Supreme Court No. 102815-6
COA No. 83157-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DAVID MORRIS,
Petitioner.

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

PETITION FOR REVIEW

Jessica Wolfe
Attorney for Petitioner, David Morris
WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

This case presents this Court with the opportunity to provide guidance on two areas of law that sorely need it: the shifting landscape of *Batson* objections following this Court's decision in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), and the admissibility of mental health defense evidence.

David Morris, a veteran diagnosed with PTSD and autism, was convicted of first-degree murder for stabbing his former girlfriend to death. His defense was that he was experiencing a PTSD-related flashback at the time of the stabbing and was thus disassociated from reality. His trial raised intersecting issues of combat trauma and neurodivergence.

Despite this, the trial court prohibited Mr. Morris from introducing any expert or lay witness testimony to corroborate his mental health diagnoses, on the basis that this evidence was not "relevant." As a result, Mr. Morris' defense was completely undermined. Because the constitutional right to

present a defense is foundational to our system of justice, this Court should accept review to provide guidance on the admissibility of mental health defense evidence.

This case also provides this Court with the opportunity to clarify the proper *Batson* framework when a party has engaged in a pattern of striking jurors of one gender. Here, the State used seven out of its eight peremptories to strike men from the jury. Yet the Court of Appeals concluded this was not prima facie evidence of gender-based exclusion, and further held that *Jefferson*'s modified *Batson* test did not apply to gender. This Court should accept review to provide much-needed guidance to lower courts on pattern objections as well as the scope of *Jefferson*'s modified *Batson* test.

B. IDENTITY OF PETITIONER AND DECISION BELOW

David Morris, the petitioner, asks this Court to review the opinion of the Court of Appeals in *State v. Morris*, No. 83157-7-I (Jan. 22, 2024) (attached to this petition).

C. ISSUES PRESENTED FOR REVIEW

1. It is constitutionally impermissible to strike a juror on the basis of their gender. *J.E.B. v. Alabama ex. re. T.B.*, 51 U.S. 127, 146, 114 S. Ct. 1419, 128 L. Ed 2d 89 (1994); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); U.S. Const. amend XIV; Const. art. XXXI, § 1. Here, the State used seven out of its eight peremptories against men. When challenged by the defense, the State only provided a gender-neutral explanation for the last man struck in the pattern. The trial court did not require the State to provide neutral explanations for the other six men struck before overruling the objection.

a. The Court of Appeals erroneously held that using seven out of eight peremptories to strike men from the jury was not prima facie evidence of a pattern of gender discrimination under *Batson*'s first step. The Court further erred in not treating this first step as moot, as required by U.S. Supreme Court precedent.

Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 395 (1991). This Court should accept review to clarify that a pattern of striking one gender from the jury is sufficient to satisfy *Batson*'s first step. RAP 13.4(b)(3).

b. This Court should also accept review to impress upon trial courts that the State is required to provide a neutral explanation for all jurors struck in a pattern of exclusion at *Batson*'s second step. *See, e.g., State v. Brown*, 21 Wn. App. 2d 541, 556, 506 P.3d 1258 (2022); RAP 13.4(b)(3).

c. The Court of Appeals held that the third step of *Batson* as modified in this Court's *Jefferson* opinion did not extend to gender. Review is warranted to clarify that *Jefferson* modified the *Batson* test for all protected classes, and that an objective observer test is therefore required in analyzing gender-based *Batson* challenges. RAP 13.4(b)(3).

2. The state and federal constitutions protect a defendant's right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); U.S. Const. amend. VI, XIV; Const. art. I, § 22. Here, Mr. Morris' right to present a defense was unconstitutionally curtailed when the trial court precluded him from introducing any expert or lay testimony to corroborate his mental health diagnoses. The trial court and the Court of Appeals both determined that because Mr. Morris' proffered expert witness could not testify that he was experiencing a flashback at the time of the stabbing, the witness's testimony was inadmissible, as was the testimony of lay witnesses that Mr. Morris suffered from PTSD. The Court of Appeals decision conflicts with its own published precedent in *State v. Mitchell*, which held "it is not necessary that the expert be able to state an opinion that the mental disorder

actually did produce the asserted impairment at the time in question—only that it could have, and if so, how that disorder operates." 102 Wn. App. 21, 27, 997 P.2d 373 (2000). Mr. Morris' proposed expert testimony easily met this standard. Review is appropriate because the lower court's decision conflicts with a published Court of Appeals' opinion and because the admissibility of mental health defense implicates the constitutional right to present a defense. RAP 13.4(b)(2), (3).

3. The state constitutional right to a jury trial is inviolate and the scope of this right may not be diminished. Const. art. I, § 21. When the constitution was adopted, the law required that jury selection be conducted in person, not by remote means such as telephone, telegram, or letter. Jury selection by video thus violates the state constitutional right to a jury trial and warrants this Court's review. RAP 13.4(b)(3).

4. Procedures that unfairly restrict a person's ability to select a jury infringe on the state and federal constitutional

rights to a jury trial. The use of video to select a jury restricts a person's ability to fully assess prospective jurors for fitness to serve. Further, the right to be present during all critical stages of a trial extends to physical presence before the venire. Jury selection by video thus infringes on the right to an impartial jury, to confrontation, and to be present during jury selection. *Skilling v. United States,* 561 U.S. 358, 386–87, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *Ham v. South Carolina*, 409 U.S. 524, 527, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973); U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22. The constitutionality of remote jury selection warrants this Court's review. RAP 13.4(b)(4).

5. The constitutional right to a fair trial is violated when a trial court erroneously denies a motion for mistrial. Informing the jury that the defendant has been incarcerated pretrial prejudices the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126

(1976); *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); U.S. Const. amend. VI, XIV. Here, a witness for the State testified that he had seen Mr. Morris in an "orange jumpsuit" previously and suggested he expected Mr. Morris to be in the same jumpsuit at trial. This informed the jury that Mr. Morris had been in pretrial detention for nearly three years, suggesting the court regarded him as dangerous, and thus guilty. The Court of Appeals erroneously concluded this was not prejudicial, in violation of this Court's established precedent. RAP 13.4(b)(1).

6. Jury instructions must permit the defendant to present their theory of the case. A "first aggressor" instruction informs the jury that self-defense or defense of others is not available if the defendant provoked or commenced the fight. As this Court held in *State v. Grott*, 195 Wn.2d 256, 272, 458 P.3d 750 (2020), the provoking act cannot be the charged conduct. Here, there was no evidence presented that Mr. Morris provoked the need to act in self-defense or defense of others. Yet the trial

court and the Court of Appeals both concluded that this instruction was proper. Review is warranted as the Court of Appeals' opinion conflicts with this Court's *Grott* decision. RAP 13.4(b)(1).

7. The Sixth and Fourteenth Amendments do not permit a court to impose an exceptional sentence unless every factual finding necessary to do so is found by the jury beyond a reasonable doubt. *Hurst v. Florida*, 577 U.S. 92, 97–98, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Const. amend. VI, XIV; Const. art. I, §§ 21, 22. However, the Sentencing Reform Act mandates a bifurcated process, requiring the jury to find the existence of an aggravating factor and the judge to engage in a separate factual inquiry to determine if that factor presents "substantial and compelling" reasons to impose an exceptional sentence. The second step of this process violates the Sixth and Fourteenth Amendments by predicating an exceptional sentence on judicial fact-finding.

Review is warranted on this significant question of constitutional law. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Mr. Morris' birth mother suffered from debilitating mental illness and gave him up for adoption shortly after he was born. CP 814. His childhood was lonely and isolating. CP 822. He had trouble relating to others and understanding social cues. *Id.*

In his early 20s, Mr. Morris decided to join the military. CP 36. He successfully completed basic training and was stationed at Fort Lewis-McChord. RP 3018. While there, he met Gabriella "Gabby" Garcia. RP 3025. They quickly fell in love, and soon Ms. Garcia was pregnant. RP 3026.

Shortly after, Mr. Morris received deployment orders to Afghanistan. RP 3052. While he was stationed there, his son, G.M., was born. *Id.*

Mr. Morris experienced active combat while in Afghanistan. RP 390. His base was routinely attacked by

mortars and suicide bombers both in vehicles and on foot. RP 3032–36. Mr. Morris witnessed numerous atrocities on patrol. One time, he patrolled an area after a recent suicide bombing, finding burning body parts of dead children swept into a garbage pile. RP 3041.

While on patrol, Mr. Morris also saw a woman in a burqa approach his tank and attempt to detonate a suicide vest with her cell phone. RP 3045–48. But the woman could not get her vest to detonate, and she ran away. RP 3048. Mr. Morris later saw a surveillance video of the same woman blow herself up in a civilian crowd, killing many people. RP 3048–49.

Mr. Morris' time in Afghanistan made him "angry" and "paranoid." RP 3051. He started having nightmares and felt that he was "constantly in danger." *Id.*

After his deployment, Mr. Morris had a short visit with Ms. Garcia and G.M. in Seattle. RP 3053–54. Ms. Garcia was shocked by the changes in Mr. Morris' personality; she

described him as "a total 180 from how he used to be." RP 1586.

Shortly thereafter, Mr. Morris was ordered to a base in Germany. RP 3057. There, his nightmares increased, and he started having flashbacks to what he'd experienced in Afghanistan, including the woman he encountered with the suicide vest under her burqa. RP 3063–65.

Mr. Morris attempted suicide, but was found and taken for medical treatment. RP 3070–72. After he recovered, the military ordered him to engage in mental health treatment, where he was diagnosed with autism for the first time in his life. RP 3072. Suddenly, his awkward childhood and lifelong struggle with social situations made sense: Mr. Morris was on the spectrum. *Id.*

However, Mr. Morris didn't tell anyone about his flashbacks because he "didn't want to be diagnosed" with PTSD. RP 3073. In the military, soldiers with PTSD were

viewed as "weak" or "broken," and "trying to steal money" from taxpayers. RP 3067.

Mr. Morris was concerned that his autism and would get him kicked out of the military for good, so he took an honorable discharge to preserve his military record. RP 3068, 3073–74.

After leaving the military, Mr. Morris moved into an apartment with Ms. Garcia and G.M. in Texas. RP 3078. Mr. Morris' PTSD symptoms became progressively worse. RP 3088–90. He was triggered by the sound of garbage trucks, crowds, burning smells, and women in loose clothing. RP 3085–86.

During this period, Mr. Morris and Ms. Garcia also learned that G.M. was autistic. RP 3079–80. Mr. Morris did not tell Ms. Garcia about his own diagnosis. RP 3088.

After several months of living together, Ms. Garcia suddenly left Texas with G.M. and moved in with her parents in Seattle. CP 823; RP 1276, 3091. Mr. Morris was heartbroken and suicidal. RP 3092. For the next two years, he held out

hope that they would get back together and raise their son. RP 3094. Because his autism prevented him from understanding social cues, Mr. Morris struggled to comprehend that Ms. Garcia had moved on. CP 48.

Mr. Morris decided to move to Seattle to be closer to his son. RP 3097. He arranged with Ms. Garcia to visit, packed his car, and drove across the country. RP 2941, 3097.

Over the next few days, Mr. Morris visited G.M. with Ms. Garcia's supervision. RP 3135–36. Ms. Garcia and Mr. Morris also attended a parent-teacher conference at G.M.'s school. RP 3133–34.

For Mr. Morris' last scheduled visit with Ms. Garcia and G.M., they visited the Pacific Science Center. RP 3143. Mr. Morris was disoriented by the crowds, noise, and lights. RP 3145. Afterwards, they walked to the Armory to get food for G.M., ending up at MOD Pizza. RP 3150–51. Eyewitnesses later described Ms. Garcia and Mr. Morris as appearing

"happy" together; there were no raised voices or signs of trouble. *See, e.g.*, RP 1940, 2035, 2478.

As they sat at the table together, Ms. Garcia started fidgeting. RP 3153. She was wearing a large, loose coat. *Id.* She was also "doing something with her phone and grabbing things." *Id.* She started to stand up. *Id.*

Mr. Morris started sweating and felt a spike of adrenaline. *Id.* He smelled something burning. RP 3156. Suddenly, he was back in Afghanistan, confronted with the suicide bomber in the burqa. RP 3154. Startled, he pulled out a knife he always carried in his pocket and flicked it open. RP 3154. He grabbed the suicide bomber and stabbed her. RP 3154.

But it wasn't the suicide bomber. Mr. Morris was stabbing Ms. Garcia.

