102758-3

Supreme Court No. ____
(COA No. 83976-4-1-I, consol. with 83977-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Karl Pierce, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review on December 4, 2023, and denying reconsideration on December 27, 2023, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies of the rulings are attached.

B. ISSUES PRESENTED FOR REVIEW

1. There is no dispute that the trial court's misapplied GR 37 and should have denied Michael Bienhoff's request to remove a juror of color when the prosecution objected. Even though Mr. Pierce did not ask to remove this juror and exercised his peremptory challenges independently of his co-defendant, the Court of Appeals held Mr. Pierce invited the court's error. Its ruling rests on a misapplication of the invited error doctrine and fundamentally dilutes GR 37's protections in a case involving co-defendants.

2. Consciousness of guilt evidence is inadmissible unless it involves behavior that clearly arises from the person's guilt for the charged offense. The Court of Appeals affirmed the admission of a video showing the mental breakdown and attempted suicide of a co-defendant, who testified for the State, as consciousness of guilt evidence. It incorrectly claimed a majority of other states allow evidence of attempted suicide to show a defendant's consciousness of guilt, when in fact, many states narrowly limit or exclude such evidence.

No published cases in Washington address attempted suicide evidence to prove a person's consciousness of guilt. This Court should grant review because a video showing a person's mental distress and suicide attempt is starkly prejudicial and should be presumptively inadmissible unless clearly relevant and unmistakeably connected to the crime, contrary to the Court of Appeals decision.

3. Mr. Pierce's sentence was elevated by several prior juvenile convictions. The law recently changed, barring the

court from counting these juvenile convictions in a person's offender score. The legislature changed the law in order to reduce to lasting, harmful consequences of wrongful behavior committed by a child. The Court of Appeals refused to apply this remedial change in the law to Mr. Pierce, even though his sentence is not final. This Court should grant review to address the application of this statutory change to pending cases.

C. STATEMENT OF THE CASE

Michael Bienhoff arranged to sell cannabis to an acquaintance, Precious Reed. 3/10/22RP 345; 3/31/22RP 1265.[1] He asked Scott Barnes and Ray Lyons to come with him. 3/10/22RP 353; 3/22/22RP 524, 555, 624; 3/23/22RP 713, 719. Mr. Lyons then asked Karl Pierce to join them as back-up for the drug sale, offering him $50. 3/23/22RP 687, 709; 3/31/22RP 1574, 1585. Mr. Pierce did not know Mr. Bienhoff

[1] The verbatim report of proceedings is referred to by the date of the proceeding and the page number because the volumes are not consecutively paginated throughout all hearings.

and had only briefly interacted with Mr. Barnes beforehand. 3/22/22RP 447; 3/31/22RP 1575, 1579.

Mr. Bienhoff got into Mr. Reed's car to complete the drug sale, while the others watched from afar. 3/10/22RP 370; 3/30/22RP 1291. The two men wrestled over a gun, and a single shot fired, fatally hitting Mr. Reed in the shoulder. 3/3/22RP 1177; 3/10/22RP 373-74; 3/29/22RP 1164-65.

The prosecution charged Mr. Bienhoff and Mr. Pierce with felony murder in the first degree, based on the predicate offense of attempted first degree robbery, with a firearm enhancement. CP 8-9. Nothing was stolen from Mr. Reed during this incident and no one testified that a robbery was planned.

Mr. Barnes pleaded guilty to a reduced charge of robbery in the first degree in exchange for testifying against the others. 3/22/22RP 517-18. At trial, Mr. Barnes insisted he did not plan or participate in a robbery, but he suspected Mr. Bienhoff did

not have cannabis in his backpack to sell. 3/22/22RP 539, 555-58, 573-75.

Mr. Lyons pleaded guilty to a reduced charge of second degree manslaughter and agreed to testify for the prosecution. 3/23/22RP 775-78, 795. He said he recklessly provided a gun to Mr. Bienhoff. 3/23/22RP 775-76. He denied knowing of any plan to rob Mr. Reed and believed a drug sale was going to occur. 3/23/22RP 721, 750, 756-57.

Over objection, the court admitted a one-hour long video that begins with Mr. Lyons's post-arrest police interview. 12/17/21RP 602-05; 3/23/22RP 798-805; Ex. 109.[2] During the interview, Mr. Lyons denied involvement in the crime while the police told him he was going to prison for murder and he was harming his children by not cooperating. 3/23/22RP 813, 837, 840-41, 865, 868.

[2] https://drive.google.com/file/d/14Z5byBRh5Zg3pk-nxAfv2iJTJAdOed_n/view?usp=sharing.

The video showed 35 minutes of Mr. Lyons in the interview room, where he fell to the ground while moaning, gurgling, and crying. Ex. 109 (33:51-105:10). He poured soda on his face and tore a soda can that he moved toward his neck. Ex. 109 (33:51-34:45; 1:00:38-1:00:48). He did not cause any injury to himself. Ex. 109 (1:00:38-1:00:42).

Mr. Bienhoff's attorney told the court the post-interview portion of the video was "grotesque," lacked any probative value, and was extremely prejudicial. 3/23/22RP 881-82. The court overruled the objection and permitted the jury to watch the video in full as an admitted exhibit. 3/23/22RP 806.

