73069-0

NO. 73069-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Appellant.

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

The Honorable Bruce E. Heller, Judge

REVISED BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Thomasdinh Newsome Bowman's Batson[1] challenge after the State peremptorily challenged the sole African American juror in the jury box.

2. Defense counsel rendered ineffective assistance by refusing to exercise his own professional judgment in determining whether to request instructions on lesser included offenses to premeditated first degree murder.

3. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

4. The trial court erred in sustaining objections during the defense closing to correct statements of law and reasonable arguments based on the evidence.

5. Cumulative error deprived Bowman of a fair trial.

6a. The trial court erred in imposing legal financial obligations (LFOs) on Bowman without assessing his ability to pay.

6b. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1a. When the State fails to provide an adequate race-neutral explanation for exercising a peremptory challenge against an African

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

American juror and instead proffers reasons not supported by the record or not unique to the challenged juror, is the State's peremptory challenge merely pretextual or a proxy for race such that the peremptory challenge violates Batson?

1b. In light of recent case law indicating Batson provides an inadequate framework for addressing racial discrimination in jury selection, should this court adopt a more workable standard that sustains a Batson challenge whenever there is a reasonable probability that a juror's race was a factor in the prosecution's exercise of a peremptory challenge?

2. Under case law, it is defense counsel's responsibility as a matter of trial strategy to ultimately decide whether to request lesser included offense instructions. Did defense counsel render ineffective assistance when he refused to exercise his own professional judgment and instead declined to request lesser included offense instructions based solely on Bowman's direction?

3. Did the reasonable doubt instruction, stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Bowman to provide a reason for why reasonable doubt exists?

4a. In prohibiting the defense from arguing that a self defense claim was subjective and that the State's evidence did not show

premeditation, did the trial court deprive Bowman of his right to present a defense and right to effective counsel?

5. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

6a. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering Bowman's current and future ability to pay?

6b. Was counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

1. Charges

The State charged Bowman with first degree premeditated murder for the shooting death of Yancy Noll on August 31, 2012, and also alleged Bowman was armed with a firearm per RCW 9.94A.533(3). CP 1.

2. Factual background and evidence at trial

On August 31, 2012, around 7:30 p.m., witnesses heard five gunshots at the intersection of 15th Avenue NE and NE 75th Street in Seattle's Roosevelt neighborhood. 12RP[2] 47, 72-73; 13RP 17, 35, 100.

[2] Bowman refers to the reports of proceedings as follows: 1RP—October 31, 2014; 2RP—November 3, 2014; 3RP—November 4, 2014; 4RP—November 5, 2014; 5RP—November 6, 2014; 6RP—November 10, 2014; 7RP—November 17, 2014; 8RP—November 17, 2014 (supplement containing voir dire); 9RP—November 18, 2014 (supplement containing voir dire); 10RP—November 18, 2014; 11RP—November 19, 2014 (supplement containing voir dire and opening statements); 12RP—November 19,

They then heard an engine rev and saw a silver BMW convertible with the top down quickly driving southbound. 12RP 52, 54, 73; 13RP 18-19, 21, 28, 30, 35-37, 103-05, 129-30, 133-34. Witnesses saw the driver and met with a police sketch artist to provide a description. 12RP 60-61; 14RP 44-45.

Police responded to reports of multiple shots and a male bleeding inside a red Subaru. 13RP 79. He had four gunshots to the head. 13RP 82; 18RP 69, 74, 78, 80.

A couple weeks later, a Crime Stoppers tip turned the police investigation towards Bowman. 14RP 91. Police obtained a search warrant for Bowman's home and found a 2006 silver BMW. 14RP 92-93. When executing the search warrant, police found broken glass inside the car and the wheels looked like they had been freshly painted black. 14RP 94-95.

Bowman had taken his car to Portland on September 1, 2012 to Safelite Auto Glass and had the passenger window replaced. 14RP 137, 141, 151, 158. Bowman explained to Safelite Auto Glass employees that he had been shopping in downtown Portland and came back to find the window was broken. 14RP 140, 152, 159.

Bowman also had ordered new tires at Big O Tires in Lynwood on September 19 or 20, 2012. 15RP 68-69. Douglas Haskett, of Big O Tires,

---

2014; 13RP—November 20, 2014; 14RP—November 24, 2014; 15RP—November 25, 2014; 16RP—December 1, 2014; 17RP—December 2, 2014; 18RP—December 3, 2014; 19RP—December 4, 2014; 20RP—December 8, 2014; 21RP—December 9, 2014; 22RP—January 2, 2015.

was confused about why the tires needed to be replaced because the tires were "like brand-new." 15RP 75. Bowman indicated a friend wanted the tires. 15RP 75. Haskett also noticed that paint came off the wheels while they were changing the tires and was concerned because the wheels were very expensive. 15RP 75, 77. Bowman indicated he would "re-spray-paint[] them." 15RP 77.

Police also searched Bowman's workplace, Vague Industries in Seattle's SoDo neighborhood. 15RP 98. They found a slide from a Glock handgun inside a storage container. 15RP 135. The State's firearm and tool mark examiners concluded that the cartridge cases found at the homicide scene were fired from that particular Glock slide. 15RP 165-66.