Mr. Morris was quickly arrested and confessed repeatedly and at length that he had killed Ms. Garcia. *See, e.g.*, Ex. 143. His affect was extremely flat and analytical,

which police found odd and "eerie." RP 2235. One of the arresting officers, who himself had served in the military and had extensive training in mental illness, thought Mr. Morris possibly had PTSD. Ex. 115 at 9, 11. The detective who interrogated Mr. Morris noted that the only other person he had ever encountered in his decades-long career who displayed a similar affect ended up being severely mentally ill. RP 2925–26.

Mr. Morris did not tell any law enforcement officers about the flashback he experienced. RP 3170. Nor did he admit that he had been diagnosed with autism, even when directly asked. RP 2727. The stigma these mental conditions carried in the military was deeply ingrained in him. RP 3066–67, 3170. However, while alone in an interrogation room at police headquarters, Mr. Morris talked to himself at length. At one point, he muttered:

> All those innocent people killed by the Taliban, and we couldn't do a god damned thing. Seeing shit, probably have schizophrenia anyway, damn auditory visual

> hallucinations, they wouldn't believe me if I told them anyway. All those nightmares after deployment. Doesn't really matter now. . . . Whether I'm insane or not, I killed her, probably, or at least tried to, kind of, doesn't matter.

RP 477.

Ms. Garcia died from her stab wounds. RP 2743. Mr. Morris was charged with first degree murder with a deadly weapon and two aggravating factors: (1) a domestic violence aggravator for committing a crime "within sight or sound" of his child, G.M., and (2) committing a crime that had "a destructive and foreseeable impact on persons other than the victim." CP 705–706 (first amended information).

Prior to trial, Mr. Morris disclosed the defense of insanity. RP 71. An expert report by the psychologist Dr. Mark Whitehill confirmed Mr. Morris' autism, PTSD, and depression diagnoses, but expressed skepticism that Mr. Morris was experiencing a flashback at the time of the stabbing because Mr. Morris had not mentioned a flashback to law enforcement. CP 45–46. The trial court excluded Dr.

Whitehill's report and testimony, ruling it was "not relevant." CP 69–70. Without the expert evidence, Mr. Morris was forced to switch to a theory of self-defense, asserting that he mistakenly believed he and others were in danger due to the flashback he experienced. RP 694. During trial, the court prohibited Mr. Morris from calling any lay witnesses that would corroborate his PTSD diagnosis or the flashback he experienced. RP 731, 2240, 2306.

Without the benefit of any corroborating evidence, Mr. Morris testified in his own defense that he suffered from autism and PTSD and was experiencing a flashback when he stabbed Ms. Garcia. RP 3067–3166. Mr. Morris' autism gave him a "blunt" effect on the stand, which even his defense counsel acknowledged was "hard" and "uncomfortable" to listen to. RP 3464.

Without any evidence to guide its understanding of Mr. Morris' autistic behavior or the mechanism of PTSD flashbacks, the jury convicted him of first degree murder,

committed with a deadly weapon, and found both charged aggravators. CP 778–82.

Mr. Morris faced a standard range sentence of 264 to 344 months (22 to 28 years). RP 3569. The court rejected Mr. Morris' request for a mitigated sentenced based on his autism and PTSD. RP 3544–45. Instead, the court found the aggravating factors constituted "substantial and compelling" reasons to depart from the standard range, and sentenced Mr. Morris to an exceptional sentence of 464 months—approximately 38 years. RP 3572.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should accept review to clarify the proper *Batson* framework when a party has engaged in a pattern of striking jurors of one gender.

During jury selection, the State used seven of its eight peremptory strikes against men. RP 1190–91. Upon the last strike, the defense objected to the pattern of gender-based exclusion. RP 1185. The trial court acknowledged the strikes "could be a pattern" of gender discrimination—but accepted the

State's gender-neutral explanation for the last juror struck, without further analysis. RP 1185–87, 1191. On review, the Court of Appeals determined Mr. Morris did not make a prima facie showing of a pattern of discrimination. Op. at 25. The Court further held that despite this Court's modification of the federal *Batson* standard in *State v. Jefferson*, 192 Wn.2d 225, 232–33, 429 P.3d 467 (2018) to include an objective observer test, that this test does not extend to gender-based exclusion. Op. at 20.

The trial court and the Court of Appeals collectively erred in applying all three steps of the *Batson* framework. This Court should take review because the proper application of this framework to patterns of gender exclusion in jury selection—including (1) whether a pattern of gender exclusion is sufficient to establish a prima facie case of discrimination, (2) whether a party is required to provide a gender-neutral reason for each juror struck in a pattern, and (3) whether *Jefferson* extended the objective observer test to gender-based exclusion—present

significant questions of law under the federal and state constitutions. RAP 13.4(b)(3).

a. A pattern of peremptory strikes against one gender constitutes a prima facie showing of discrimination, necessitating a gender-neutral explanation for each juror struck in the pattern as analyzed under an objective observer test.

It is constitutionally impermissible to strike a juror on the basis of their gender. *J.E.B. v. Alabama ex. re. T.B.*, 51 U.S. 127, 146, 114 S. Ct. 1419, 128 L. Ed 2d 89 (1994); *State v. Burch*, 65 Wn. App 828, 836–37, 830 P.2d 357 (1992); U.S. Const. amend XIV; Const. art. XXXI, § 1. To determine whether a peremptory strike contravenes the Equal Protection Clause, courts apply the *Batson* test criteria. *See State v. Jefferson*, 192 Wn.2d 225, 232–33, 429 P.3d 467 (2018) (citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)); *State v. Beliz*, 104 Wn. App. 206, 212–13, 15 P.3d 683 (2001). This test has three steps.

First, the defendant must show the State's decision to strike a juror evinces intentional discrimination on the basis of

gender. *J.E.B.*, 511 U.S. at 144–45; *Burch*, 65 Wn. App. at 840. The court must consider all relevant circumstances and decide if there is an inference that the State based its challenge on gender. *Burch*, 65 Wn. App. at 840. When the State uses the majority of its peremptory strikes against one gender, this supports an inference that the State is engaging in intentional gender discrimination. *See United States v. Alanis*, 335 F.3d 965, 96–68 (9th Cir. 2003).

Once the inference of purposeful discrimination is established, the second step requires the prosecutor articulate a gender-neutral explanation for the peremptory. *Beliz*, 104 Wn. App. at 213. And when the defense alleges there is a pattern of exclusion against one gender, the Court of Appeals has recognized that the prosecutor is required to provide a gender-neutral reason for *each* of the jurors in the pattern. *State v. Brown*, 21 Wn. App. 2d 541, 556, 506 P.3d 1258 (2022).

Under a classic *Batson* assessment, the third step requires the court to determine whether the prosecutor engaged in

purposeful discrimination. *Beliz*, 104 Wn. App. at 213. However, this Court modified this prong of the *Batson* test in 2018 with a "new inquiry" sourced from the recently adopted GR 37. *See Jefferson*, 192 Wn.2d at 229. Instead of determining whether the strike constitutes purposeful discrimination, the third step now requires the trial court to ask whether an objective observer "*could* view" discrimination against a protected class as "*a* factor" in the use of the peremptory strike. *Id.* at 230 (emphasis added).

To be sure, *Jefferson* concerned discriminatory strikes based on race, not gender. *Id.* at 230–31. However, *Jefferson* was clear it was modifying the federal *Batson* standard. *See id.* at 242 ("this court can modify *Batson* using its authority under federal law to create new procedures within existing Fourteenth Amendment frameworks."). *Id.* at 242. And *Batson* applies to all classes protected by equal protection, including gender. *See Burch*, 65 Wn. App. at 835; *see also J.E.B.*, 511 U.S. at 146.

b. The trial court and Court of Appeals misapplied the modified *Batson* framework in several ways, demonstrating the need for this Court to provide further guidance.

i. Review is warranted to clarify that a pattern of gender exclusion is sufficient to satisfy Batson's first step.

Regarding the first *Batson* step, this Court should accept review to clarify that the Court of Appeals erred in holding the State's use of seven out of eight peremptories against men did not amount to a prima facie case of discrimination. Op. at 24–26.

A prima facie showing is not a "substantial" burden; an inference is permissible where discrimination "*may have occurred*." *Sanchez v. Roden*, 753 F.3d 279, 301–02 (1st Cir. 2014) (emphasis in the original) (quoting *Johnson v. California*, 545 U.S. 162, 173, 125 S. Ct 2410, 162 L. Ed. 2d 129 (2005)). As the Ninth Circuit has recognized, a pattern of striking one gender from the jury alone is sufficient to meet this burden. *United States v. Alanis*, 335 F.3d 965, 968–69 (9th Cir. 2003).

(prosecutor's use of six of peremptory challenges against men was prima facie evidence of discrimination); *United State v. De Gross*, 960 F.2d 133 (9th Cir. 1992) (defendant's use of seven out of eight peremptories against men was sufficient to establish prima facie case of discrimination).

To the extent the Court of Appeals held Mr. Morris was required to show *more* than a pattern to establish a prima facie showing—*i.e.* "discriminatory comments by the party exercising the challenge," Op. at 25—it conflated the first *Batson* step with the traditional third step of *Batson*, which analyzes the presence of "purposeful discrimination." *See Jefferson*, 192 Wn.2d at 24.

Additionally, by conducting its own *de novo* assessment of whether Mr. Morris made a prima facie showing, Op at 24–26, the Court of Appeals contravened U.S. Supreme Court precedent. In *Hernandez v. New York*, the Court held that once the State has offered a neutral explanation for the peremptory challenge "and the trial court has ruled on the ultimate question

of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 395 (1991). Accordingly, even in situations where the trial court skipped *Batson*'s first step—as the Court of Appeals erroneously concluded occurred here, Op. at 24—it is still proper for an appellate court to analyze *Batson's* second and third steps. *See Brown*, 21 Wn. App. 2d at 555-56.

This Court should take review to clarify that a pattern of gender exclusion alone is sufficient to satisfy *Batson*'s first step, and also to impress upon appellate courts that this first step becomes moot if the lower court has issued a ruling on *Batson*'s second and third step.

ii. This Court should clarify that parties must provide a neutral explanation for each juror struck in a pattern of exclusion.

The court did not require the State to articulate a gender-neutral reason for the first six men that it struck from the venire, as required by *Batson*'s second step. RP 1185–87; *Brown*, 21

Wn. App. 2d at 556 (State was required to provide gender-neutral reason for *each* of the six female jurors struck); *see also Alanis*, 335 F.3d at 968–69; *Johnson v. Martin*, 3 F.4th 1210, 1223–24 (10th Cir. 2021) (finding reversible error where a pattern of racial exclusion was raised but the "trial court only determined that *one* explanation offered by the prosecutor for excusing *one* minority" satisfied *Batson*). This Court should take review to clarify that when a party fails to provide an explanation for *each* juror in a pattern of peremptory strikes, it fails to rebut the presumption of discriminatory exclusion. *Johnson*, 545 U.S. at 169–70.

iii. Review is warranted to extend the objective observer test to gender-based exclusion.

At the third step of *Batson*, the trial court claimed it was applying "GR 37," *i.e.*, the objective observer test, to Mr. Morris' claim of gender-based exclusion. RP 1185. However, the trial court did not actually consider whether an objective observer "*could* view" discrimination against a protected class

as "*a* factor" in the State's use of peremptory strikes. *Jefferson*, 192 Wn.2d at 229.

On review, the Court of Appeals rejected Mr. Morris' argument that *Jefferson* extended the objective observer test for all protected classes. Op. at 20–21.

In short, the trial court presumed the objective observer test applied to gender exclusion (but then did not actually apply the test), while the Court of Appeals presumed the test did *not* apply to gender exclusion. This obvious confusion amongst the lower courts calls for this Court to clarify that *Jefferson*'s modified *Batson* test extends to gender.

"[A]ll the evils associated with racially discriminatory peremptory challenges also result from peremptory challenges based on gender." *Burch*, 65 Wn. App. at 835. When the State strikes a person on the basis of gender stereotypes, it "ratif[ies] and reinforce[s] prejudicial views of the relative abilities of men and women." *J.E.B.*, 511 U.S. at 140. Such strikes thus "invit[e] cynicism" of the neutrality of the judicial system, and

this "potential for cynicism is particularly acute in cases where gender-related issues are prominent." *Id.* Accordingly, the reasoning for applying an objective observer test to race-based exclusion applies equally to gender-based exclusion.

In sum, this Court's review is warranted to provide much-needed clarity to the *Batson* framework post-*Jefferson*. Lower courts require direction on what constitutes a prima facie case of discrimination, whether a party must offer a neutral explanation for *every* juror in a pattern of exclusion, and whether the objective observer test applies to gender-based exclusion. Given the significance of these constitutional questions, this Court should accept review pursuant to RAP 13.4(b)(3).