During jury selection, Mr. Bienhoff used a peremptory challenge against an Asian juror and the prosecution objected under GR 37. 2/22/22RP 128. The trial court denied the GR 37 objection, ruling there were reasons "besides" bias to use a peremptory challenge against her. 2/22/22RP 131-32.

On appeal, the prosecution conceded the court erred by denying the GR 37 objection. Slip op. at 10. Juror 80 said "she

could be fair and impartial and follow the law" and the record supports her promise that she could serve fairly. Resp. Brief at 76. However, the Court of Appeals ruled Mr. Pierce invited the error despite not asking the court to strike this juror.

The facts are further explained in the Court of Appeals decision and the Appellant's Opening and Reply Briefs, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. The Court of Appeals decision undermines the protections of GR 37 and creates an unprecedented barrier for fairly selecting jurors in cases involving co-defendants.

a. It is uncontested that the trial court failed to enforce GR 37.

Racial discrimination in jury selection is impermissible. *Batson v. Kentucky*, 476 U.S. 79, 85-87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Jefferson*, 192 Wn.2d 225, 229-30, 429 P.3d 467 (2018). It invidiously impacts the fairness of the proceedings and denies the prospective juror their right not to

be excluded from serving on a jury due to discrimination. *State v. Orozco*, 19 Wn. App. 2d 367, 373, 496 P.3d 1215 (2021); U.S. Const. amend. XIV; Const. art. I, §§ 3, 12.

GR 37 sets the framework for trial courts to assess whether there is invidious discrimination in jury selection. *Jefferson*, 192 Wn.2d at 249; *State v. Tesfasilasye*, 200 Wn.2d 345, 356, 518 P.3d 193 (2022). It replaces *Batson* as the constitutional test to enforce the essential requirements of a fair trial and equal protection of the law.

Under GR 37, when a party objects to use of a peremptory challenge on grounds of alleged racial or ethnic bias, the trial court must hold a hearing outside the presence of the venire wherein the party exercising the challenge explains its reasons for doing so. GR 37(c), (d). The trial court must evaluate the party's explanation, and, if it determines "that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge," the challenge must be denied. GR 37(e).

The Court of Appeals ruled the trial court erred when it denied the GR 37 challenge to the peremptory strike exercised by Mr. Bienhoff, Mr. Pierce's co-defendant. Slip op. at 11. The trial court did not apply the controlling test and assess whether racial or ethnic bias "could" be a factor in the strike. *Id*. The record offers ample reasons why the court should have disallowed this strike under GR 37(g) and the prosecution conceded the trial court's error. *See* Appellant's Opening Brief, 18-24 (discussing application of GR 37(g) factors to this case).

The trial court failed to enforce GR 37. This failure was not due to Mr. Pierce's actions. The Court of Appeals decision affirming Mr. Pierce's conviction despite acknowledging that the trial court misapplied GR 37 is not only contrary to this Court's precedent, it adversely affects public perceptions of fairness and the integrity of court proceedings. *See State v. McCrea*, 17 Wn. App. 2d 1023, 2021 WL 1550839, at *4 n.4

(2021)[3] (ordering new trial due to prosecutor's removal of juror for reasons that could include race, even though defense did not object, due to importance of enforcing GR 37).

b. The invited error doctrine, which demands affirmative, purposeful conduct materially contributing to an error, does not apply here.

The invited error doctrine applies when a party "set[s] up an error at trial and then complain[s] of it on appeal." Slip op. at 11 (quoting *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990)). "The doctrine is designed to prevent a party from misleading the court and then receiving a windfall by doing so." *Id*. (citing *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009)).

The invited error doctrine does not apply simply because an attorney was in some way involved in causing the trial court's error. *See State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (holding invited error "is not applicable" even

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[3] Unpublished, cited for persuasive authority under GR 14.1.

though defense counsel improperly sought court's assistance in encouraging the defendant to plead guilty, because the court made comments that exceeded the defense counsel's request).

Invited error requires that the defendant "must . . . materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." *State v. Hockaday*, 144 Wn. App. 918, 924 n.5, 184 P.3d 1273 (2008). Where "there is nothing in the record showing that [the defendant] materially contributed to the specific error he now alleges," the doctrine of invited error does not apply. *Id.*; *see also In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (invited error doctrine requires the defendant's "affirmative actions" and "knowing and voluntary actions to set up the error").

The sole remark Mr. Pierce made in the context of the GR 37 objection was that ths juror said something in her questionnaire that "philosophical or religious reasons that might

interfere with her ability to be impartial." 2/22/22RP 130. Mr. Pierce did not say this comment meant she could not be fair, but only signaled that the jury questionnaire might be relevant to consider. *Id.*

The Court of Appeals did not find Mr. Pierce "misled" the trial court or affirmatively "set up" the error, as the invited error doctrine demands. There is no evidence he materially contributed to the error. The trial court explained why it was denying the GR 37 objection and these reasons did not even mention, much less rely on, Mr. Pierce's sole remark about Juror 80. 2/22/22RP 131-32.

The Court of Appeals incorrectly depicted Mr. Pierce as providing the trial court with a reason to allow the peremptory strike, but Mr. Pierce did not advocate for any such result. Slip op. at 12. The trial court gave no indication that anything Mr. Pierce said prompted its ruling. 2/22/22RP 131-32.