The police also found electronic equipment at Vague Industries, including computer towers and hard drives. 16RP 150-52. Detective Chris Hansen made images of the various electronic equipment's contents using the forensic software program EnCase. 16RP 196-204.

Hansen described various materials he found on the electronic equipment, which included a National Rifle Association video on vehicular defense. 17RP 68. Hansen also found several PDFs, including those titled "Forensic Gunshot Residue Analysis," "Chemical Analysis of Firearms and Gunshot Residue," "Gunshot Wounds Practical Aspects of Firearms, Ballistics, and Forensic Techniques," "Advances in Fingerprint

Technology," "Automated Fingerprint Identification," Forensic Interpretation of Glass Evidence," "Arrest-Proof Yourself," "Murder, Inc.," and "Death Dealer's Manual." 17RP 68-71; see also 18RP 115-26. These materials were "found in subfolders of a folder called 'Reference' on the hard drive." 17RP 71. The reference folder contained 350 gigabytes of data. 17RP 74. The State's witnesses attempted to draw parallels between these materials and drawings and statements in a journal Bowman maintained. 18RP 112, 139-46.

Police also found evidence Bowman had looked at Noll's Facebook memorial page and the police blotter titled "Surveillance video of suspect's car in Roosevelt homicide." 17RP 85-86, 95.

Overall, the police found more than 12 terabytes of materials. 17RP 97. Although the State's witnesses acknowledged there was so much electronic material found that no one person could read all of it, the State relied on of these materials as evidence of Bowman's planning and premeditation at trial. See 17RP 97 (Hansen stating it was "very unlikely" that Bowman read all the material found); 18RP 149 (officer Frank Clark recognizing "I don't think anybody could" read all of the materials and stating he had no idea if Bowman actually read any of the materials).

3. Self defense evidence

Bowman admitted to shooting Noll in self defense. Bowman testified he had perhaps cut off Noll while getting off northbound I-5. 19RP 41. Noll honked, accelerated, flashed headlights, and yelled, "'You better learn how to drive that fancy car, dick boy, or you're going to get yourself fucked up.'" 19RP 44-47. Shortly afterwards, the front dashboard area of Bowman's car was hit with a water bottle Noll threw. 19RP 49-50.

Bowman said Noll was chasing him, accelerating quickly through Seattle streets south of the Lake City Way exit. 19RP 51, 54-58. Bowman was afraid and opened up his bag where he kept a gun. 19RP 62.

Bowman then described something hit him, in response to which he crouched down and tried to duck inside the car. 19RP 63-64. Noll "pulled up right to the side and he was kind of leaning out -- like, leaning out of the car and flipping me off with his left hand and yelling." 19RP 64. Noll was extremely angry. 19RP 64. Bowman recalled hearing "dick boy" and that Noll was going to "fuck [him] up." 19RP 66.

Then Bowman described Noll turning away and ruffling or searching for something on the passenger side of the vehicle. 19RP 66-68. Bowman thought Noll was rummaging for a gun. 19RP 73. Bowman stated that when Noll turned back toward him, everything "went completely quiet . . . . It was . . . completely surreal in, like, a nightmare where you fade from one -

- like, there's some horrible thing happening and then it just kind of ends." 19RP 68. Bowman's next remembered opening his eyes, seeing his gun, broken window, and glass inside his car. 19RP 68-69. Bowman testified he did not remember shooting Noll and did not intend to kill him. 19RP 65, 67.

4. *Batson* challenge

At a sidebar during jury selection, the State indicated it would be peremptorily challenging the only African American woman sitting in the jury box, Juror 5. 11RP 65 (putting peremptory challenge sidebar on record). The trial court directed the prosecutor to provide a race-neutral explanation for the peremptory. 11RP 66.

The State proffered five primary reasons it felt were race neutral for challenging Juror 5: (1) her nephew was in prison for murder and Juror 5 stated she would "like to believe" he was innocent though she did not actually believe so, 9RP 112; 11RP 21, 66-67; (2) the State wasn't sure "about her ability to follow things," 11RP 66-67; (3) she answered affirmatively to the State's question about whether it is difficult to "sit in judgment" of others, 11RP 66-67; (4) she referenced an Apple television commercial which "seemed to have nothing to do with anything," 11RP 66-67; (5) she was not "completely forthcoming about whatever her job is," 11RP 67. The State also assured the trial court that it was not seeking to

excuse Juror 5 on the basis of race, "not[ing] there are numerous minorities on this panel. There are one or two in the box itself." 11RP 68.

The trial court denied the Batson challenge, relying primarily on Juror 5's agreement with the prosecutor that "she would have trouble sitting in judgment of somebody." 11RP 70-71. As a secondary reason, which was "people could differ about what inferences they drew from" Juror 5's statement that "she would like to think [her nephew]'s innocent." 11RP 71. The trial court stated it "wouldn't be as bothered by that," likely because "[s]he never said that she thought her nephew was innocent." 11RP 71. The trial court did not address the State's other proffered race-neutral reasons.