2. The Court of Appeals' holding that that Mr. Morris' mental health defense evidence was not "relevant," and therefore not admissible, conflicts with established Court of Appeals precedent and places undue limits on the constitutional right to present a defense.

Prior to trial, Mr. Morris planned to assert an insanity defense. Specifically, Mr. Morris intended to argue that the PTSD flashback he experienced at the time of the stabbing meant he was unable to understand what he was doing or to tell right from wrong. RP 72; CP 51, 54; *see also* RCW 9A.12.010. In addition to his own testimony, Mr. Morris planned to offer the testimony of Dr. Whitehill that he suffered from autism, PTSD, and regular flashbacks at the time of the crime, and that a defense of insanity "would be applicable" if the jury believed that Mr. Morris was experiencing a flashback at the time of the crime. CP 47; RP 72. To further support this defense, Mr. Morris also attempted to introduce the testimony of several jail medical staff who interacted with him after his arrest and treated him for his diagnoses during his incarceration, and the

testimony of one of the arresting officers that Mr. Morris appeared to be experiencing symptoms of PTSD when he was apprehended.

Yet the trial court excluded Dr. Whitehill's testimony on the grounds of "relevance," because Dr. Whitehill stated in his report that he did not believe Mr. Morris was experiencing a flashback at the time of the crime. CP 47, 69–70; RP 79–80. Then, because it had excluded Dr. Whitehill's testimony, the court concluded it must exclude the lay testimony from jail staff and the arresting officer because "[t]here's no expert opinion to—to support th[e] diagnosis" of PTSD. RP 727, 731–32; *see also* 2240, 2305.

The Court of Appeals affirmed, reasoning that "Dr. Whitehill could not testify that [Mr.] Morris lacked the capacity to understand the nature and quality of his actions," or that he "lacked the intent to commit the offense, and that Mr. Morris "needed to provide expert testimony as to his PTSD diagnosis

before proffering lay witness testimony as to the same." Op. at 12–13, 15.

In doing so, the Court of Appeals contravened its own published precedent in *State v. Mitchell*, which held that an expert opinion is relevant—and therefore admissible—if it "explains how the mental disorder relates to the asserted" defense. 102 Wn. App. 21, 27, 997 P.2d 373 (2000). As the *Mitchell* Court acknowledged, "[u]nder this standard, it is not necessary that the expert be able to state an opinion that the mental disorder *actually did* produce the asserted impairment at the time in question—only that it *could have*, and if so, how that disorder operates." *Mitchell*, 102 Wn. App. at 27 (emphasis added).

In other words, Dr. Whitehill did not need to conclude that Mr. Morris' diagnoses *did* render him legally insane at the time of the stabbing; only that it "*could* have." *Mitchell*, 102 Wn. App. at 27 (emphasis added). Dr. Whitehill's opinion easily met the *Mitchell* standard, as he confirmed both

applicable diagnoses (PTSD and autism) and a mechanism of those diagnoses (flashback) that "would be applicable" to a defense of insanity—if Mr. Morris' account was believed. CP 47. And whether Mr. Morris' account was credible was an issue of fact for the jury to decide. *See Mitchell*, 102 Wn. App. at 27–28.

Regardless of whether Dr. Whitehill's testimony was admissible, the trial court further erred in excluding the lay witness testimony. Lay witnesses are permitted to testify about their perceptions of a defendant's mental health, provided they had a sufficient opportunity to observe the defendant and are able to testify as to the facts on which they base their conclusions. *State v. Stoudamire*, 30 Wn. App. 41, 47, 631 P.2d 1028 (1981). This includes testimony regarding the "acts, conditions, and conduct of the accused, not only at the time of the offense, but prior and subsequent thereto." *State v. Odell*, 38 Wn.2d 4, 20, 227 P.2d 710 (1951) (internal citation and quotation marks omitted); *see also State v. Clark*, 187 Wn.2d

641, 653, 389 P.3d 462 (2017) ("[A] criminal defendant has the constitutional right to present evidence in his or her own defense, and relevant observation testimony tending to rebut any element of the State's case, including mens rea, is generally admissible.").

Because the trial court excluded any corroborating evidence of his mental health, Mr. Morris was unconstitutionally restrained from presenting his theory of the defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *State v. Broussard*, 25 Wn. App. 2d 781, 785, 525 P.3d 615 (2023); U.S. Const. amend. VI, XIV; Const. art. I, § 22.

In sum, review is warranted as the Court of Appeals' opinion conflicts with *Mitchell*. RAP 13.4(b)(2). Review is further warranted to clarify when mental health defense evidence is "relevant," and therefore admissible, at trial—an

issue that implicates the constitutional right to present a defense. RAP 13.4(b)(3).

3. This Court should take review to determine the constitutionality of conducting voir dire remotely via video.

Jury selection occurred in the spring of 2021. The court expressed its intent to select the jury using Zoom, an online video communication platform. RP 31. Mr. Morris objected via a motion in limine, CP __ (Sub. No. __) (filed Feb. 7, 2023), expressing concern that the use of video voir dire would interfere with the ability to access "information conveyed through demeanor and body language." *Id.* at 7. The court overruled his objection, citing the ongoing COVID-19 pandemic and concluding that instructions to the venire would cure any concerns. RP 616–19.

The court erred for two reasons. First, Mr. Morris had a state constitutional right to in-person jury selection, which the court failed to recognize. Second, selecting a jury by video constrained Mr. Morris' ability to accurately assess potential

jurors, and was thus not an effective substitute for in-person jury selection. This Court should accept review of these significant constitutional issues. RAP 13.4(b)(3).

a. Under article I, section 21, Mr. Morris had a state constitutional right to in-person jury selection. The violation of this right requires reversal.

Mr. Morris had a state constitutional right to in-person jury selection under article I, section 21 of the Washington Constitution. Under this provision, adopted in 1889, the "right of trial by jury shall remain inviolate." Const. art. I, § 21. "The word 'inviolate' carries with it a strong command: the right—as it existed in the minds of the framers and as it is relevant today—must exist 'free from assault or trespass: untouched, intact.'" *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 662, 771 P.2d 711, 725 (1989) (quoting Webster's Third New International Dictionary 1190 (1976)). This inviolate right "may not be impaired by either legislative or judicial action." *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

As this Court has repeatedly recognized, "the right to trial by jury which was kept 'inviolate' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789." *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982); *see also State v. Williams-Walker*, 167 Wn.2d 889, 896 & n.2, 225 P.3d 913 (2010); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

The scope of the jury trial right is "determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889." *Smith*, 150 Wn.2d at 151. Thus, the "basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889." *Sofie*, 112 Wn.2d at 645.

To do so, the Code of 1881 is helpful because it was "in effect and had been for some years when the constitution was drafted and accepted by the people." *Mace*, 98 Wn.2d at 98. The Code of 1881 endorsed in-person jury selection, requiring

the venire to "appear before said justice" at a specific "time and place." Code of 1881 § 1772;[1] *see also id.* at §§ 206, 1078; *see White v. Territory*, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) ("Our system provides for examination of persons called into the jury–box as to their qualifications to serve as such."). Notably, jury selection did not occur by telephone, telegram, or written correspondence. Thus, the inviolate right to a jury trial under article I, section 21 includes the right to in-person jury selection. *See Mace*, 98 Wn.2d at 98–99 (in light of the Code of 1881, jury trial right guarantees jury trial on all crimes, including misdemeanors); *State v. Strasburg*, 60 Wash. 106, 115–16, 110 P. 1020 (1910) (legislature could not eliminate insanity defense because this was part of jury trial right that existed in 1889).

Accordingly, the trial court violated article I, section 21

[1] *Available at* https://leg.wa.gov/CodeReviser/documents/sessionlaw/1881Code.pdf.

by denying Mr. Morris his right to in-person jury selection. This Court's review is warranted. RAP 13.4(b)(3).

Alternatively, the trial court should have analyzed the necessity of jury selection by video and the impact this procedure would have on Mr. Morris' rights. This analysis is required before modifying courtroom procedures that impact a defendant's constitutional right to physically confront witnesses. *Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *State v. Milko*, 21 Wn. App. 2d 279, 291, 505 P.3d 1251 (2022), *review denied*, 199 Wn.2d 1024, 512 P.3d 890 (2022). And the defendant's right to be present for jury selection is "rooted to a large extent in the confrontation clause." *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). Absent a proper analysis, a trial court errs in modifying courtroom procedures that infringe on a constitutional right. *State v. Palmer*, 24 Wn. App. 2d 1, 17, 518 P.3d 252 (2022).

Here, the trial court's analysis on why it was choosing

jury selection by video was insufficient. It did not recognize Mr. Morris had a constitutional right to in-person jury selection and did not give it any weight. It did not analyze how the alternative procedure would affect his rights. While the court emphasized that jury selection by video was necessary because of the risk of COVID-19, it did not consider whether any risk of COVID-19 could be sufficiently mitigated, such as through masking or air-filtration. RP 616–18.

Departure from constitutional jury selection requirements is presumptively prejudicial, requiring reversal and a new trial. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 233, 257 P.3d 648 (2011). And but for the error, different jurors likely would have sat. Jurors are not fungible. *Irby*, 170 Wn.2d at 886–87. "Reasonable and dispassionate minds may look at the same evidence and reach a different result." *Id.* Review of this constitutional issue is similarly warranted. RAP 13.4(b)(3).

b. Video voir dire is unduly restricted Mr. Morris' ability to select a fair jury and denied him his right to be present for jury selection.

Restrictions on voir dire may violate the defendant's constitutional right to a fair and impartial jury. *See, e.g., Ham v. South Carolina*, 409 U.S. 524, 527, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973) (due process entitled defendant to be permitted to have potential jurors questioned on issue of racial bias); *State v. Brady*, 116 Wn. App. 143, 146-48, 64 P.3d 1258 (2003) (trial court's decision to alter voir dire process in the middle of jury selection, resulting in elimination of a questioning period, was improper); U.S. Const. amend. VI, XIV; Const. art. I, § 22. Accordingly, "the defendant should be permitted to examine prospective jurors carefully, and to an extent which will afford him every reasonable protection." *State v. Frederiksen*, 40 Wn. App. 749, 152, 700 P.2d 369 (1985) (alterations, citations, and quotation marks omitted). Further, defendants have a right to be present "at all critical stages of a trial," including voir dire. *Irby*, 170 Wn.2d at 880–81; U.S. Const. amend. VI, XIV;

Const. art. I, § 22. Here, jury selection by video unduly restricted Mr. Morris' rights to select a fair jury and to be physically present with the jury venire.

Communication via video is not the same as being "face-to-face." *State v. Sweidan*, 13 Wn. App. 2d 54, 63, 461 P.3d 378 (2020). Substantial research demonstrates that communicating by video strips nonverbal cues from communication, interferes with eye contact, and negatively impacts the viewer's assessment of credibility. *See, e.g.,* Harvard Law Rev. Ass'n, *Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 Harv. L. Rev. 1181, 1184–86 (2009) (summarizing research).

Yet a potential juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty are key to assessing their fitness to serve. *Skilling v. United States,* 561 U.S. 358, 386–87, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *see also Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) ("[V]ideo conference may render it difficult for a factfinder in

adjudicative proceedings to make credibility determinations and to gauge demeanor."); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) ("The immediacy of a living person is lost" with video technology).

In addition to interfering with communication, appearing by video does not have the same gravitas as appearing in court. The courtroom is "more than a location;" rather, it "is itself an important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process." *Estes v. Texas*, 381 U.S. 532, 561, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Warren, C.J., concurring) (internal citation, quotation marks omitted). "The nobility and often grandeur of the courthouse and the courtrooms within it reaffirm the authority of the state and the centrality of adjudication to good government while simultaneously recognizing every litigant and witness as worthy of dignity and respect." *Vazquez Diaz v. Commonwealth*, 167 N. E. 3d 822, 847 (Mass. 2021) (Kafker, J., concurring) (citation omitted).

The physical space of the courthouse thus plays a central role in imposing upon potential jurors the significance of the proceedings. When jurors interact with a defendant "through the barrier of technology," they are desensitized "to the impact of negative decisions." Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1118 (2004).

Additionally, there is no uniformity in the virtual experience. Each participant determines how much space to allocate to the other participants on their screen—which may be as small as a cell phone. *Vazquez Diaz*, 167 N. E. 3d at 848, (Kafker, J., concurring). And when jurors appear in a tiny computer window, the parties may struggle to track which jurors are paying attention and their reactions to other jurors' remarks. *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275, 1299–1301 (2020). Technical difficulties further frustrate the ability of the parties

to properly assess potential jurors. *Vazquez Diaz*, 167 N. E. 3d at 850 (Kafker, J., concurring); *see, e.g.*, RP 1097–1104 (technical difficulties resulting in some jurors missing instructions).