There is no precedent endorsing the Court of Appeals' broad interpretation of the invited error doctrine to deny relief

despite an undisputed impropriety by the trial court that violated constitutional protections inherent to a fair trial and the equal protection of the law.

c. Mr. Pierce is not at fault for the court's ruling and did not set up or affirmatively encourage it as required for invited error.

Mr. Bienhoff sua sponte moved to strike Juror 80, an Asian woman, and the prosecutor immediately objected under GR 37. 2/22/22RP 128.

Mr. Bienhoff responded by saying his primary reason was that "she said she can't be impartial." 2/22/22RP 129. He insisted he had "spent a lot of time talking to her about" her inability to be fair, and while he did not think it was enough to make a "for cause" challenge, these remarks justified his peremptory challenge. *Id*.

However, as the prosecutor's and court's notes reflected, no such conversation occurred. 2/22/22RP 129, 131. In fact, the prosecution pointed out that Mr. Bienhoff seemed to be describing a different Asian juror. 2/22/22RP 130.

Mr. Pierce never asked to remove Juror 80. He did not say she was not qualified to serve or urge the court to strike her. The sole remark Mr. Pierce made occurred after the discussion between the prosecutor, court, and Mr. Bienhoff about whether Juror 80 made comments indicating her inability to be impartial. 2/22/22RP 130-31. Mr. Pierce mentioned that he thought she said something relevant on her questionnaire. 2/22/22RP 130. The court then reviewed the jury questionnaire and reiterated that the questionnaire did not indicate she was unable to serve. 2/22/22RP 131-32.

The trial court explained why it was denying the GR 37 motion. It did not have anything to do with the single ambiguous remark in the jury questionnaire that Mr. Pierce's attorney mentioned. 2/22/22RP 131-32. Instead, the court noted various comments she made in court and concluded there were reasons "besides bias" to challenge her. *Id*.

The Court of Appeals incorrectly attributed material, controlling weight to Mr. Pierce's comments without a basis in

the record. Slip op. at 12. There is no evidence Mr. Pierce's remarks played any role in the court's decision.

Mr. Pierce did not affirmatively encourage the trial court to misapply the criteria of GR 37. He did not benefit from the court's ruling. He was not the party trying to remove Juror 80 from the jury. In fact, Juror 80's remarks indicated she was pragmatic, neutral, cautious, and qualified to serve as a juror. 2/8/22RP 1749-50, 1813-14. Nothing in the record indicates Mr. Pierce did not want Juror 80 to serve.

Mr. Bienhoff's desire to remove Juror 80 cannot be attributed to Mr. Pierce simply because they are co-defendants. Throughout jury selection, they separately and independently used their peremptory strikes. 2/22/22RP 125-49. On several occasions, Mr. Bienhoff insisted the jury panel was acceptable but Mr. Pierce disagreed and removed other jurors, including those Mr. Bienhoff wanted to serve. 2/22/22RP 134-35, 139, 147.

The Court of Appeals refused to give Mr. Pierce the protections of GR 37 because his co-defendant tried to remove a juror for reasons that could be related to her race. But Mr. Pierce did not exercise this challenge and should not be held responsible for another party's peremptory strikes. The trial court failed to apply the controlling GR 37 test and this error undermines the fairness of the trial proceedings. This Court should grant review.

2. Contrary to this Court's test for admitting consciousness of guilt evidence, and misrepresenting other states' decisions, the Court of Appeals ruled a video showing a co-defendant attempting suicide was admissible despite its tenuous connection to the crime.

a. The Court of Appeals misapplied this Court's precedent governing consciousness of guilt evidence.

Consciousness of guilt evidence, such as flight, often rests on a tenuous assumption. *State v. Slater*, 197 Wn.2d 660, 667-68, 486 P.3d 873 (2021); *see Hickory v. United States*, 160 U.S. 408, 421, 16 S. Ct. 327, 40 L. Ed. 474 (1896) ("flight is

not limited to those who are guilty, it also includes some who are innocent"); *United States v. Foutz*, 540 F.2d 733, 740 (4th Cir. 1976) ("The inference that one who flees from the law is motivated by consciousness of guilt is weak at best").

While consciousness of guilt evidence "tends to be only marginally probative" of the person's guilt, it may be markedly prejudicial. *Slater*, 197 Wn.2d at 668 (quoting *State v. Freeburg*, 105 Wn. App. 492, 498, 501, 20 P.3d 984 (2001)).

Due to the risk of improper prejudice, the party offering the evidence must prove a "substantial and real" inference that a person's conduct results from their consciousness of guilt. *Slater*, 197 Wn.2d at 668. The inference cannot be "speculative, conjectural, or fanciful." *Id.*

To reach this inference, the trial court must confidently connect the behavior and the inference of guilt by drawing each of the following inferences: (1) the behavior constituted flight, (2) this flight shows consciousness of guilt, (3) this consciousness of guilt concerns the crime charged; and (4) this

consciousness of guilt shows actual guilt of the crime charged. *Id*. at 668-69 (quoting *Freeburg,* 105 Wn. App. at 498). Each link in this chain must be "sturdily supported" for evidence of the accused person's conduct to be admissible at trial. *United States v. Beahm,* 664 F.2d 414, 420 (4th Cir. 1981).