5. Jury instructions

Defense counsel raised a need to have a colloquy on the record with Bowman regarding whether to request lesser included offenses. 19RP 174. Defense counsel asserted, "it's ultimately [Bowman's] decision, not mine. So I need to look into that with him." 19RP 174.

The next day, the parties revisited the lesser included issue. The State argued that the decision to propose lesser included offense instructions is ultimately counsel's, not the defendant's, decision under State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). 20RP 168. The State thus sought "a statement that this is a strategic decision." Defense counsel repeatedly and

fervently indicated the decision to request lesser included instructions was his client's. 20RP 168-69; 21RP 5

The jury was also instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 25.

6. Defense closing

During closing, defense counsel argued, "The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable . . . . and keep in mind this is all subjective, because you have to view things from Mr. Bowman's standpoint." 21RP 104. The State objected, "This is a misstatement," and the trial court sustained the State's objection. 21RP 105.

To respond to arguments that Bowman was a "student of murder because he possessed this manual, and this book," counsel argued, "he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car." 21RP 117. The State objected, "facts not in evidence." This objection was sustained.

7. Verdict, judgment, sentence, and appeal

The jury returned a verdict finding Bowman guilty of first degree murder. CP 17. By special verdict, jurors also found him armed with a firearm at the time of the crime. CP 18.

The trial court sentenced Bowman to a standard range sentence of 290 months and imposed a 60-month firearm enhancement for a total prison term of 350 months. CP 88. Along with the mandatory $500 victim penalty assessment and the $100 DNA collection fee, the trial court imposed $665 in discretionary court costs. CP 87. Although the judgment and sentence contained boilerplate language that the trial court considered Bowman's financial resources as well as his current and future ability to pay LFOs, the trial court did not actually engage in this inquiry. CP 87; 22RP 47.

Bowman timely appealed. CP 95.

C. ARGUMENT

1. THE PROSECUTION'S REASONS FOR PEREMPTORILY CHALLENGING JUROR 5 WERE NOT RACE NEUTRAL BUT PRETEXTUAL OR A PROXY FOR RACE, AND THE TRIAL COURT CLEARLY ERRED IN REJECTING BOWMAN'S BATSON CHALLENGE

The Fourteenth Amendment's equal protection clause requires trial "by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When the prosecution peremptorily challenges a venireperson based on race, it violates the defendant's right to equal protection of the laws. Id.

Batson establishes a three-part test to determine whether the State's peremptory challenge is discriminatory: (1) the defendant must establish a prima facie case of discrimination; (2) if the defendant establishes a prima facie case, the State bears the burden to articulate a race-neutral reason for exercising the peremptory challenge on the juror; and (3) the trial court ponders the plausibility of the State's explanation and determines whether the peremptory challenge is discriminatory. Id. at 93-98.

During a sidebar, defense counsel raised a Batson challenge to the prosecution's peremptory challenge against Juror 5. 11RP 60, 64-66. Juror 5 was the "only African-American woman even close to being seated in the case." 11RP 69. The trial court apparently believed the defense had made a prima facie showing of the State's discriminatory purpose, given that it asked the State to proceed with the second step of Batson after putting the sidebar on the record. 11RP 66. In any event, "a prima facie showing is unnecessary once the State has offered a purported race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination." State v. Cook, 175 Wn. App. 36, 39, 312 P.3d 653 (2013) (citing State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991))). Thus, the only pertinent question is "whether the State's

reasons given for the peremptory challenge were race neutral." Cook, 175 Wn. App. at 39. The answer is no.

a. The State's reliance on the incarceration of Juror 5's nephew for a murder that occurred more than 30 years ago was pretextual

The State began its unconvincing race-neutral explanation by pointing out that Juror 5 "has a nephew who [is] in prison for murder. She would like to believe that he's innocent. In which case she believes she has an innocent nephew in prison for murder." 11RP 66. This fails as a race-neutral explanation for three reasons.

First, the record does not support the prosecutor's claim that Juror 5 believed she had an innocent nephew in prison for murder. The prosecutor asked whether Juror 5 believed her nephew "was rightfully or wrongly accused," to which Juror 5 responded, "That's hard because I don't know," and "I don't know that I'll ever know for sure. I know what I'd like to believe, but I don't know for sure." 9RP 112. Juror 5 proceeded to explain that she had no firsthand knowledge of her nephew's court proceedings and had only heard about his case indirectly through relatives in California. 9RP 112-13. Juror 5 also discussed her mixed feelings about law enforcement, describing both positive and negative experiences. 9RP 113-14. After hearing these experiences, the prosecutor stated, "So you had a lot of experiences in your life that seem to me might make you a good juror in this

case." 9RP 115. Juror 5 agreed, stating, "I think I would be as fair as I know how to be. I would. I would look at things. I would -- I'm analytical too. And I don't rush." 9RP 115. The following day, the prosecutor asked Juror 5, "So do you believe that there's a chance that your nephew is in prison unjustly?" 11RP 21. Juror 5 responded, "I don't believe that. I don't believe that." 11RP 21.