Given the defects of jury selection by video, this process violated Mr. Morris' right to select a fair and impartial jury. Further, holding voir dire over Zoom burdened his right to be present in person with the jury venire. *Irby*, 170 Wn.2d at 883. Because the selection of the jury via video implicates several constitutional rights, review is warranted. RAP 13.4(b)(3).

4. Review is warranted as the Court of Appeals' conclusion that a witnesses' reference to Mr. Morris' lengthy pre-trial incarceration was not prejudicial conflicts with the established precedent of this Court.

The right to a fair trial is secured by the Fourteenth and Sixth Amendments. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). The right to a fair trial is violated when a trial court erroneously

denies a motion for mistrial. *State v. Weber*, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). A trial court must grant a mistrial where a trial irregularity may have impacted the outcome of a trial. *State v. Escalona*, 49 Wn. App. 251, 254–55, 742 P.2d 190 (1987).

In determining whether a trial irregularity impacted the outcome of trial, courts weigh (1) the seriousness of the irregularity, (2) whether it was cumulative of properly admitted evidence, and (3) whether a curative instruction would cure it. *Id.* Whether a particular practice impacted the judgment of jurors must receive "close judicial scrutiny." *Williams*, 425 U.S. at 504.

"[A]n accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Williams*, 425 U.S. at 504; *also State v. Finch*, 137 Wn.2d 792, 844–45, 975 P.2 967 (1999) (collecting cases recognizing "the substantial danger of destruction in the midst of the jury of the presumption

of innocence where the accused is required to wear prison garb"). The fact that these considerations only impact defendants who are unable to make bail, or who are denied bail entirely, is "repugnant to the concept of equal justice embodied in the Fourteenth Amendment." *Williams*, 425 U.S. at 505–506.

Here, the State asked Ms. Garcia's father, Joseph Garcia, to identify Mr. Morris in the courtroom during his testimony. RP 1280. However, Mr. Garcia had bad eyesight. RP 1280. As Mr. Garcia searched around the courtroom, the following exchange occurred:

> PROSECUTOR: And if you're not able to, that's okay.
> MR. GARCIA: Well, I should be able to, I sat in a bunch of hearings in the children's side[2]—
> PROSECUTOR: Well—
> MR. GARCIA: —and he was in an orange jumpsuit, so—
> PROSECUTOR: Joe—Mr. Garcia—
> MR. GARCIA: Okay.
> PROSECUTOR: —if you're not able to make the identification, that's okay.

[2] Mr. Garcia was ostensibly referring to hearings in Mr. Morris' dependency case concerning his son, G.M. RP 3173.

> MR. GARCIA: Okay. All right.
> DEFENSE COUNSEL: Objection—
> THE COURT: Yes. Ladies and gentlemen, please disregard the last statement by the witness.

RP 1281.

During a break in the proceedings, defense counsel moved for a mistrial. RP 1267. Defense argued this was "incredibly prejudicial for the jury to hear" and was a "bell that's not able to be un-rung" because Mr. Garcia had "identified for the jury that Mr. Morris is in custody." RP 1297. Defense asserted no curative instruction would ameliorate the prejudice. RP 1297. The court denied the motion. RP 1299. The Court of Appeals affirmed on the basis that this testimony was not prejudicial. Op. at 34.

Yet numerous courts have recognized the prejudicial nature of prison garb, including the United States Supreme Court and this Court. *Williams*, 425 U.S. at 504; *Finch*, 137 Wn.2d 792, 844–45. And Mr. Garcia's statement suggested not only that he had previously seen Mr. Morris in an "orange

jumpsuit," but that he expected Mr. Morris to be wearing the same jumpsuit at trial—nearly three years after his arrest. RP 1281. Mr. Garcia's testimony thus made clear that Mr. Morris had been incarcerated for a lengthy period of time pretrial, suggesting the court regarded him as dangerous, and thus, guilty. *See State v. Jaime*, 168 Wn.2d 857, 865, 233 P.3d 554 (2010).

Because the Court of Appeals' holding that Mr. Garcia's testimony was not prejudicial conflicts with the established precedent of this Court, review is warranted. RAP 13.4(b)(1).

5. The trial court improperly gave a "first aggressor" jury instruction in violation of this Court's decision in *Grott*.

After the court excluded Dr. Whitehill's testimony, Mr. Morris was forced to change course from a defense of insanity to a theory of self-defense. RP 694. Self-defense is warranted under the law if a person believes "in good faith and on reasonable grounds" that they are in actual danger of great personal injury, even if they are mistaken. CP 771. In

assessing a claim of self-defense, the jury must consider "all the facts and circumstances as they appeared" to the defendant. CP 770. Here, Mr. Morris argued that he was experiencing a flashback that led him to mistakenly—but reasonably—believe Ms. Garcia was a suicide bomber and thus his life was in danger. RP 3317–19.

Yet the court extinguished any possibility the jury would find Mr. Morris acted in self-defense by giving a "first aggressor instruction" over defense objection. CP 771; RP 3317–20. This instruction informed the jury Mr. Morris was not entitled to use self-defense if he was "the aggressor" and that his "acts and conduct provoked or commenced the fight." CPP 771.

This instruction is only appropriate where "there is credible evidence from which a jury can reasonably determine that the *defendant provoked* the need to act in self-defense." *State v. Riley*, 137 Wn.2d 904, 909–910, 976 P.2d 624 (1999) (emphasis added). Accordingly, the Supreme Court has held

that "where the defendant undisputedly engaged in a single aggressive act and that act was the sole basis for the charged offense," "that the single aggressive act cannot support a first aggressor instruction." *State v. Grott*, 195 Wn.2d 256, 272, 458 P.3d 750 (2020).

Here, there was *no* evidence—even viewed in the light most favorable to the State—that Mr. Morris *provoked* the need to act in self-defense. Rather, Mr. Morris undisputedly engaged in a "single aggressive act": stabbing Ms. Garcia. This act was the sole basis for the charged offense of first degree murder. Therefore, pursuant to *Grott*, the first aggressor instruction was erroneously given. Review is therefore warranted. RAP 13.4(b)(1).

6. This Court should accept review because the aggravated sentence violates Mr. Morris' constitutional rights to due process and trial by jury.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is

labeled an "element" or a sentencing "factor." *Hurst v. Florida*, 577 U.S. 92, 97–98, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Const. amend. VI, XIV; Const. art. I, §§ 21, 22. This is because any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime.'" *Alleyne v. United States*, 570 U.S. 99, 111, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (internal quotations omitted). Accordingly, the State must prove to a jury beyond a reasonable doubt *any* fact which increases punishment. *Id.* at 103; *State v. Dyson*, 189 Wn. App. 215, 225, 360 P.3d 25 (2015).

In *Blakely v. Washington*, the United States Supreme Court concluded aggravating factors used to support an exceptional sentence under Washington's Sentencing Reform Act (SRA) are "elements" that the State must prove to a jury beyond a reasonable doubt. 542 U.S. at 303–04.

Following *Blakely*, the Washington Legislature amended the SRA such that imposition of an aggravated sentence, in most cases, requires two steps. First, a unanimous jury must find one or more of the aggravating factors set forth in RCW 9.94A.535(3) beyond a reasonable doubt. RCW 9.94A.537(3). Second, a court must find, considering the purposes of the SRA, that the aggravating factors found by the jury constitute a "substantial and compelling reason justifying an exceptional sentence." RCW 9.94A.535, RCW 9.94A.537(6). The judicial fact-finding step of this process violates the Sixth and Fourteenth Amendments because it removes the State's burden to prove to the *jury* a "substantial and compelling reason" beyond a reasonable doubt.

The United States Supreme Court held that Florida's similar sentencing scheme, which requires a jury to make a factual finding that permits but does not require a judge to impose a greater sentence, was unconstitutional. *Hurst*, 577 U.S. at 99.

There, a jury convicted the defendant of first-degree murder, for which the maximum sentence is life in prison. *Hurst*, 577 U.S. at 95. Following the conviction, the jury then determined the existence of an aggravating factor which could permit—but did not require—a court to impose a death sentence. *Id*. at 96. Upon finding an aggravating factor, Florida law required the jury to make a nonbinding sentence recommendation after considering the aggravating factor against any mitigation. *Id.* The jury in *Hurst* recommended death. *Id.* As required by the Florida statute, the court then weighed the evidence of aggravating and mitigating factors to determine what sentence to impose. *Id*. The court sentenced the defendant to death. *Id.* And, as required by Florida law, the court entered written findings of fact detailing its decision. *Id.*

The Supreme Court explained "the Florida sentencing statute does not make a defendant eligible for death until finding *by the court* that such person shall be punished by death." *Hurst*, 577 U.S. at 100 (internal citations omitted)

(emphasis in the original). But because the statute permitted an additional judicial finding as a prerequisite to the sentence imposed, the Court concluded the sentence was unconstitutional. *Id.* at 99.

The jury in Mr. Morris' case found the evidence supported two aggravating factors: that the crime was an "aggravated domestic violence offense" and that the crime "involved a destructive and foreseeable impact on persons other than the victim." CP 781–82. But those findings alone did not permit an exceptional sentence. Instead, both RCW 9.94A.535 and RCW 9.94A.537(6) required the court to make an additional judicial determination "considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." *See also* RP 3572 (court finding "[s]ubstantial and compelling interests exist for departing from the presumptive range.") The court was then required to enter written findings of fact. RCW

9.94A.535; *State v. Friedlund*, 182 Wn.2d 388, 390–91, 341 P.3d 280 (2015); CP 870–71 (written findings).

The critical flaw in both Florida and Washington's statutory schemes is that the jury's verdict *alone* cannot support a greater sentence. Instead, each scheme requires the court to make a factual finding *beyond* the jury's verdict before imposing a greater sentence. This violates the constitutional requirement that a jury find every fact that serves as a basis for sentencing beyond a reasonable doubt.

The Florida scheme in *Hurst* did not require a judge find the aggravating factor, but did require the judge to independently weigh any aggravating factor against mitigation. *Hurst*, 577 U.S. at 100. Similarly, the SRA does not permit a judge to find the existence of aggravating factor, but requires the judge alone to weigh any aggravating factor and to "*find*[], considering the purposes of this chapter, that the facts found [by the jury] are *substantial and compelling reasons* justifying an exceptional sentence." RCW 9.94A.537(6) (emphasis added).

Both statutory schemes require the judge to enter specific written findings of fact. *Hurst*, 577 at 96; RCW 9.94A.535. And both schemes hinge imposition of the greater sentence on the independent factual findings of a judge.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 303–04 (internal citations omitted) (citing 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)). As is clear from *Hurst*, the "substantial and compelling" determination is a factual determination that requires a jury determination beyond a reasonable doubt. Review is warranted on this significant question of constitutional law. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

In compliance with RAP 18.17(b), counsel certifies that this brief contains 9,468 words (word count by Microsoft Word). A motion to file an overlength petition for review is filed concurrently with this brief.

DATED this 21st day of February, 2024.

Respectfully submitted,

/s Jessica Wolfe

Jessica Wolfe
Attorney for David Morris
State Bar Number 52068
Washington Appellate Project
(91052)
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID LEE MORRIS, Appellant.	No. 83157-7-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — A jury convicted David Lee Morris of murder in the first degree with a deadly weapon enhancement for stabbing his former girlfriend, Gabrielle Garcia, in a food court in front of their five-year-old son. On appeal, Morris contends the trial court erred by (1) excluding testimony of an expert witness in violation of his right to present a defense, (2) overruling his GR 37 challenge, (3) conducting voir dire via Zoom, (4) denying his motion for mistrial, (5) giving a first aggressor jury instruction, (6) imposing an exceptional sentence, and (7) imposing a victim penalty assessment and DNA fee. Finding no error, we affirm the conviction. However, we remand for Morris to move to have the victim penalty assessment and DNA fee stricken.

FACTS

Background

David Lee Morris and Gabrielle Garcia met online and began dating in May 2012. Shortly thereafter, Garcia became pregnant. She gave birth to their son, G.M., in February 2013. At that time, Morris was an infantryman in the Army

and deployed in Afghanistan; he was still stationed there when G.M. was born. Although Morris and Garcia had been engaged when he deployed, they separated shortly after he returned in June 2013. In early 2014, Morris was stationed in Germany and stayed there until June 2015, when he was honorably discharged for unsatisfactory performance. After leaving the Army, Morris moved in with his mother in Texas.