Neither the Court of Appeals nor the trial court analyzed the mandatory inferences required to admit consciousness of guilt evidence as required by *Slater*. The Court of Appeals said that while the video showing Mr. Lyons' mental distress and potential suicide attempt may be "inconclusive evidence of consciousness of guilt," it was reasonable for the trial court to admit it. Slip op. at 8. But under *Slater*, there must be a substantial and real connection between the behavior and consciousness of guilt. 197 Wn.2d at 668.

Mr. Lyons did not flee -- he was arrested at his home months after the incident. 3/23/22RP 812. The behavior at issue occurred after a hostile interrogation where the police repeatedly pressed him to consider the harm he was causing his

children and told him he would go to prison for murder, while he demanded to know why he was arrested. 3/23/22RP 813, 837, 840-41, 865, 868.

No one asked Mr. Lyons why he acted as he did. It is far more likely that he was in despair about not seeing his family, feared his limited role in the incident would lead to a long prison sentence as the police threatened, and was scared and upset about being incarcerated, than he was expressing consciousness of guilt of the charged crime.

The Court of Appeals disregarded the law governing the admission of consciousness of guilt evidence. Its deference to a trial court finding of relevance does not satisfy the test for admitting consciousness of guilt evidence.

b. The Court of Appeals misrepresented case law from other jurisdictions.

The Court of Appeals said "[c]ritical" to its decision was that "a majority of U.S. courts . . . have held that evidence of suicide and attempted suicide is admissible as relevant to a

defendant's consciousness of guilt, often analogizing suicide evidence to flight evidence.'" Slip op. at 7 (quoting *State v. Martin*, 146 Hawai'i 365, 382, 463 P.3d 1022 (2020)).

However *Martin* expressly disavowed this view of admissibility and explained the prior "majority view" was outmoded. 463 P.3d at 1022. According to *Martin*, many jurisdictions no longer accept the notion that an attempted suicide is admissible as consciousness of guilt. *Id*. "Scholarship from as early as the 1950s" has "called into question the relevance of a suicide attempt as consciousness of guilt." *Id*. As *Martin* noted, "[p]sychologists rarely find that an attempted suicide was motivated by a sense of conscious guilt in connection with a crime." *Id*.

Martin recognized that, "more recently, state courts of last resort have questioned the probative value of suicide evidence as to consciousness of guilt." *Id*.

Rather than endorsing this so-called majority view, *Martin* agreed with the Vermont Supreme Court that "[t]he

underlying reasons motivating an attempt to take one's life can be both numerous and highly complex." *Id.* (quoting *State v. Onorato*, 762 A.2d 858, 859-60 (Vt. 2000)). It also "agree[d] with the New Jersey Supreme Court that, aside from guilt, other factors such as 'a defendant's psychological, social or financial situation may underlie a suicide attempt.'" *Id.* (quoting *State v. Mann*, 625 A.2d 1102, 1108 (N.J. 1993)).

The Court of Appeals incorrectly painted *Martin* as endorsing a majority rule admitting attempted suicide evidence, when it actually rejected that rule and pointed to other authorities that do not follow it. This Court should grant review due to the Court of Appeals' misrepresentation of the majority rule. There is no published case law in Washington on the admissibility of attempted suicide evidence as consciousness of guilt, leaving trial courts to rely on this unpublished case under GR 14.1.

c. Evidence of mental distress and attempted suicide is tenuously connected to actual guilt and should only be admitted is rare situations, but no published decisions guide trial courts.

Evidence that a person attempted suicide is "subject to innumerable interpretations." *Pettie v. State*, 560 A.2d 577, 582 (Md. 1989). A person may want to avoid incarceration, without regard to guilt. *State v. Coudette*, 72 N.W. 913, 915 (N.D. 1897). The accusation of criminal wrongdoing may cause despair and stress, triggering mental health issues. *Mann*, 625 A.2d at 1108; *see People v. Foster*, 56 Ill. App. 3d 22, 371 N.E.2d 961, 970 (Ill. App. 1977) (rejecting suicide attempt as evidence of consciousness of guilt when made after police "drill[ed]" and belittled the defendant).

A suicide attempt is far more likely to arise from a complex set of unknown personal circumstances than flight evidence, which itself is tenuous proof of guilt. At a minimum, the trial court should be required to conclude the behavior was an actual suicide attempt, and also find "an unmistakablenexus

by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial," as South Carolina mandates. *State v. Cartwright*, 819 S.E.2d 756, 762 (S.C. 2018).

This Court should grant review and reject the Court of Appeals' deferential admission of a grotesque video showing a co-defendant experiencing mental distress and attempting to harm himself, which had little to no probative value, was not proven to be connected to the crime charged, and was starkly prejudicial.

3. Mr. Pierce is entitled to a new sentencing hearing on his juvenile convictions based on a change in the law.

The legislature recently passed a law mandating that most prior juvenile felony adjudications do not count in a

subsequent offender score calculation. Laws of 2023, ch. 415, § 2.[4] The law took effect on July 23, 2023.

Mr. Pierce had two prior Class C non-violent juvenile adjudications that were counted in his offender score. CP 592. This increased his offender by one point and raised the governing standard range. CP 588; *see* RCW 9.94A.525.