These exchanges demonstrate there was no basis in the record for the prosecutor's assertion that Juror 5 would not be a good juror because she believed she had an innocent nephew in prison for murder. 11RP 66. Although Juror 5 stated she might like to believe in her family member's innocence—and who would not *like to believe* a relative was innocent?—she stated very clearly that she did not actually believe he was innocent.[3] The prosecutor's characterization of Juror 5's statements to the contrary was wholly unsupported by the record. "[T]his alone can 'raise[] an inference' that the remaining reasons are pretextual." Cook, 175 Wn. App. at 40 n.9 (second alteration in original) (quoting Ali v. Hickman, 584 F.3d 1174, 1192 (9th Cir. 2009)); see also Lewis v. Lewis, 321 F.3d 824, 830 (9th Cir. 2003) ("[I]f a review of the record undermines the prosecutor's stated reasons, or

[3] During her Batson argument, though the prosecutor acknowledged, "She thinks he probably isn't [innocent], but she would like to believe that," the prosecutor nonetheless continued, "And that means that she believes that there are innocent people in prison for murder in her family." 11RP 67. The prosecutor's second statement does not follow from the first.

many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination."). The prosecution's peremptory challenge of Juror 5 was impermissibly based on race.

Second, Juror 5 was not the only juror who had a relative in prison for murder yet the State only exercised a challenge against Juror 5 for this reason. "A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge." McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000); see also Snyder v. Louisiana, 552 U.S. 472, 483, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'.").

Juror 2, who sat on the jury, disclosed during voir dire that his or her maternal relative had also been convicted of first degree murder. 9RP 59. And, unlike Juror 5's nephew, who had been in prison for more than 30 years, Juror 2's relative was convicted only 12 years ago. 9RP 59-60. The prosecution cannot claim its peremptory strike of Juror 5 for having a murder convict as a relative was race neutral when it did not seek to exclude a non-

African American who also had a relative in prison for murder.[4] The peremptory challenge against Juror 5 was mere pretext to eliminate a black woman from Bowman's jury. "The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." Snyder, 552 U.S. at 485 (citing Miller-El v. Dretke, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)).

The third reason the prosecutor's reliance on Juror 5's nephew's incarceration must be rejected as a race-neutral explanation is more fundamental. No government official should seek to exclude an African American juror because she has a relative in prison. It should come as no surprise to this court that our criminal justice system is racist and that it is particularly so against African Americans. State and federal governments incarcerate African Americans at much higher rates and for longer sentences than white people, although there is no appreciable difference in the rates of criminality between the two groups. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2d ed. 2012); NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, Criminal Justice Fact Sheet, available at www.naacp.org/pages/criminal-justice-face-sheet (last visited Dec. 8, 2015) (noting "African American and Hispanics comprised 58% of all prisoners in

[4] Furthermore, several other venirepersons stated they had friends and family members convicted of serious crimes or in prison. See 9RP 58-77.

2008, even though African Americans and Hispanics make up approximately one quarter of the US population" and "One in six black men had been incarcerated as of 2001. If current trends continue, one in three black males born today can expect to spend time in prison during his lifetime").

Washington is no exception to this troubling reality. Ten years ago, Professor Robert Crutchfield from the University of Washington analyzed several statistics on racial differences in arrest, prosecution, and sentencing in Washington's criminal justice system. Robert D. Crutchfield, Racial Disparity in the Washington State Criminal Justice System, available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofmaterialfactspart3.pdf (Oct. 25, 2005) (last visited Dec. 8, 2015). Crutchfield concluded "there are substantial reasons to believe that Native Americans, blacks and Latinos are at elevated risk that cannot be justified by differential involvement in crimes likely to lead to arrests." Id. at 25. He also stated "there is credible evidence that there are significant racial disparities that are not fully warranted by race or ethnic differences in illegal behavior." Id. at 25-26. Indeed, according to a report by The Sentencing Project, Washington State incarcerates 393 out of every 100,000 white persons but 2,522 out of every 100,000 black persons. Marc Mauer & Ryan S. King, Uneven Justice: State Rates of Incarceration by Race and Ethnicity,

at 5-6 (Jul. 2007), available at www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

The State promotes racial disparities in the criminal justice system when it seeks to exclude African American jurors simply because they have relatives in prison. Not only does the removal of jurors such as Juror 5 demonstrate that the State exercised a peremptorily challenge based on overt or implicit racial discrimination but it also shows how the State disproportionately removes persons of color from juries based on their disparate rates of contact with the criminal justice system.[5] Removing an African American juror because of his or her incarcerated relative is not a race-neutral reason but a racially charged reason. This court should reverse Bowman's conviction and remand for retrial at which the State does not exclude venirepersons on the basis of race.

b. Juror 5's self-reflective acknowledgment that "sitting in judgment" of others is difficult did not provide a valid reason to exclude her, especially when other jurors expressed similar difficulties

