J.