The Court of Appeals ruled this amendment does not apply to pending prosecutions for crimes committed before its effective date unless the legislature "fairly conveys that intent" in the statute. Slip op. at 13 (quoting *State v. Jenks*, 197 Wn.2d 708, 720, 487 P.3d 482 (2021)). However, despite legislative language indicating the intent to apply this rule to any future sentencing, the Court of Appeals ruled no such language allows the application of this law to people whose cases are not yet final. See Laws of 2023, ch. 415, § 1.

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4 https://leg.wa.gov/CodeReviser/documents/sessionlaw/2023pam2.pdf. The exceptions are for first and second degree murder along with class A felony sex offenses.

In the statement of intent, the legislature fairly conveyed the message that the law applies to any future sentencing (as opposed to just offenses committed after its effective date) and this includes non-final cases on direct appeal. The legislature said it intended this change in the law in order to:

> (1) Give real effect to the juvenile justice system's express goals of rehabilitation and reintegration;
>
> (2) Bring Washington in line with the majority of states, which do not consider prior juvenile offenses in sentencing range calculations for adults;
>
> (3) Recognize the expansive body of scientific research on brain development, which shows that adolescent's perception, judgment, and decision making differs significantly from that of adults;
>
> (4) Facilitate the provision of due process by granting the procedural protections of a criminal proceeding in any adjudication which may be used to determine the severity of a criminal sentence; and
>
> (5) Recognize how grave disproportionality within the juvenile legal system may subsequently impact sentencing ranges in adult court.

Laws of 2023, ch. 415, § 1. These goals make little sense if they do not apply to people whose cases are pending.

The statutory change does not need to be retroactive to apply to Mr. Pierce. Mr. Pierce is entitled to remedial changes in the law that occur before his case is final. *See State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007).

The "general rule" is that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969). "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) "It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment … since each court, at every level, must decide according to existing laws." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (cleaned up). Washington is in accord with these

basic legal principles. *See In re Estate of Hambleton*, 181 Wn.2d 802, 822, 335 P.3d 398 (2014).

"[R]emedial statutes are liberally construed in order to effectuate the remedial purpose for which the statute was enacted." *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978). "[R]emedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). "A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *Id.* (internal quotation omitted).

Here, the statute "relate[s] only to procedures and does not affect substantive or vested rights." *Id.* The State does not have a substantive or vested right in having Mr. Pierce's juvenile adjudications count in his offender score.

This Court should grant review because the Court of Appeals decision is contrary to established law and undermines the intent of the legislature.

E. CONCLUSION

Based on the foregoing, Petitioner Karl Pierce respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4368 words and complies with RAP 18.17(b).

DATED this 26th day of January 2024.

Respectfully submitted,

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APPENDIX A

FILED
12/4/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MICHAEL WILLIAM BIENHOFF, KARL EMERSON PIERCE, and each of them, Appellants.	No. 83976-4-I (Consolidated with No. 83977-2-I) DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Michael Bienhoff and Karl Pierce (collectively defendants) appeal their convictions of first-degree felony murder. We reverse and remand to the trial court to consider whether to impose restitution interest on defendants under RCW 10.82.090 and strike the Victim Penalty Assessment (VPA) fees on defendants' judgments and sentences. We affirm in all other respects.

FACTS

Defendants were initially convicted of first-degree felony murder in 2015. The convictions were reversed by this court, and our Supreme Court affirmed the result based on instructional error. *State v. Pierce*, 195 Wn.2d 230, 244, 455 P.3d 647 (2020). This appeal stems from the second trial and subsequent convictions.

At the new trial, there were two competing narratives for the events that gave rise to the charges: defendants asserted that they were the victims of an attempted robbery that resulted in the death of Precious Reed; and the State asserted that defendants were the perpetrators of an attempted robbery that resulted in the death of Reed. At the conclusion of the trial, the jury convicted defendants of first-degree felony murder (RCW 9A.32.030(1)(c)) with a special finding that defendants committed the crime while armed with a firearm (RCW 9.94A.533(3)). The trial court sentenced Bienhoff within the standard range plus 60 months for the firearm enhancement for a total of 515 months and sentenced Pierce within the standard range plus 60 months for the firearm enhancement for a total of 505 months.

Defendants appeal.

ANALYSIS

Comment on the evidence

Defendants argue on appeal that the trial court impermissibly commented on the evidence. The alleged error came at the end of the eighth day of trial, when the trial court gave an instruction to the jury to not do any independent research outside the courtroom with regard to the case:

> [THE COURT]: (To the jury) Once again, please do not do any research. Please do not do any talking or listening to anybody about anything you've heard about this case so far or anything that might be related to this case. *We still have plenty of the trial to go and I am confident that your questions will be answered by testimony and evidence to be presented*.

(Emphasis added.) Defendants claim that the italicized text constitutes an impermissible comment on the evidence because the court's assurance may have caused the jury to view the evidence through a lens more "favorable to the prosecution than the defense," arguing the statement implied the trial judge believed the prosecution would meet its burden of proof.