The State also asserted Juror 5 "would find it difficult to sit in judgment, and in talking to her it was clear, it seemed clear to us that she would be probably unable to reach a verdict at all." 11RP 67. The

[5] As Justice Sotomayor recently pointed out during oral argument in Foster v. Chatman, No. 14-8349, the State would likely exclude her from jury service: "I have cousins who I know have been arrested, but I have no idea where they're in jail. I hardly -- I don't know them." Tr. from No. 14-8349, at 52 (Nov. 2, 2015), available at www.supremecourt.gov/oral_arguments/argument_transcripts/14-8349_1bo2.pdf.

prosecutor also purported to recite Juror 5's statement, "I'm not sure I would make a good juror," which Juror 5 never actually said. 11RP 66. The prosecution misrepresented Juror 5's statements and put words in Juror 5's mouth, betraying its exercise of a peremptory challenge on the impermissible basis of race.

As discussed above, on the first day Juror 5 spoke, she explained her positive and negative experiences with law enforcement, describing in much more detail the positive experiences. 9RP 113-15. Providing context to her nephew's situation, Juror 5 explained,

> But hearing from relatives, of course you're going to get their side of it. But what it did for me was that at one time I thought everything was black and white, and then I see that there are gray areas, you know, because there has to be an assurance when you make a decision, you know, there has to be an assurance, so you have to look at it.
>
> So for me, I'm not sure what kind of juror I'd make even because I want to see, you know, let me see, and then let me experience this and go through the process, because even coming in saying, yeah, that's even like saying -- you know, making a decision right there. But, yeah, I had that -- that experience. I've talked to that family member and my love goes out to him, and, of course, he was quite young. So -- but I don't know.

9RP 112-13. The rather lengthy discussion between the prosecutor and Juror 5 regarding Juror 5's nephew and regarding law enforcement more generally culminated in the prosecutor remarking that Juror 5's experiences "seem to me might make you a good juror in this case." 9RP 115.

However, the other prosecutor revisited Juror 5's remarks the next day: "Now, yesterday, when Ms. McCoy was talking to you about case proof, you said 'I'm not sure I'd make a good juror.' And the reason was you said 'I need to see.' Can you expand on that a little bit more?" 11RP 21. Juror 5 responded, "What did I say?" Juror 5 understandably did not remember saying that she was unsure she would make a good juror because she never said it. Rather, Juror 5 said she was not sure what kind of juror she would make and she also stated she would be fair, "would look at things," was "analytical" and she would not rush into a decision, all admirable qualities in a potential juror. 9RP 115.

The prosecutor nonetheless proceeded to inquire about Juror 5's ability to sit:

> [PROSECUTOR]: You need to see is what you said.
>
> And just I'm not saying specifically that sentence because in context it doesn't make a lot of sense, but were you concerned about your ability to sit? What do you think about having to see things?
>
> JUROR NUMBER 5: Well, maybe it is I have to believe. So that's why prosecution is so -- I mean, the role of a prosecutor is so important because it has to be enough evidence and collective input in order to make a good decision. And I'm not sure.[6]

[6] Earlier in Juror 5's explanations, Juror 5 expounded on her correct understanding of the prosecutor's role to overcome the presumption of innocence:

[PROSECUTOR]: About what?

JUROR NUMBER 5: About my ability. I think I better be honest.

[PROSECUTOR]: Uh-huh, please do.

JUROR NUMBER 5: Okay. Because I did think about it last night. The defense attorney had mentioned that. And that is because -- I think my nephew is a good example of me not being able to say, well, for sure because there are times that I say he should be where he is if all of this is right, and then my heart says that's not what I would want for his life or anyone's life. But then I've been through grief. So I understand the part of a person who's lost someone.

[PROSECUTOR]: So it would be -- it sounds what you're saying, I don't want to put words in your mouth, but that it would be difficult for you to sit in judgment?

JUROR NUMBER 5: Thank you.

[PROSECUTOR]: To make that --

JUROR NUMBER 5: That's correct.

[PROSECUTOR]: Okay. Thank you. That helps me understand it. Thank you very much.

JUROR NUMBER 5: You're welcome.

11RP 21-22.

One thing, and maybe I should have responded also to your first question, in that one thing that impacted me quite a bit yesterday was to put it in my head about the defendant coming in innocent, not guilty, whichever way you want to phrase it, and in that the reason I raised my hand about process -- you know, being a prosecutor is the challenge of maintaining -- no, the defendant's attorney maintains his innocence. The onus is on you to provide evidence to -- it's hard to put into words, but I understood the challenge.

11RP 19-20.

Juror 5's reservations about her ability to sit as a juror did not amount to an expression of belief that she would not "make a good juror," as the State argued. 11RP 66. Rather, Juror 5 thoughtfully explained that she could see both sides of a case, using her nephew's situation as an example. She correctly indicated that the prosecutor's role was important to put forth sufficient evidence to support a conviction, but then also expressed the difficulty with condemning a person to a lengthy prison term. She simply stated she was open to different perspectives in light of both her nephew's experience and her own experience as a person who has been through the grief of losing a loved one. 11RP 22. Contrary to the State's misattribution of the statement, "I'm not sure I would make a good juror" to Juror 5, Juror 5 merely expressed uncertainty about jury service given her ability to see multiple points of view.