In March 2016, Morris and Garcia began dating again and Garcia moved to Texas with G.M. to be with Morris. Six months later, they separated again and Garcia moved back to Seattle with G.M. After her return to Seattle, Garcia hired a lawyer to write a parenting plan so that she could maintain custody of G.M.

In the meantime, Morris became fixated on getting back together with Garcia, and his behavior toward her quickly escalated into obsession, harassment, and hatred. Morris was particularly jealous of Garcia's relationships with other men and he believed that her alleged promiscuity was harming G.M. Garcia started to limit her communication with Morris, and began relying on her father, Joe Garcia, as an intermediary. Despite this, Morris continued to inundate Garcia and her father with threatening text messages and e-mails.[1] By August

[1] For example, in February 2018, Morris sent the following text message to Garcia's father: "And so help me God if I see [G.M.] sitting in that strangers [sic] lap. I am tired of no say. . . . Gabby can [sleep with] half of Seattle, but this bullshit ends now sir." And in August 2018, Morris sent the following text message to Garcia's father: "I hope her cheating and avoidance due to cowardice was worth it. Three bfs in 1 year and my son has no father. . . . You have no idea how hard I've fought to keep myself from taking revenge. . . . If there is a God, may you all burn in hell."

2018, Morris's messages became even more troubling—he threatened suicide and claimed that G.M. would be "better off in foster care" than with Garcia.

In September 2018, a parenting plan was entered giving Garcia full custody of G.M. and permitting Morris to have limited phone contact and in-person visits. In October 2018, Garcia obtained an anti-harassment order to restrain Morris from continuing to contact her. The same day that the anti-harassment order was issued, Morris e-mailed Garcia about his plans to visit G.M. in Seattle. In the e-mail, he also threatened to surveil Garcia and to convey inappropriate information about her to G.M.

After a hearing in late October 2018, a permanent anti-harassment order was entered against Morris. Morris was in Seattle at that time for a scheduled visit with G.M. Unbeknownst to Garcia, Morris had been fired from his job in Texas and had planned to stay in Seattle and sleep in his car until he found work in the city.

On November 1, following a barrage of messages from Morris, Garcia reported to her lawyers and to law enforcement that Morris had violated the anti-harassment order.

On November 2, 2018, Garcia and G.M. were scheduled to meet Morris at Seattle Center for a visit. That morning, Garcia's lawyers had e-mailed Morris about his violation of the anti-harassment order and cautioned him to follow the order; Morris responded in an agitated and angry manner. Around 3:30 p.m., Garcia met Morris at the Pacific Science Center. Morris tried to talk to Garcia about their relationship but Garcia refused, and Morris got upset.

Garcia and Morris eventually left the Science Center and headed to the food court located in the Armory. At the Armory, Garcia ordered a cheese pizza at MOD Pizza for G.M. While she was ordering, G.M. came to the counter and asked Garcia to buy him a treat. When Garcia told G.M. that he needed to eat his pizza first, G.M. became upset and started yelling. Morris came over and told Garcia to "[j]ust buy [G.M.] the cake." Garcia, Morris, and G.M. then proceeded to a table to eat the pizza.

Minutes later, several Armory employees and food court patrons heard Garcia scream and witnessed Morris pinning her up against the wall, stabbing her repeatedly in the neck. G.M. was less than three feet away. Morris quickly left the building. Bystanders tried to save Garcia's life by applying pressure to her neck with towels and clothing but she later died in surgery at Harborview Medical Center.

Outside the Armory, a witness approached Morris, drawing his firearm to keep Morris from fleeing. Other witnesses told Morris to drop the knife, and Morris repeatedly told them that he had killed the woman he loved and asked that they shoot him. Another passerby pepper sprayed Morris.

Police arrived on the scene and subdued Morris. Morris immediately began to tell officers that he had murdered Garcia. Officers advised Morris of his Miranda[2] rights. Morris continued to relay details about the murder to officers, telling them that he "was trying to make her death quick" but that if Garcia

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

survived, she'd "probably use this to victimize herself the rest of her life." When a responding officer asked Morris if he understood why he'd been arrested, Morris replied: "Well, let's see here, I mean, I'm covered in blood from killing the woman I love for taking my son. I think it might be attempted murder, or possibly murder depending if she dies."

Morris was transported to an interview room at the Seattle Police Department headquarters and read his Miranda rights again. When left alone in the interview room, Morris started talking to himself about the stabbing. He ranted that he wanted "revenge" against Garcia, that she was "evil" for having an abortion, that she was promiscuous, and that she "deserved to die." When the detective returned, Morris spoke freely for several hours about his relationship problems with Garcia and his motivations for killing her. Morris told the detective that he debating killing Garcia and ultimately decided that G.M. would be better off being raised by another family. Morris also acknowledged that his son was likely traumatized; he stated that he hoped his son would either repress the events or "eventually get over it with therapy." Throughout the interview, Morris fixated on Garcia's relationships with other men and what he perceived to be promiscuity as a justification for killing her.

Morris also provided the detective a detailed account of his plan for killing Garcia. He told the detective that when he first got to the Science Center, he had "briefly thought about just taking her out right there, taking it and knifing her." Morris stated that he had "remembered all the horrible things [Garcia] had done, and how much had been cut out of [his] life." Once they got to the food court,

Morris told the detective that he "was really starting to let out [his] anger at her." He called Garcia a "whore" and told her she was being a "coward" about her anxiety. Morris also told the detective that he started seriously thinking about killing Garcia several months earlier, in April or May.

Morris explained that when Garcia got up to use the restroom, he thought she was going to call her lawyer and report him for violating the anti-harassment order. He decided then to act. Morris told the detective: "Like, okay, that's it. She's just gonna go tell some other people; I'm getting cut out of my son's life. I'm, like, all right . . . . I'm taking her out for this. I'm not going to let her get away with anything else." Morris then explained how he pulled out his knife, confronted Garcia, and started stabbing her. Morris claimed that he was "trying to be humane" and "kill her quickly," but that "no plan is perfect."

Morris was later charged with murder in the first degree with a deadly weapon enhancement. The State also alleged several aggravating factors, including that it was a crime of domestic violence, that Morris had committed it within the sight or sound of his minor child, and that the crime had a destructive and foreseeable impact on persons other than Garcia.

Pre-Trial Motions and Trial

Morris's initial defense was one of insanity. He claimed that he suffered a post-traumatic stress disorder (PTSD)-induced flashback that made it impossible for him to discern that he was stabbing Garcia and not a burka[3]-clad woman he'd

[3] A burka is a loose enveloping garment that covers the face and body and is worn in public by certain Muslim women.

encountered while deployed Afghanistan. Before trial, the State moved to exclude Morris's expert witness, Dr. Mark Whitehill, on the grounds that Dr. Whitehill was unable to testify that Morris's mental disorder met the requirements for a defense of insanity or diminished capacity. The trial court granted the motion, reasoning that because Dr. Whitehill concluded that neither defense was available to Morris, the testimony was irrelevant.

At trial, Morris proceeded on a theory of self-defense. He testified that he experienced a PTSD-induced flashback that led him to believe Garcia was a burka-wearing woman from whom he needed to protect himself and G.M. He claimed that his confessions to police were lies.

The jury rejected Morris's self-defense claim and convicted him as charged. The State requested an exceptional upward sentence, while Morris requested an exceptional downward sentence. The court imposed an exceptional upward sentence of 464 months. Morris appeals.

ANALYSIS

Exclusion of Expert Testimony and Right to Present a Defense

Morris asserts that the court erred in excluding expert testimony of Dr. Whitehill as irrelevant and that this error infringed on his constitutional right to present a defense. He maintains that Dr. Whitehill should have been allowed to testify about his PTSD and autism diagnoses because the testimony was relevant to Morris's insanity and diminished capacity defenses and theory of self-defense. He also asserts that this error led to other lay witnesses being wrongly excluded. We disagree. Because Dr. Whitehill could not testify that Morris met

the elements of either diminished capacity or insanity, the testimony was irrelevant and the court did not err by excluding it. And because Morris never asked the court to admit Dr. Whitehill's testimony in support of his self-defense theory, the court never ruled on whether the testimony was admissible for that purpose. We also conclude that Morris's right to present a defense was not violated, as Morris was still able to present his theory of the case and could have sought to introduce expert testimony related to self-defense.

We apply a two-step standard of review to determine whether an evidentiary ruling violates a defendant's Sixth Amendment right to present a defense. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). First, we review the trial court's evidentiary ruling for an abuse of discretion. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). If the ruling constitutes an abuse of discretion, we apply a harmless error analysis. Jennings, 199 Wn.2d at 59. If the error was not harmless, our analysis ends here. Jennings, 199 Wn.2d at 59.

Second, if no abuse of discretion occurred, or if the abuse of discretion was harmless error, we review de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Jennings, 199 Wn.2d at 58-59.

1. Exclusion of Dr. Whitehill's Testimony

We review a trial court's determination on the admissibility of expert testimony for an abuse of discretion. Arndt, 194 Wn.2d at 798. A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable

grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Expert testimony is admissible under ER 702 if (1) the witness qualifies as an expert, and (2) the testimony is helpful to the trier of fact. L.M. v. Hamilton, 193 Wn.2d 113, 134, 436 P.3d 803 (2019). A witness may qualify as an expert by knowledge, skill, experience, training, or education. ER 702. Expert testimony is helpful if it concerns matters outside the common knowledge of laypersons and is not otherwise misleading. State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011). Only relevant testimony is helpful to the jury. State v. Atsbeha, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001). Testimony is relevant if it tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Irrelevant evidence is not admissible. ER 402.

a. Insanity and Diminished Capacity Defenses

Here, Morris's primary defenses were that of insanity and diminished capacity. To establish insanity, he needed to prove that at the time of the murder, his mental condition prevented him from appreciating the nature, quality, or wrongfulness of his actions. RCW 9A.12.010; State v. Box, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). To establish diminished capacity, he needed to show that the alleged condition demonstrably impaired his ability to form the requisite mental intent to commit the charged crimes. State v. Thomas, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). A mental disorder may amount to insanity and also have a specific effect on the defendant's capacity to achieve a culpable

mental state but diminished capacity does not necessarily follow from insanity. State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989).

In order for an expert's testimony to be helpful where a defendant raises an insanity or diminished capacity defense, it is not enough that the defendant be diagnosed as suffering from a particular mental condition. State v. Greene, 139 Wn.2d 64, 73-74, 984 P.2d 1024 (1999). Rather, "[t]he diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." Greene, 139 Wn.2d at 74. "The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged." Atsbeha, 142 Wn.2d at 921. "Under this standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question—only that it could have, and if so, how that disorder operates." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000).

For example, in Mitchell, the defendant was charged with third degree assault after punching a police officer. 102 Wn. App. at 23. In a pretrial hearing, the defendant's expert testified that, at the time of the offense, the defendant suffered from paranoid schizophrenia, a disorder capable of diminishing his capacity to know that the individuals he was interacting with were police officers. Mitchell, 102 Wn. App. at 26. But the expert could not say with reasonable certainty that the defendant's mental disorder actually caused his capacity to be diminished at the time of the incident, only that it was possible. Mitchell, 102 Wn.

App. at 26. The trial court excluded the testimony, concluding that an explanation of the disorder would only confuse the jury and invite them to speculate unless the expert could affirmatively state that the defendant's disorder was actually affecting his conduct at the time of the incident. Mitchell, 102 Wn. App. at 27. On appeal, this court concluded that the trial court erroneously excluded the expert's testimony because it would have helped the jury understand the dynamics of the defendant's mental disorder and helped explain an otherwise bizarre incident. Mitchell, 102 Wn. App. at 26-27. The court noted that the "jury should be allowed to determine whether Mitchell was experiencing delusions at the time of his arrest even if [the expert] could only say it was possible." Mitchell, 102 Wn. App. at 28.

In contrast, in Greene, our Supreme Court concluded that the trial court properly excluded expert testimony concerning the defendant's dissociative identity disorder (DID) as irrelevant because, given the state of the relevant science at the time, "it was not possible to reliably connect the symptoms of DID to the sanity or mental capacity of the defendant." 139 Wn.2d at 79. The court explained that there were various approaches to determining whether an individual suffering from DID was legally insane at the time of committing the offense, but that "none of the various approaches ha[d] been accepted as producing results capable of reliably helping to resolve questions regarding sanity and/or mental capacity in any legal sense." Greene, 139 Wn.2d at 77.