Because defendants failed to object to the alleged error below, they may raise the argument for the first time on appeal only if they can demonstrate "(1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Defendants' argument is premised on article 4, section 16 of the Washington State Constitution, which states that "Judges shall not charge juries with respect to matters of fact, nor comment thereon." Thus, the alleged error is of constitutional dimension. To be manifest, the alleged error must have practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court. *O'Hara*, 167 Wn.2d at 108. A juror could potentially interpret a statement that their questions would be answered, in isolation, as implying that the testimony and evidence to come will eliminate any reasonable doubt that defendants are guilty. For that reason, such a statement should be avoided in favor of specific instructions not to perform outside research.[1]

[1] The pattern instruction on this issue is set forth in 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.61, at 137 (5th ed. 2021), which states in relevant part as follows: "Do not read, view, or listen to any report from the newspaper, magazines, social networking sites, blogs, radio, or television on the subject of this trial. Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of

But when viewed in context, the alleged error is neither apparent nor reasonably obvious as required to raise the argument for the first time on appeal. The context of the statement during the course of trial shows that the statement amounted to a routine and proper admonition that jurors not perform research outside the evidence admitted at trial. The challenged statement was one instance of a repeated routine instruction to the jury at the conclusion of each trial day instructing the jury to not conduct outside research or talk about the case. In addition, the trial court judge gave the following instruction at the beginning and closing of the trial:

> The State Constitution prohibits a trial judge from making any comments on the evidence. It would be improper for me to express by my words or conduct my own personal opinion about the value of any testimony or other evidence, and I have not intentionally done that.
>
> If it appears to you, or has appeared to you, that I have indicated my personal opinion in any way either during trial or in giving these instructions, you must disregard that entirely.

The full context explains the import of the trial judge's emphasis on "the testimony and evidence to be presented" in the challenged comment, which was to caution the jury against consulting any information other than the trial evidence. As a result, any alleged constitutional error is not manifest and we decline to address this argument under RAP 2.5(a).

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outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law."

Ramon Lyons video

Defendants next argue that the trial court abused its discretion when it admitted a video of a state witness, Ramon Lyons, having a mental breakdown and attempting suicide after police interrogated him about his involvement in the attempted robbery and death of Reed. We disagree with defendants' argument; the trial court did not abuse its discretion in admitting the video and any error was harmless.

Before trial, Lyons pled guilty to manslaughter in the first degree for his participation in the events that led to the death of Reed. At trial, Lyons testified on direct examination he had not planned a robbery and knew nothing about a plan:

> Q: So just to be clear, Mr. Lyons, if we understand your testimony correctly, you're saying you knew nothing about a plan; is that right?
> A. No, there wasn't no plan.
> Q. All right. So on February 20th, 2012, you're telling us that Mr. Bienhoff just called you out of the blue, correct?
> A. (No audible response.)
> Q. Yes?
> A. Yes.

After Lyons testified in this fashion, the State sought to attack his credibility by showing he had a mental breakdown and attempted to commit suicide when interrogated about his involvement in the events that led to Reed's death. The State argued that this conduct shows consciousness of guilt and thus refutes Lyons' assertion that there was no plan to rob Reed.

This conduct was captured on a lengthy video, which starts with Detectives Norton and Mudd questioning Lyons about his involvement in the events that led to Reed's death. After about thirty minutes of repeatedly denying any involvement in the events that led to Reed's death, the police left Lyons alone in the interrogation room. Once alone in the room, Lyons proceeds to have a mental breakdown. He pours soda on his face, falls off his chair, begins to vomit, and remains horizontal on the floor sobbing until the fire department arrives. Once fire department personnel arrive, they sit him up, but Lyons falls back to the ground, grabs the soda can from the floor, tears it in half, and moves one half of the can towards his throat. The fire department personnel quickly react and take the torn soda can from his hand. The trial court admitted the video over defendants' objection.

We review the trial court's decision to admit this video for abuse of discretion and defer to the trial court's ruling "unless no reasonable person would take the view adopted by the trial court." *State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017) (internal quotation marks omitted) (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914,16 P.3d 626 (2001)). The credibility of a witness may be attacked by any party, including the party calling the witness. ER 607. Evidence is relevant and potentially admissible to attack a witness's credibility if it tends to cast doubt on the credibility of the witness and if the witness's credibility is a fact of consequence to the action. *State v. Allen* S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). Here, Lyons testified that he "knew nothing about a

plan," which tends to exculpate defendants. Having so testified, Lyons' credibility is clearly a fact of consequence to the action. The State, therefore, could properly attack his credibility.

We must next determine whether the video of Lyons' interrogation is relevant and admissible to attack his credibility. Washington courts have found several forms of conduct to be relevant and admissible to attack a witness's credibility because they allow a reasonable inference of consciousness of guilt. Examples include giving false information to the police (*State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990)), making threatening gestures toward a witness (*State v. McGhee*, 57 Wn. App. 457, 460-61, 788 P.2d 603 (1990)), and flight from the crime scene (*State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982)). "[E]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are [also] admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001). Critical here, "a majority of U.S. courts have . . . held that evidence of suicide and attempted suicide is admissible as relevant to a defendant's consciousness of guilt, often analogizing suicide evidence to flight evidence." *State v. Martin*, 146 Hawai'i 365, 382, 463 P.3d 1022 (2020).