As for the State's argument that Juror 5 indicated "it will be difficult for her to sit in judgment," 11RP 66, after hearing Juror 5's conflicting feelings about her ability to serve as a juror—which consisted of both pro-State and pro-defense statements—the prosecutor stated, "it sounds what you're saying, I don't want to put words in your mouth, but that it would be difficult for you to sit in judgment?" 11RP 22. Juror 5 then agreed. 11RP 22. Juror 5's agreement that sitting in judgment of others is difficult did not at all support the State's assertion that Juror 5 "would be probably unable to

reach a verdict at all." 11RP 67. Juror 5 was simply acknowledging the difficulties inherent in serving as a juror and deciding another person's fate. This is a positive, not negative, attribute.

Nothing Juror 5 stated before or after the prosecutor's "sitting in judgment" question remotely undermined her impartiality with regard to either the defense or the State in any respect. Quite the contrary—Juror 5 repeatedly indicated she could be fair and unbiased. See 9RP 60 (Juror 5 answering "No" to the court's question about whether her nephew's incarceration would "impact [her] ability to judge this case on its merits"); 9RP 115 ("I think I would be as fair as I know how to be. I would. I would look at things. I would -- I'm analytical too. And I don't rush."); 11RP 21 ("So you have to be optimistic about life, be open to whatever it is that comes in front of you. And that's where you have to be unbiased."); 11RP 45 ("I think I'm here to judge to the best of my ability the evidence that's presented about the young man and -- and to determine whether I feel he did it or if there are extenuating cir -- I don't know. You'd have to put it altogether."); 11RP 45 (agreeing with defense counsel that the jury's role "[i]s to determine one thing only, and that is whether the State has proven its case beyond a reasonable doubt").

Moreover, Juror 5 was not alone in expressing reservations about the difficulties in performing jury service. For instance, Juror 63 stated he or she

"would be happy to do [jury service] as my duty. I've thought about it, that it would be an honor to do it, but at the same time, it's like, oh, my God . . . . do I really want to? And actually I do. I would like to do that." 11RP 62. Likewise, Juror 64 indicated, "Just the overwhelming serious nature of this case makes me nervous, and I understand the huge responsibility that 14 will face if they are selected and it will determine the rest of [Bowman's] life." 11RP 63. Juror 64 also stated, "just given the serious nature of this, I would want to be very sure to absorb all the information that was provided to me . . . . when making a decision." 11RP 64. Juror 52 stated,

> this whole process has made me reflect on, you know, the way that the media portrays a conclusion, the happy ending where, you know, justice has been served, but it also gives me pause to reflect on the gravity of Mr. Bowman's situation and the fact that . . . he has a right to a fair and . . . impartial jury. He's going to want us to look at the merits of this case alone and make a decision whether reasonable doubt is reached or not.

11RP 14. These comments show that other jurors were also wary of their abilities to serve on the jury and were engaged in serious self-reflection regarding those abilities, just like Juror 5. Cf. Cook, 175 Wn. App. at 41 ("[A] reason for challenging a juror may be deemed pretextual and thus not race neutral if other jurors made similar assertions."). It is troubling that the State would single out Juror 5 for appreciating the gravitas of the jury's essential yet often difficult role.

Finally, there is no good answer to the question, "would it be difficult for you to sit in judgment?" If the answer is yes, in the prosecution's eyes the juror becomes too soft or sensitive to return a guilty verdict. E.g., 11RP 67 (prosecutor explaining, because Juror 5 "would find it difficult to sit in judgment . . . it seemed clear to us that she would be probably unable to reach a verdict at all"). If the answer is no, then the State could argue the juror does not view her role seriously enough to carry out her duties impartially. Either way, by asking this question, the State would seemingly always have a legitimate sounding race-neutral explanation. This heavily undermines the State's and the trial court's reliance on Juror 5's answer to this question as a race-neutral explanation for peremptorily challenging her.

Juror 5 never stated she would not make a good juror. Juror 5's agreement with the prosecutor that it is difficult to "sit in judgment" did not provide a race-neutral basis to exclude her from the jury given her statements that she could be a fair and impartial juror and the similar statements of other jurors. The State peremptorily challenged Juror 5 on the basis of race.

c. Juror 5's discussion of employment, an Apple television commercial, and the State's self-contradicting statements regarding Juror 5's intelligence did not provide legitimate race-neutral explanations for the peremptory strike

Although they were not among the "the main two reasons" discussed above, the State also asserted Juror 5's explanations of her employment,

reference to an old Apple television commercial, and the State's "concerns about her ability to track in a whole" were race-neutral reasons to challenge her. 11RP 66-67. These explanations are not supportable.