Here, Dr. Whitehill diagnosed Morris with PTSD and autism. Dr. Whitehill concluded that Morris's PTSD manifested in the following ways: anxious arousal

(e.g., worrying about things); depression (e.g., feeling empty inside); intrusive experiences (e.g., nightmares or bad dreams); and defensive avoidance (e.g., trying to block out certain memories). Dr. Whitehill noted that Morris tested very well on a screen for neurological difficulties, placing him in the range of "[v]ery low probability of impairment." As to Morris's ability to tell right from wrong, Dr. Whitehill opined that there was no evidence to support Morris's assertion that he suffered a PTSD-induced flashback and that Morris's subsequent justifications for stabbing Garcia undercut his claim that he had experienced a flashback. As to Morris's capacity to understand the nature and quality of the acts committed, Dr. Whitehill opined that "there is no question that Mr. Morris was aware that he was stabbing." Dr. Whitehill noted that this conclusion was also supported by Morris's statements to police and his musings about the murder when left alone in the interview room.

As to Morris's defense of diminished capacity, Dr. Whitehill opined that such a defense was not warranted regardless of whether Morris experienced a PTSD-induced flashback or not because Morris intended to stab someone either way.

On these facts, the trial court did not err in excluding Dr. Whitehill's testimony as it related to Morris's defenses of insanity or diminished capacity. Dr. Whitehill's conclusion that Morris had the capacity to understand the nature of his actions is fatal to Morris's claim that the testimony was relevant. Even if Dr. Whitehill testified that it was possible Morris experienced a flashback that impeded his ability to tell right from wrong, Dr. Whitehill could not testify that

Morris lacked the capacity to understand the nature and quality of his actions. Similarly, regardless of whether Morris experienced a flashback or not, Dr. Whitehill could not testify that he lacked the intent to commit the offense. Because Dr. Whitehill could not reliably connect the symptoms of Morris's PTSD diagnosis with insanity or diminished capacity, the trial court properly excluded the testimony as irrelevant.

b. Self-Defense

Morris also argues that Dr. Whitehill's testimony was relevant to his theory of self-defense. He contends that Dr. Whitehill should have been able to testify as to his diagnoses of PTSD and autism and that the exclusion of Dr. Whitehill as a witness led to other witness's testimony being erroneously excluded. But because Morris did not ask the court to admit Dr. Whitehill's testimony to support his self-defense claim, the court did not rule on whether it was admissible. Therefore, this issue is not properly before this court.

In general, mental disorders, such as PTSD, are beyond the ordinary understanding of laypersons and require explanation via expert testimony. State v. Green, 182 Wn. App. 133, 146, 328 P.3d 988 (2014). For example, a layperson might not understand that PTSD can induce a host of lesser known effects, like a dissociative state or a flashback. Green, 182 Wn. App. at 146-47; State v. Bottrell, 103 Wn. App. 706, 715, 14 P.3d 164 (2000).

Here, after the court excluded Dr. Whitehill's testimony as to insanity and diminished capacity, Morris pursued a theory of self-defense. In support of this theory, Morris planned to elicit testimony from jail health staff and Seattle Police

Officer Brian Muoio that Morris was experiencing PTSD symptoms after the murder. During motions in limine, the State moved to exclude testimony of the jail health staff, contending it was inadmissible without supporting expert testimony about PTSD. Defense counsel had the following colloquy with the court about the jail health staff witnesses:

> [DEFENSE]: There is no evidentiary requirement. This is not a diminished capacity defense. And there's no evidentiary requirement that we present a mental health expert witness for Mr. Morris to be able to testify about PTSD or his subjective flashback.
>
> I think there would be some minimal observations about Mr. Morris's demeanor in their interactions.
>
> The jail health staff would likely testify about their actions in relation to Mr. Morris—
>
> [COURT]: Well, let's—before we move onto actions, what about the demeanor and how does it relate to the events at issue in this case?
>
> [DEFENSE]: So, Mr. Morris's demeanor when he was relating symptoms of mental health to them; whether or not his demeanor, I guess, was consistent with his recounting of any mental health symptoms.
>
> [COURT]: But, do I understand correctly that you are not going to be calling these witnesses with respect to any kind of diagnosis or any other expert opinion?
>
> [DEFENSE]: There will be no expert opinion.

Before the court ruled on the admissibility of the jail health staff testimony, it followed up with defense counsel about expert testimony:

> [COURT]: Just to confirm: you're not going to be asking any witness for a diagnosis or any other medical opinion; is that correct?
>
> [DEFENSE]: We are not asking for any medical opinion, and I think it's safe to say we're not going to ask them to opine about his diagnosis.

The court then excluded the testimony of the jail health staff, reasoning that Morris needed to proffer an expert opinion to support his PTSD diagnosis before lay witnesses could testify about his PTSD. The court also noted that Morris could move for reconsideration of the court's ruling if Morris was able to provide additional evidence that would directly link his PTSD diagnosis to his self-defense claim.

Later at trial, the State objected to the admission of Officer Muoio's testimony about PTSD, arguing that it lacked foundation without underlying expert testimony about Morris's PTSD diagnosis. The court agreed, explaining that expert testimony was needed to establish an adequate foundation as to Morris's diagnosis.

The court did not err in excluding the jail health staff or officer's testimony on the basis that such testimony lacked foundation. It is well-established that the intricacies of a PTSD diagnosis are outside the understanding of laypeople. Thus, Morris needed to provide expert testimony as to his PTSD diagnosis before proffering lay witness testimony as to the same. But because Morris never asked the court to rule on the admissibility of Dr. Whitehill's testimony as it related to self-defense, the court did not rule on whether the testimony was admissible for that purpose and no ruling exists about the exclusion of an expert witness for us to review on appeal.

2. Right to Present a Defense

Because the court did not err in excluding Dr. Whitehill's testimony as it related to Morris's insanity and diminished capacity defenses, we next consider

whether the exclusion of the testimony violated Morris's right to present a defense. We conclude that it did not.

Criminal defendants have a right to present a defense guaranteed by both the federal and state constitutions. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Jennings, 199 Wn.2d at 63. But this right is not absolute; for example, defendants only have a right to present relevant evidence, not irrelevant evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). And when a defendant has an opportunity to present their theory of the case, the exclusion of some aspects of their proffered evidence is not a violation of their constitutional right to present a defense. State v. Ritchie, 24 Wn. App. 2d 618, 635, 520 P.3d 1105 (2022), review denied, 1 Wn.3d 1005, 526 P.3d 851 (2023).

Here, Morris contends that he was "forbidden from eliciting any corroborating testimony about his mental state at the time of the stabbing." This is inaccurate. Although the court excluded Dr. Whitehill's testimony for the purposes of Morris's insanity and diminished capacity defenses, it did not prevent Morris from presenting another expert to testify about how his PTSD diagnosis related to his theory of self-defense. Rather, the court repeatedly asked Morris's counsel if it would like to proffer expert testimony as to PTSD and Morris's counsel expressly told the court that they did not plan to offer such expert testimony. Without expert testimony to properly explain the PTSD diagnosis, lay witness testimony about Morris's PTSD-related symptoms was inadmissible and properly excluded. Green, 182 Wn. App. at 146 (expert testimony needed to explain PTSD); ER 701 (lay witness testimony cannot be based on scientific or

other specialized knowledge). We conclude that Morris's right to present a defense was not violated.

GR 37 Challenge

Morris contends that the State engaged in a pattern of gender discrimination in violation of GR 37 by using seven of its eight peremptory strikes against men. He also argues that the court incorrectly applied Batson[4] by (1) not requiring the State to articulate a gender-neutral reason for striking each of the seven jurors, and (2) not assessing whether an objective observer could view gender as a factor for each of the seven peremptory challenges, only the one challenge that Morris objected to. We disagree that GR 37 applies to gender-based challenges. We also disagree that the court found that a pattern of discrimination existed; therefore, the State did not need to articulate a gender-neutral reason for the previous jurors. And because the State set forth a gender-neutral reason for striking the challenged juror, we conclude that the court did not err in overruling Morris's GR 37 challenge.

1. Waiver

As a preliminary matter, we must determine whether Morris properly preserved this issue for review. The State maintains that Morris did not ask the trial court to reconsider its first six peremptory challenges nor did he request that the court apply an objective observer standard to the first six peremptory challenges and that these arguments are waived on appeal. We disagree.

[4] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In general, we will not consider issues raised for the first time on appeal. RAP 2.5(a). Here, Morris objected to the State's alleged pattern of excluding male jurors. This objection also preserved Morris's argument that the court failed to apply the right standard to each of the challenges. By highlighting what he asserted to be a pattern and specifying the number of stricken jurors, Morris implicitly challenged each of the State's earlier peremptory challenges against men. The argument was not waived.

2. GR 37 and Gender Bias

We now turn to Morris's GR 37 argument and first address whether GR 37 applies to claims of gender discrimination. We conclude that it does not.

Our federal and state constitutions guarantee criminal defendants the right to a trial by impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. In furtherance of this right, parties may exercise for cause and peremptory challenges to excuse potentially unfit jurors. RCW 4.44.130. However, peremptory challenges may not be used to exclude potential jurors on the basis of race or ethnicity. Batson, 476 U.S. at 91.

When an objection to the use of a peremptory challenge is raised, the court applies the three-step Batson test. First, the party challenging the strike must make a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. Second, if a prima facie case is made, the burden shifts to the striking party to provide an adequate, race-neutral justification for the strike. City of Seattle v. Erickson, 188 Wn.2d 721, 726-27, 398 P.3d 1124

(2017). Third, if the party making the strike provides a race-neutral reason, the court must then weigh all the relevant circumstances to decide if the proffered reasons are pretextual and give rise to an inference of discriminatory intent. Batson, 476 U.S. at 97-98; Flowers v. Mississippi, 588 U.S. __, 139 S. Ct. 2228, 2241, 204 L. Ed. 2d 638 (2019). "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' " Rice v. Collins, 546 U.S. 333, 388, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)). On review, we afford "a high level of deference to the trial court's determination of discrimination" and the trial court's decision will only be reversed if the appellant can show it was clearly erroneous. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008); Erickson, 188 Wn.2d at 727.

In the early 1990s, this court and the Supreme Court extended Batson's application to gender-based discrimination in the use of peremptory challenges. State v. Burch, 65 Wn. App. 828, 830 P.2d 357 (1992); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

In 2017, recognizing the shortcomings of the Batson test in addressing racial bias in jury selection, our State Supreme Court adopted GR 37, which modifies the third Batson step. Instead of the court determining whether a challenge was motivated by racial animus, GR 37 requires the court to assess whether "an objective observer could view race or ethnicity as a factor in the use

of the peremptory challenge." GR 37(e). The rule defines an "objective observer" as someone who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f). If the court finds that an objective observer could view race or ethnicity as a factor, the peremptory challenge must be denied. State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018). But although GR 37 expands the Batson test, the rule is limited to bias and discrimination based on race and ethnicity. State v. Brown, 21 Wn. App. 2d 541, 552, 506 P.3d 1258, review denied, 199 Wn.2d 1029, 514 P.3d 641 (2022).

Here, Morris's assertion that Jefferson expanded the GR 37 framework to include gender is unavailing. The Jefferson court did not consider whether GR 37 applied to gender and did not state that GR 37 applied to all discrimination traditionally subject to Batson. Rather, the court's analysis was explicitly limited to race and ethnicity. See Jefferson, 192 Wn.2d at 239 ("Our current Batson test does not sufficiently address the issue of *race* discrimination in juror selection." (emphasis added)). And the court was clear as to the purpose of GR 37: "The evil of *racial* discrimination is still the evil this rule seeks to eradicate." Jefferson, 192 Wn.2d at 249 (emphasis added). No case since Jefferson has applied GR 37 in a gender discrimination context. See, e.g., State v. Listoe, 15 Wn. App. 2d 308, 333 n.21, 475 P.3d 534 (2020) (Melnick, J., concurring) ("In addition, even though GR 37 is not applicable to peremptory challenges that implicate gender-based discrimination, Batson applies."); Brown, 21 Wn. App. 2d at 554

("Jefferson's test was explicitly limited to race and ethnicity. . . . GR 37 does not apply to gender or any other protected status covered by the equal protection clause and our state constitution.").

Moreover, the final report on GR 37 makes clear that the rule does not apply to gender. See PROPOSED NEW GR 37—JURY SELECTION WORKGROUP, FINAL REPORT.[5] The report explicitly states that GR 37 does not apply to issues of gender and sexual orientation because the workgroup had not yet discussed those categories or classifications. FINAL REPORT at 5. The workgroup members "agreed that while gender and sexual orientation should be included in the proposed rule at a later time after thoughtful consideration, in order to meet the court's requested time frame and objective, it was necessary to postpone further discussion on gender and sexual orientation." FINAL REPORT at 5. We are unconvinced that GR 37 applies to gender-based challenges and conclude that the objective observer standard does not apply in the present case.