Because Lyons' credibility was a fact of consequence to the action and his prior conduct could properly be offered to attack his credibility by showing consciousness of guilt, the trial court did not abuse its discretion by admitting the

video showing Lyon's mental breakdown and attempted suicide. While it may be argued persuasively that the video is inconclusive evidence of consciousness of guilt, we may only find an abuse of discretion where "no reasonable person would take the view adopted by the trial court." *Clark*, 187 Wn.2d at 648. A reasonable person could potentially view the video as Lyons' attempted suicide to avoid arrest, prosecution, and punishment for his unlawful conduct and thus evidence of consciousness of guilt. The trial court, therefore, did not abuse its discretion in admitting the video to attack Lyons' credibility.

Moreover, even if the trial court abused its discretion, its evidentiary ruling was harmless. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Non-constitutional evidentiary error "is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial." *State v. Webb*, 64 Wn. App. 480, 488, 824 P.2d 1257 (1992). A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Chavez*, 76 Wn. App. 293, 297, 884 P.2d 624 (1994) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1995)).

Here, admitting the video was harmless for two reasons. First, there was substantial other evidence to attack Lyons' credibility. Hiram Warrington, a witness for the State, lived in Lyons' home at the time of the murder. During Lyons' direct examination, he testified that he did not see Warrington the day of

the murder and did not have conversations with him about the events that led to Reed's death. To attack Lyons' credibility, the State elicited testimony from Warrington that he saw Lyons leave the house with a gun on the day in question and saw Lyons return to the house at 2:00 or 3:00 a.m. the next day where Lyons and Warrington spoke about what had occurred.

Second, there was also ample other evidence to convict defendants of first-degree felony murder. For example, Scott Barnes, an individual who pled guilty to robbery in the first degree for his role in the murder, testified that he anticipated a robbery was going to take place. He further testified that Bienhoff said in the car while leaving the crime scene that he "may have killed [Reed]." Also, Barnes testified that Pierce said he had "let off several rounds into a Cadillac." Warrington also testified that when Lyons returned home the night of the murder, Lyons told Warrington their intent was to rob Reed and detailed a plan to get rid of the evidence:

> He said that all of them were supposed to take their clothes and their gloves and their masks and the weapons and go -- just like get rid of them. And he gave me two places: I don't know if this to be true or not, but this is what he said was to put it in one of those drain holes, like a sewer thing. One was at Bitter Lake and then the other one was to disperse of it at the Carkeek Park beach in the ocean.

Because of the ample other evidence admitted to convict defendants of first-degree felony murder, as well as the other evidence to attack Lyons' credibility, any evidentiary error in admitting the video of Lyons was harmless.

GR 37 Violation

Pierce alone argues that the trial court erred by failing to apply the correct test for determining whether Bienhoff's peremptory strike of juror 80 violated GR 37. The State concedes that the trial court failed to apply the correct test to the State's GR 37 objection, but argues that Pierce invited the error and is therefore prohibited from now complaining of it on appeal. We agree with the State's argument.

After Bienhoff exercised a peremptory strike for juror 80, an Asian woman, the State immediately raised a GR 37 objection. Bienhoff said his primary reason for striking this juror was that "she said that she can't be impartial." The prosecutor noted, "I don't have anything in my notes about her saying that she had difficulties being impartial." The judge agreed and said his notes did not support that juror 80 "would have trouble being impartial." The court asked Pierce's attorney, "did you want to say anything?" Pierce's attorney responded, "Well, I believe it was on her questionnaire where she said she'd have philosophical or religious reasons that might interfere with her ability to be impartial."[2] The court rejected the GR 37 objection and said, "I will excuse Juror 80 based on the peremptory challenge." The court ruled there were reasons "besides" bias to use a peremptory strike against her. Among the other reasons the trial court noted were that juror 80 said she felt "unsafe coming downtown . . .

[2] Juror 80 answered yes to the following question in the juror questionnaire: "Do you have religious or philosophical views that may cause you to feel uncomfortable sitting as a juror in a criminal case involving the charges alleged with respect to the defendants in this case?"

as an Asian woman" and her responsibilities for taking care of her 93-year-old brother.

As Pierce argues and the State concedes, the trial court failed to apply the correct test when assessing the State's GR 37 objection. The trial court ruled that there were other reasons "besides" bias to use a peremptory strike against juror 80. But that is not the correct test to determine whether to sustain the State's GR 37 objection. Rather, the trial court was required to analyze whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e). Because the trial court's ruling left room for racial or ethnic bias to be a possible factor behind Bienhoff's use of the peremptory strike, we agree with Pierce and the State that the trial court erred in this regard.

But the trial court's error was invited by Pierce. The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). This is true even where constitutional issues and constitutional rights are involved. *Id.* at 871. The doctrine is designed to prevent a party from misleading the court and then receiving a windfall by doing so. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). To determine whether the invited error doctrine applies, courts consider whether the complaining party affirmatively assented to the error, materially contributed to it, or benefited from it. *Id.* at 154.

Even though the trial court erred when it failed to apply the correct test to the State's GR 37 objection, Pierce invited the error and therefore is prohibited from complaining of it on appeal. When asked whether Pierce had anything to add to the State's GR 37 objection, Pierce directed the trial court to another reason—besides improper bias—to permit Bienhoff's peremptory strike of juror 80. The trial court then permitted Bienhoff's preemptory strike, and dismissed juror 80 upon concluding, just as Pierce had argued, that there were other reasons "besides" bias to excuse juror 80. Thus, Pierce assented to, materially contributed to, and then benefited from the trial court's error. As a result, we conclude that Pierce invited the error and cannot rely on it as a basis for reversal.[3]

Sentencing issues

Lastly, Pierce raises three additional issues regarding his sentence. Bienhoff joins in the second and third issue.