The State asserted, Juror 5's "sentences stopped halfway, but she talked about the old Apple commercial where a woman comes in in a ball and breaks the ball and that seemed to have nothing to do with anything." 11RP 66. Juror 5 referred to an Apple commercial after discussing the presumption of innocence and the "challenge" to be sure before the presumption of innocence is overcome. 11RP 19-20. She stated, "And that is what I haven't seen in my nephew's case. I haven't seen enough, you know, putting aside Forensic Files that I watch or whatever." 11RP 20. She continued, "But that's what I mean, is that the challenge is to be sure." Then she discussed the Apple commercial by way of analogy:

> And about life experience, this might seem a little asinine, but what comes to my mind is that old commercial, Apple commercial, where this person, this woman comes in with this ball of some sort and just breaks down whatever it is that's been held in, for example, my origin to that I should have an attitude about life, but then there's that . . . moment that comes where it breaks down all of those things. You know, breaks down even traditions sometimes.
>
> So you have to be optimistic about life, be open to whatever it is that comes in front of you. And that's where you have to be unbiased.

11RP 20-21. Although Juror 5 could perhaps have been more articulate regarding the content of the Apple commercial, her general point—which, as

discussed above, she made several times in several different ways—was that it was important to be unbiased and open to reexamining preconceived notions.[7] As defense counsel explained, "I remember the commercial she's talking about. It was basically about how your world changes when you learn things, which is a Steve Job's commercial." 11RP 69. Juror 5's comment about the Apple commercial was, at worst, innocuous and, at best, a genuine demonstration of her open-mindedness. It was not a valid race-neutral explanation for excluding her. And if the prosecutor was so confused or concerned about the commercial reference, she could have inquired further but did not. Instead she chose to resume questioning Juror 5 about her nephew. 11RP 21. The prosecutor's issue with the Apple commercial was pretextual.

The State also indicated that it was unsatisfied with Juror 5's explanation of her employment: "She defined herself as being an administrative consultant, but . . . the way she described that was that she pulls things together and puts a system together, and the example she gave was helping someone who is in hospice." 11RP 67. From this the prosecutor stated, "We do not feel like she was being completely

[7] The gist of Juror 5's remarks was in fact echoed in the jury instructions: "Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based on upon further review of the evidence and these instructions." CP 24 (Instruction 2) (emphasis added).

forthcoming about whatever her job is. We are not exactly sure what she does. We have concerns about her ability to track in a whole." 11RP 67. The State's explanation is mystifying given that Juror 5 explained her job as an independent administrative consultant was "bringing an order out of chaos," and "[p]ulling things together, putting a system together." 11RP 18-19. She referenced a recent example where she "put[] everything together" for a close friend who was in in-home hospice. 11RP 18. The State did not express concern about Juror 5's lack of candor with respect to her employment but rather joked with her about "What could [she] do to make [the prosecutor's] desk cleaner" and stated, "I need you in my office." 11RP 18-19. The prosecution's attitude toward Juror 5's employment during voir dire cannot be squared with its concerns during the Batson argument. Like the Apple commercial, the prosecutor's feigned concern about Juror 5's employment was merely a pretext to exclude this African American woman from Bowman's jury.

Finally, the State asserted, "She said today that she wasn't sure about her ability to follow things" and "We have concerns about her ability to track in a whole." 11RP 67. These concerns were completely contradicted by the prosecutor's later comment, "I actually think she's a pleasant and intelligent woman, but given her perspective on the world and criminal justice system, we cannot keep her." 11RP 68. Defense counsel was at a loss "to even

respond respectfully to what Ms. Richardson said about this juror not being intelligent." 11RP 68. The prosecutor's acknowledgment of Juror 5 as an intelligent person is at odds with the statement she made moments earlier about Juror 5's supposed difficulty "tracking." And jurors need not be perfectly articulate to qualify for jury service, at least if they are white anyway. Juror 5's comments overall expressed her ability and desire to follow the jury instructions in an impartial manner. The prosecutor's ability-to-track concerns are yet another example of the prosecutor's unsupported race-neutral explanations for peremptorily challenging Juror 5. This court should reverse under Batson.

d. The State's observation that "there are numerous minorities on this panel" is irrelevant to Bowman's *Batson* challenge

At the end of its failed attempt to proffer race-neutral explanations, the State also "note[d] there are numerous minorities on this panel. There are one or two in the box itself. There's several who are going to be coming up. This has nothing to do with Juror 5's race." 11RP 68. The record shows that the State opted to peremptorily challenge the only black woman "even close to being seated in this case." 11RP 69. It does not matter how many other minority jurors happened to remain on Bowman's jury (if any at all). Having a 100 percent nonwhite venire would not permit the State to base peremptory challenges on racially discriminatory criteria. This court should

categorically reject the State's incorrect suggestion that not striking other minority jurors somehow gave it license or more leeway to strike Juror 5.

e. The State focused on Juror 5 more than any other juror, demonstrating it was fishing for a race-neutral reason to exercise the peremptory strike

"[D]isparate questioning of minority jurors can provide evidence of discriminatory purpose because it creates an appearance that an attorney is 'fishing' for a race-neutral reason to exercise a strike." State v. Saintcalle, 178 Wn.2d 34, 43, 309 P.3d 326 (2013) (lead opinion) (citing Miller-El, 545 U.S. at 244-45). Prosecutors may not "go fishing for race-neutral reasons and then hide behind the legitimate reasons they do find. This disproportionately affects minorities." Id.