3. Application of *Batson*

Because the objective observer standard does not apply here, Morris's claim of gender discrimination is properly analyzed under the traditional Batson test. Under that test, we conclude that Morris fails to prove that the strikes were motivated by gender-based animus.[6]

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[5] https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf

[6] We note, too, that most cases addressing gender bias in jury selection focus on the exclusion of female jurors, not male jurors. See, e.g., Burch, 65 Wn. App. at 837 (concluding that gender-based peremptory challenges are an obvious denial of female jurors' equal rights); Brown, 21 Wn. App. 2d at 555-56

As discussed above, once a Batson challenge is raised, the court applies a three-part test. First, the objecting party must demonstrate a prima facie case of purposeful discrimination. Burch, 65 Wn. App. at 840. This prong is met by showing that the peremptory challenge was exercised against a member of a constitutionally protected group and that "other relevant circumstances" raise an inference that the challenge was based on that group membership. Batson, 476 U.S. at 96. Relevant circumstances can include a " 'pattern' " of strikes against a particular constitutionally cognizable group. Burch, 65 Wn. App. at 840 (quoting Batson, 476 U.S. at 96-97). But "a 'pattern of strikes' is only found when '[t]he strikes . . . affect those members to such a degree *or with such a lack of apparent nonracial explanation as to suggest the possibility of racial motivation*.' " State v. Wright, 78 Wn. App. 93, 102, 896 P.2d 713 (1995) (quoting People v. Hope, 137 Ill.2d 430, 462-63, 560 N.E.2d 849, 168 Ill. Dec. 252 (1990)).

Second, if the objecting party establishes a prima facie case, the burden then shifts to the striking party to provide a gender-neutral reason for striking the juror. Burch, 65 Wn. App. at 840. The neutral explanation must be "clear and reasonably specific." Batson, 476 U.S. at 98 n. 20 (quoting Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Finally, the court must determine from the totality of the circumstances whether the objecting party has established purposeful discrimination. Jefferson, 192 Wn.2d at 232. Because these findings depend on the court's determination of

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(examining exclusion of female jurors for gender bias); but cf. J.E.B., 511 U.S. at 130 (determining that use of peremptory challenges to remove all male jurors from venire was discriminatory).

the credibility of the attorneys and jurors, we review them for clear error. Brown, 21 Wn. App. 2d at 558.

At the outset, we acknowledge that the trial court engaged in these steps out of order. Nevertheless, we agree with the court's determination that Morris failed to carry his burden of proving purposeful discrimination.

After Morris alleged that the State engaged in a pattern of gender discrimination by striking male jurors, the court immediately asked the State to articulate a gender-neutral reason for striking juror 115, the last juror in the alleged pattern. The State explained that the juror indicated he received his news from a far-right, libertarian blog that had been banned in some countries for its extremist views and from a "Russian State controlled international television network." Morris then offered additional argument as to why he believed a pattern of discrimination existed. The court overruled the challenge. A while later, the State reminded the court that it had not yet ruled as to whether Morris had established a prima facie case that a pattern of discrimination existed. The court then stated: "I think seven out of eight *could* be a pattern; but—and so, I believe the Rule requires me to consider the rationale given; but, I continue to rule—to overrule the objection." (Emphasis added.)

Typically, to avoid collapsing the Batson test, the court should first make a preliminary determination that the challenger has demonstrated a prima facie showing of discrimination before eliciting the State's gender-neutral explanation. Wright, 78 Wn. App. at 100-01. When the State provides an explanation and the court rules on the ultimate question of discrimination, the preliminary prima facie

case is unnecessary. Hicks, 163 Wn.2d at 492. In the instant case, however, the State's explanation as to juror 115 did not render the prima facie case moot. Although the court should have asked Morris for further proof of a pattern before eliciting a response from the State, we disagree that this misstep rendered the prima facie case moot. While the court indicated that there *could* be a pattern, it then, in direct response to the State's inquiry about ruling on whether Morris had established a prima facie case concerning a pattern of discrimination, stated,

> I think seven out of eight could be a pattern; but—and so, I believe the Rule requires me to consider the rationale given; but, I continue to rule—to overrule the objection because political beliefs are not a protected category. Peremptories have a long-standing—the long-standing tradition of peremptory challenges in our system of justice is that unless—unless it's prohibited due to an improper motive based on excluding members of a protected category, in general, Counsel, exercise at their discretion to benefit their client's position.

While the court indicated it *could* be a pattern, we conclude that the above statement and the court's actions are inconsistent with the court having made a determination that a prima facie showing of a pattern was made.

In any event, the circumstances of the present case do not support a conclusion that the court's determination was clear error. Although the State's use of seven peremptory challenge against men could, at first glance, appear disproportionate, the State also struck a female juror. And the female juror was stricken after the State had exercised four peremptory strikes against male jurors but before the final three strikes. Of the seven male jurors stricken by the State, three were replaced by other male jurors whom the State did not attempt to strike. The State also waived its last peremptory challenge, which could have

been used to remove another male juror. Moreover, the State accepted the jury on two separate occasions: once after it had struck only two men and once after it had struck six men and one woman. On both occasions, the jury consisted of six men and ten women. We also note that Morris, too, struck seven male jurors. At the end of voir dire, there were six men and ten women on the final jury. The original venire consisted of 130 people, 66 men, 64 women, and 1 non-binary person.

On appeal, Morris contends that the court erred by not requiring the State to give a neutral explanation for each of the seven male jurors in the alleged pattern. But aside from the fact that seven male jurors were struck, Morris does not provide any other relevant circumstances that would indicate bias or discrimination. Without more, we are unconvinced that a discriminatory purpose existed or that the court committed clear error in finding none. Finally, we note that venires commonly consist of only male and female jurors. That a "pattern" emerges in a party's use of peremptory challenges against a specific gender is not enough on its own to constitute discriminatory intent; such a "pattern" may very well be random. To establish a prima facie case, the strikes must be accompanied by relevant circumstances indicative of discrimination, such as discriminatory comments by the party exercising the challenge.[7] Here, the record

[7] Relying on Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), Morris also maintains that political affiliation is constitutionally suspect and that the court erred in concluding that the State's explanation for striking juror 115 was not discriminatory. We disagree. The Zant court discussed constitutionally impermissible factors to consider at sentencing—not jury selection—and only stated that the political affiliation of the *defendant* should not be relied upon. 426 U.S. at 885 (". . . factors that are constitutionally

supports that the court properly reviewed the alleged pattern and concluded that a discriminatory pattern did not exist. We conclude that the court's finding was not clearly erroneous.

Jury Selection

Morris maintains that by conducting voir dire via Zoom, the court violated his constitutional right under article I, section 21 of the Washington Constitution to in-person jury selection. He also argues that Zoom voir dire violated his ability to select a fair jury and his right to be present. Finally, he contends that the trial court violated a local rule by proceeding with jury selection over his objection. We disagree.

A trial court has wide discretion in conducting voir dire. State v. Wade, __ Wn. App. 2d __, 534 P.3d 1221, 1229 (2023). Absent an abuse of discretion and a showing of prejudice, the trial court's ruling on the scope and content of voir dire will not be disturbed on appeal. Wade, 534 P.3d at 1229. The court abuses its discretion if its decision is manifestly unreasonable, rests on untenable grounds, or is made for untenable reasons. Wade, 534 P.3d at 1229.

1. Article 1, Section 21

This court recently addressed whether article 1, section 21 of our state constitution applied to jury selection and concluded it did not. State v. Booth, 24 Wn. App. 2d 586, 604-05, 521 P.3d 196, review denied, 1 Wn.3d 1006, 526 P.3d

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impermissible or totally irrelevant to the sentencing process, such as for example, the race, religion, or political affiliation of the *defendant* . . ." (emphasis added)). Zant does not address whether the political affiliation of jurors is an acceptable basis on which to exercise a peremptory strike.

849 (2022). In Booth, we engaged in a Gunwall[8] analysis to address whether article I, sections 21 and 22 of our state constitution protected the use of peremptory challenges in criminal jury selection proceedings. 24 Wn. App. 2d at 601-02. We explained that article I, section 21 governs a litigant's right to a jury trial while article I, section 22 governs jury selection and that the two sections serve complementary roles. Booth, 24 Wn. App. 2d at 604. We concluded that article 1, section 21 did not apply to jury selection and to interpret it as such would render article I, section 22's protections superfluous. Booth, 24 Wn. App. 2d at 604-05.

Booth controls in the present case. Because article 1, section 21 does not govern jury selection procedures, we disagree that it necessitates in-person jury selection.

2. Ability to Select a Fair and Impartial Jury

Next, Morris asserts that conducting voir dire via Zoom violated his right to a fair and impartial jury because he was unable to properly assess the jurors' demeanor or credibility. He also contends that remote voir dire prevented the potential jurors from understanding the significance of the proceedings because they could not feel the gravitas of being present in a courthouse. Finally, he maintains that remote voir dire resulted in unequal juror experiences due to variances in the quality and size of the potential jurors' video screens. We are unpersuaded.

[8] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Our federal and state constitutions guarantee criminal defendants the right to an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. This guarantee includes "the right to have a jury drawn from a fair cross section of the community." State v. Meza, 22 Wn. App. 2d 514, 533, 512 P.3d 608, review denied, 200 Wn.2d 1021, 520 P.3d 978 (2022). Voir dire is central to protecting this right, because it permits the parties to "ask questions and engage in discussion with potential jurors to draw out potential bias." State v. Bell, 26 Wn. App. 2d 821, 829, 529 P.3d 448, review denied, 1 Wn.3d 1035, 536 P.3d 181 (2023). "But voir dire is more than just a question and answer session," it also allows the parties to assess a potential juror's credibility via nonverbal cues, which are often more indicative of a juror's real character. Bell, 26 Wn. App. 2d at 829. The scope of voir dire should be coextensive with its purpose, which " 'is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges.' " State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (quoting State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984)).

The trial court's broad discretion in conducting voir dire is limited "only by the need to assure a fair trial by an impartial jury." State v. Brady, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003). The court abuses its discretion if it "adopts a view that no reasonable person would take." State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

In response to the COVID-19[9] pandemic, Washington courts instituted a variety of practices to ensure that trials could continue safely. Our State Supreme Court issued an order requiring courts to "conduct all [jury trial] proceedings consistent with the most protective applicable public health guidance in their jurisdiction." Ord. re: Modification of Jury Trial Proc., In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, at 3 (Wash. June 18, 2020) https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Jury%20Resumption%20Order%20061820.pdf [https://perma.cc/S5YJ-BWPR]. It also noted that "[t]he use of remote technology in jury selection, including use of video for voir dire in criminal and civil trials, is encouraged to reduce the risk of coronavirus exposure." Ord. re: Modification of Jury Trial Proc. at 3. King County Superior Court issued a similar order authorizing in-person criminal jury trials with remote voir dire. Emergency Ord. #27 re: Crim. Cases, No. 21-0-12050-3, Suspension of In-Person Criminal Jury Trials Through February 12, 2021 (King County Super. Ct., Wash. Jan. 22, 2021) https://kingcounty.gov/~/media/courts/superior-court/docs/COVID-19/FILED-Emergency-Order27-KCSC-210120503.ashx?la=en [https://perma.cc/X2JE-4YGV].

Morris's arguments about the burdens of Zoom voir dire are without merit. At the time voir dire took place, masking was still mandatory in King County. Had voir dire been conducted in-person, the venire would have been masked and

[9] COVID-19 is the World Health Organization's official name for "coronavirus disease 2019," a severe, highly contagious respiratory illness that quickly spread throughout the world after being discovered in December 2019.

Morris likely would have had more difficulty ascertaining the jurors' demeanor. In contrast, on Zoom, the jurors did not need to be masked and Morris could easily see their full faces on his computer screen. Zoom voir dire also permitted Morris to see each of the jurors clearly, as opposed to in-person voir dire where jurors could be in a faraway row, or hidden by other jurors surrounding them. Moreover, the jurors were given clear instructions on remote voir dire procedures to ensure that they were fully engaged and fully attentive to the process.

Given that voir dire took place at the height of the COVID-19 pandemic, we disagree that the court's decision to conduct voir dire remotely was an abuse of discretion. The court implemented reasonable voir dire procedures to protect the health and safety of all involved parties. These procedures did not violate Morris's ability to select to a fair and impartial jury.

3. Right to be Present

Morris also maintains that remote voir dire violated his right to be present. We are unconvinced.