First, Pierce asks us to remand for the trial court to remove his prior juvenile felony adjudications of guilt because a recent amendment to RCW

[3] Following oral argument, Pierce submitted a statement of additional authority citing *State v. McCrea*, No. 37416-5-III (Wash. Ct. App. February, 20 2021) (unpublished), for the proposition that this court should address his GR 37 argument even if he expressly waived the issue. *McCrea* is distinguishable because there is no argument here, nor do we find, that Pierce waived his GR 37 argument. Instead, Pierce affirmatively assented to the trial court's error, materially contributed to it, and benefited from it by directing the trial court to a reason besides improper bias to permit Bienhoff's peremptory strike of juror 80. As a result, the invited error doctrine precludes Pierce's argument. The court in *McCrea* did not address any such argument. Pierce also argues "[i]f the errors during Mr. Pierce's trial are insufficient to require reversal when viewed in isolation, they undermine the fairness of the trial when viewed cumulatively." As discussed in the text, Pierce waived the first alleged error by failing to object to the trial court's instruction below, invited the second alleged error and therefore cannot complain about it on appeal, and failed to establish prejudice as to the third. Because Pierce has not met his burden to show multiple trial errors resulting in prejudice, his cumulative error argument also fails.

9.94A.525 provides that only juvenile adjudications of first- and second-degree murder and class A sex offenses will be included in an adult offender score. The State argues RCW 9.94A.345 and RCW 10.01.040 control and require that the "law in effect at the time of a crime must be applied to the imposition of sentence for that crime." We agree with the State.

RCW 9.94A.345 states that "any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." And RCW 10.01.040 states, "Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal." Under these statutes, "sentences imposed under the [Sentencing Reform Act] are generally meted out in accordance with the law in effect at the time of the offense." *State v. Jenks*, 197 Wn.2d 708, 714, 487 P.3d 482 (2021).

Here, the legislature's recent amendment took effect July 23, 2023. LAWS OF 2023, ch. 415, § 2. It provides that "adjudications of guilt pursuant to Title 13 RCW which are not murder in the first or second degree or class A felony sex offenses may not be included in the offender score." *Id.* But under RCW 9.94A.345 and 10.01.040 (quoted above) and controlling case law, this amendment does not apply to pending prosecutions for crimes committed before the amendment's effective date unless the legislature "fairly convey[s] that intention" in the newly enacted statute. *Jenks*, 197 Wn.2d at 720 (quoting *State v.*

Ross, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004)). None of the language Pierce cites in the new statute fairly conveys an intention for the law to apply to pending prosecutions. As a result, we cannot avoid a clear statutory directive to apply the law as it existed at the time when the current offense was committed. Accordingly, we reject Pierce's argument.

Second, defendants ask us to remand for the trial court to consider waiving interest on restitution. A recent amendment to RCW 10.82.090 provides that the superior court "may elect not to impose interest on any restitution the court orders" and that this determination shall be based on factors such as whether the defendant is indigent. LAWS OF 2022, ch. 260, § 12. Defendants argue that although this provision did not take effect until after their sentencing, it applies to them because their cases are still on direct appeal. We agree with defendants.

Division Two's opinion in *State v. Ellis*, 27 Wn. App. 2d 1, 530 P.3d 1048 (2023), is controlling on this point. Relevant here, the court held, "Although this amendment did not take effect until after Ellis's resentencing, it applies to Ellis because this case is on direct appeal." *Id.* at 16. The court therefore remanded the issue "for the trial court to address whether to impose interest on the restitution amount under the factors identified in RCW 10.82.090(2)." *Id.* We agree with Division Two's opinion in *Ellis* and conclude that the same reasoning and result apply equally here. We therefore remand to the trial court to address

whether to impose interest on restitution in defendants' judgments and sentences.

Finally, defendants argue that remand to the trial court to strike the $500 VPA from his judgment and sentence is required. They contend that recent amendments to RCW 7.68.035 provide that the VPA shall not be imposed against a defendant who is indigent at the time of sentencing. LAWS OF 2023, ch. 449, § 1. The State does not dispute that defendants are indigent and does not object to a remand for purposes of striking the VPA from their judgments and sentences. We accept the State's concession and, accordingly, remand for the superior court to strike the VPA fee from defendants' judgments and sentences.

We reverse and remand to the trial court to consider whether to impose restitution interest on Defendants under RCW 10.82.090 and strike the VPA fees on defendants' judgments and sentences. We affirm in all other respects.

Feldman, J.

WE CONCUR:

Birk, J.

Coburn, J.

APPENDIX B

FILED
12/27/2023
Court of Appeals
Division I
State of Washington

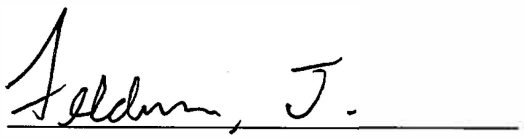
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. MICHAEL WILLIAM BIENHOFF, KARL EMERSON PIERCE, and each of them, Appellants.	No. 83976-4-I (Consolidated with No. 83977-2-I) ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Karl Pierce, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.



Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83976-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 26, 2024

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