Criminal defendants have the right to be present at all critical stages of trial, including voir dire. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Whether this right has been violated is a question of law that we review de novo. Irby, 170 Wn.2d at 880.

In accordance with orders from King County Superior Court and our State Supreme Court, the trial court conducted voir dire remotely via Zoom. The court noted that voir dire would not exclude anyone who did not have access to internet and that anyone who wished to attend voir dire in-person could do so.

Morris cites no authority for his contention that the right to be present means the right to be present in-person with the entire venire. Nor does he explain specifically how his right to be present was "burdened" by remote voir dire. As Morris was able to attend voir dire in-person himself and was able to view the venire via Zoom, we conclude that his right to be present was not violated.

4. Violation of LCrR 4.11

Lastly, Morris claims that the trial court violated LCrR 4.11(b) because the parties did not agree to remote voir dire. This court recently rejected a similar claim in Wade.

In Wade, the defendant objected to remote voir dire and later claimed that the trial court violated LCrR 4.11(b) by proceeding with remote voir dire over his objection. 534 P.3d at 1230. On appeal, we explained that the trial court properly relied on the Supreme Court's October 2020 and June 2020 Orders and King County Superior Court Emergency Order #27 when it allowed for remote jury selection. Wade, 534 P.3d at 1231. We concluded that the trial court did not violate LCrR 4.11(b) because the Supreme Court's June 2020 order recognized that courts would need to adopt, modify, or suspend rules like LCrR 4.11 during the pandemic. Wade, 534 P.3d at 1231. We also noted that " 'local rules may not be applied in a manner inconsistent with the civil rules' promulgated by the Supreme Court." Wade, 534 P.3d at 1231 (quoting Jones v. City of Seattle, 179 Wn.2d 322, 344, 314 P.3d 380 (2013)).

The same holds true in the present case. When this case proceeded to trial in April 2021, all of the emergency orders at issue in Wade were still in effect. Therefore, our analysis in Wade applies here and we conclude that the court did not violate LCrR 4.11(b) by complying with the courts' orders and conducting voir dire via Zoom.

Motion for Mistrial

Morris asserts that the court abused its discretion in denying his motion for a mistrial after a witness stated that they'd seen Morris in an orange jumpsuit before. Because the comment did not result in prejudice, we disagree.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. State v. Barry, 184 Wn. App. 790, 797, 339 P.3d 200 (2014). A trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." Emery, 174 Wn.2d at 765. We consider three factors in determining whether an irregularity warrants a new trial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and (3) whether an instruction would cure the irregularity. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011). We presume that jurors follow instructions and disregard improper evidence. State v. Christian, 18 Wn. App. 2d 185, 199, 489 P.3d 657, review denied, 198 Wn.2d 1024, 497 P.3d 394 (2021).

Morris challenges the following exchange with Joe Garcia, Gabrielle Garcia's father, in which the witness was asked to identify Morris in the courtroom:

> [STATE]: And if you're not able to, that's okay.
>
> [GARCIA]: Well, I should be able to, I sat in a bunch of hearings in the children's side.
>
> [STATE]: Well—
>
> [GARCIA]: —and he was in an orange jumpsuit, so—
>
> [STATE]: Joe—Mr. Garcia—
>
> [GARCIA]: Okay.
>
> [STATE]: —if you're not able to make the identification, that's okay.
>
> [GARCIA]: Okay. All right.
>
> [DEFENSE]: Objection.
>
> [COURT]: Yes. Ladies and gentlemen, please disregard the last statement by the witness.

Condon is instructive here. In Condon, a witness made three separate statements that the defendant had been in jail, in violation of a ruling in limine. 72 Wn. App. 638, 648, 865 P.2d 521 (1993). The witness testified that the defendant called her "when he was getting out of jail" and that he had asked her to pick him up from jail in Seattle. Condon, 72 Wn. App. at 648. Later, on cross-examination, the witness testified, "Yeah. I didn't tell her where I was picking him up. I'm not allowed to say that, but he was in a desperate situation that night." Condon, 72 Wn. App. at 648. The trial court granted the defendant's motion to strike the comments, denied the defendant's subsequent motion for a mistrial, and instructed the jury to disregard any references that the defendant was in jail. Condon, 72 Wn. App. at 648. This court upheld the trial court's ruling on appeal,

reasoning that the fact the defendant had been in jail did not mean he was guilty. Condon, 72 Wn. App. at 649. We also determined that the statements were not serious enough to warrant a mistrial and that the court's instruction was sufficient to cure any potential prejudice. Condon, 72 Wn. App. at 649.

Like in Condon, the court granted Morris's objection, struck the statements, and gave a curative instruction to the jury. We also note that the irregularity in the present case is less serious than that in Condon. Here, the witness made one passing statement, not three, that Morris had been in an orange jumpsuit. This comment was not prejudicial. Even though some jurors may have inferred that Morris was in custody, that would not be unusual given the nature of the charges. And nothing about the witness's reference to "a bunch of hearings" indicated how long Morris may have been in custody. We conclude that the court properly denied Morris's motion for mistrial.

First Aggressor Jury Instruction

Morris claims that the court erred in giving a first aggressor instruction because it relieved the State of its burden of proving the absence of self-defense. Because such an instruction does not shift the burden of proof away from the State, we disagree.

A party is entitled to an instruction if it is "supported by substantial evidence in the record." State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). We review de novo whether sufficient evidence exists to support an instruction, viewing the evidence in the light most favorable to the party

requesting the instruction. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

"Generally, a slayer may not claim self-defense to justify a killing when they were the aggressor or provoked the confrontation." State v. Hatt, 11 Wn. App. 2d 113, 135, 452 P.3d 577 (2019). A first aggressor jury instruction is appropriate where "there is credible evidence from which the jury can reasonably determine that the defendant provoked the need to act in self-defense" or "if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). A first aggressor instruction is also appropriate if "the evidence shows that the defendant made the first move by drawing a weapon." State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). But such an instruction is not warranted "where the defendant undisputedly engaged in a single aggressive act and that act was the sole basis for the charged offense." State v. Grott, 195 Wn.2d 256, 272, 458 P.3d 750 (2020).

Contrary to Morris's assertion, first aggressor instructions do not relieve the State of its burden of proof. Our Supreme Court clarified recently that "first aggressor instructions are used to explain to the jury one way in which the State may *meet* its burden: by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." Grott, 195 Wn.2d at 268. And here, the jury instructions stated that the State needed to prove the absence of self-defense beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the State, a first aggressor instruction was warranted because there was some conflicting evidence as to who precipitated the events and there was evidence that Morris made the first move by drawing a knife. On the day of the murder, a folding pocketknife was found in Garcia's jacket pocket. Morris also sustained a cut on his finger. When asked about the cut during his police interview, Morris told detectives that Garcia did not have a knife that day but that "she had been armed before" and that he "didn't really think she would ever try to stab [him]."

But at trial, Morris's story changed. He cross-examined one of the investigating detectives at length about the pocketknife found in Garcia's jacket, asking about the blade length and whether the user could "open it just one-handed." Morris then testified that, on the day of the murder, Garcia "had some big, dragon, shiny knife thing" and that he saw it "[a] few times." He also testified that Garcia kept "drawing [the blade] out," that she was shuffling things in her backpack, and that Garcia was fidgeting. He stated that he was "scared."

Morris also testified that Garcia's actions at the food court made him anxious:

> She—she had the baggy clothing and the phone fidgeting thing, and she had scratched herself a little. . . . I started panicking. I think I was mumbling to myself or something, I'm not certain. And that's—that's when the thing happened.
>
> She—she stood up and was starting to move a little bit and I . . . I freaked out. I got up and flicked the knife really quickly, and then she—she took one step. I don't know which leg. I don't know. She took some step. And then I started moving at her, and she screamed, obviously, and then this—this hook stabbing thing happened.

Because there was conflicting evidence as to who initiated the events—even though Morris asserts he was not implying that Garcia was the first aggressor—and there was evidence that Morris made the first move, we conclude that substantial evidence supported a first aggressor instruction. We also reject Morris's novel argument on appeal that there was no evidence indicating Morris was not the sole aggressor.

Imposition of Exceptional Sentence

Morris asserts that the court violated the Sixth and Fourteenth Amendments to the United States Constitution by making a factual determination that facts found by the jury were substantial and compelling reasons justifying an exceptional sentence. Our case law mandates a different result. This court considered the same argument in State v. Sage, 1 Wn. App. 2d 685, 407 P.3d 359 (2017), and determined that this inquiry is a legal one.

Whether the imposition of an exceptional sentence violates the Sixth and Fourteenth Amendments is a question of law that we review de novo. State v. Alvarado, 164 Wn.2d 556, 563, 192 P.3d 345 (2008).

The Sixth Amendment guarantees criminal defendants a right to trial by jury. This right, in conjunction with the due process clause of the Fourteenth Amendment, requires that each element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (plurality opinion). Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum is an "element" that must be submitted to the jury and proved beyond a

reasonable doubt. Hurst v. Florida, 577 U.S. 92, 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis omitted).

For the court to impose an exceptional sentence, the jury must first find "unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence" exist. RCW 9.94A.537(6). Then, the court must "find[], considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). The court must set forth its reasons for imposing an exceptional sentence in written findings of fact and conclusions of law. RCW 9.94A.535.

Despite settled law to the contrary, Morris contends that the court engaged in impermissible fact finding by concluding that there are substantial and compelling reasons justifying an exceptional sentence. And although this court rejected the same argument in Sage, Morris claims that the court in Sage did not fully explain its reasoning. We disagree.

Like Morris, the defendant in Sage argued that the trial court engaged in fact finding, in violation of his Sixth Amendment right to a jury trial, by entering an exceptional sentence. 1 Wn. App. 2d at 707. This court disagreed, explaining that

> "once the jury by special verdict makes the factual determination whether aggravating circumstances have been proved beyond a reasonable doubt, '[t]he trial judge [is] left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.' "

1 Wn. App. 2d at 708 (quoting State v. Suleiman, 158 Wn.2d 280, 290-91, 291 n.3, 143 P.3d 795 (2006)).

The Sage court also rejected Morris's argument that Washington's sentencing scheme is analogous to the sentencing scheme deemed unconstitutional by the Supreme Court in Hurst:

> In Hurst, the Supreme Court held Florida's death penalty procedure violated the defendant's Sixth Amendment right to a jury trial because the jury's findings of aggravating factors were advisory, resulting in prohibited fact finding by the judge. But the Florida statute at issue expressly state[d] that the jury findings were "advisory." FLA. STAT. § 921.141 (2004). By contrast, under Washington procedure here, the jury exclusively resolves the factual question whether the aggravating circumstances have been proven beyond a reasonable doubt.

1 Wn. App. 2d at 710 n.86.

We decline to deviate from our holding in Sage. In the present case, the jury entered special verdict forms with specific findings that the aggravating circumstances had been proved beyond a reasonable doubt. The court then noted on the record that the jury had made such findings and described the evidence that supported each finding. The court next concluded that the jury's findings constituted "[s]ubstantial and compelling interests" for imposing an exceptional sentence. The trial court properly analyzed and articulated its basis for imposing an exceptional sentence and did not engage in any fact finding.

Victim Penalty Assessment and DNA Fee

In supplemental briefing, Morris maintains that the victim penalty assessment should be stricken because the court determined he was indigent at the time of sentencing. He also contends that the DNA fee should be waived for the same reason. We disagree that the court determined Morris to be indigent, but remand for Morris to make such a motion as to the victim penalty assessment and the DNA fee.

The legislature recently amended RCW 7.68.035 to prohibit the imposition of a victim penalty assessment if the court finds that the defendant is indigent at the time of sentencing. See LAWS OF 2023, ch. 449, § 1 ("The court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent."). If the court does not make such a finding at sentencing, a defendant can later move to have the fee waived if they are unable to pay the penalty and the court must waive the fee. RCW 7.68.035(5)(b). The legislature also eliminated the DNA collection fee from RCW 43.43.7541. Under newly amended RCW 43.43.7541, the court must waive any DNA collection fee imposed before to July 1, 2023 upon a motion by a defendant.

Here, the court did not find Morris indigent at sentencing, but did grant his motion for an order to proceed in forma pauperis on appeal. Because such a finding was not made and Morris is now indigent, we remand for Morris to move to strike the victim penalty assessment. On remand, he may also move to waive the DNA collection fee.

We affirm the conviction and remand for Morris to move to strike the victim penalty assessment and DNA collection fee.

Smith, C.J.

WE CONCUR:

Díaz, J.

Chung, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83157-7-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:

☒ respondent Amy Meckling, DPA
[amy.meckling@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: February 21, 2024

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