Saintcalle's prohibition on race-neutral fishing expeditions is related to and supported by federal authority requiring a holistic approach to scrutinizing the prosecutor's proffered race-neutral reasons. See, e.g., Snyder, 552 U.S. at 485 ("[T]he prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent, even where other, potentially valid explanations are offered."); Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003) ("After analyzing each of the prosecutor's proffered reasons, our precedent suggest that the court should then step back and evaluate all of the reasons together. The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the

prosecutor's credibility to such an extent that a court should sustain a Batson challenge."); United States v. Chinchilla, 874 F.2d 695, 699 (9th Cir. 1989) ("[T]he fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency [of the remaining two reasons].").

Here, the prosecutor spent significantly more time questioning Juror 5 than any other juror. See 9RP 107-32 (in these 26 pages of the transcript, the State questions Juror 5 between pages 111 and 115, representing 15 to 20 percent of the State's allotted time); 11RP 5-30 (in these 26 pages, the State questions Juror between pages 15 to 22, representing 20 to 25 percent of the State's allotted time). The State's focus on Juror 5—who described herself repeatedly as unbiased and whom the State thought "might make . . . a good juror in this case," 9RP 115—appears to have been a fishing expedition to generate race-neutral explanations it could use later in the event the defense raised a Batson challenge. To the extent that the State's disparate questioning of Juror 5 provided any "legitimate reasons" to exercise a peremptory—which Bowman does not concede—the State should not be permitted to "hide behind the[se] legitimate reasons." Saintcalle, 178 Wn.2d at 43. And in any event, there were far more illegitimate reasons for exercising the peremptory challenge than legitimate ones. This militates

against accepting any explanation that this court may deem legitimate. Snyder, 552 U.S. at 485.

f. The trial court clearly erred in denying the *Batson* challenge

The trial court primarily relied on Juror 5's supposed "trouble sitting in judgment of somebody," stating, "it seems to me that a completely acceptable race neutral reaction to that statement would be this is a person who might have difficulty finding a judgment of guilt against Mr. Bowman regardless of the evidence. This is a legitimate concern." 11RP 71.

With regard to Juror 5's nephew, the trial court stated, "She never said that she thought her nephew was innocent. She said she would like to think he's innocent." 11RP 71. The trial court continued, "if I were sitting in the State's shoes I probably wouldn't be as bothered by that, but again, it's not a pretext for racial challenge. It is something that she said, and I think reasonable people could differ about what inferences they drew form that statement." 11RP 71.

As discussed in the preceding subsections, the trial court's conclusions were erroneous and unsupported by the record, especially in light of other jurors' remarks. But even accepting these conclusions for the sake of argument, the trial court did not rely on any of the other supposedly race-neutral reasons the State provided regarding the Apple commercial,

Juror 5's employment, or Juror 5's difficulty "tracking." The trial court implicitly rejected these other explanations and should have therefore considered these illegitimate explanations alongside the ones it thought were legitimate. Although the trial court made a point of noting "there's a high percentage of minority people that are charged with crimes and yet predominantly we have nonminorities sitting on juries," 11RP 70, its failure to conduct a thorough analysis renders its words idle. The court's conclusions were clearly erroneous but even if they were only partially erroneous, it was nonetheless clearly erroneous not to conduct a thorough, holistic analysis of the Batson challenge before it. The State's peremptory challenge of Juror 5 violated Bowman's right to be tried by a jury selected pursuant to nondiscriminatory criteria. This court must reverse.

2. ALTERNATIVELY, BATSON DOES NOT GO FAR ENOUGH TO ADDRESS RACIAL DISCRIMINATION IN JURY SELECTION, WHICH CALLS FOR GREATER JUDICIAL SCRUTINY OF THE STATE'S USE OF PEREMPTORY CHALLENGES BASED ON THE WASHINGTON CONSTITUTION'S ENHANCED PROTECTION OF THE RIGHT TO TRIAL BY JURY

A majority of the Washington Supreme Court has acknowledged that, in spite of Batson, racial discrimination remains a serious problem with respect to jury selection and something must change to meaningfully address and improve this serious problem. Saintcalle, 178 Wn.2d at 50 (lead opinion of Wiggins and Owens, JJ.) ("Race should not matter in the selection of a

jury, but under current law it often does. We conclude from this that we should strengthen our Batson protections, relying both on the Fourteenth Amendment and our state jury trial right."); id. at 60-63 (Madsen, C.J., concurring (joined by J.M. Johnson, J.)) (acknowledging concerns "about racial discrimination during jury selection" call for "reassess[ing] or modify[ing] the Batson approach" where a party so argues); id. at 71 (González, J., concurring) (arguing peremptory challenges must be abolished to "address the ongoing problem of racial discrimination in the use of peremptory challenges"); id. at 118 (Chambers, J., dissenting) ("Batson was doomed from the beginning because it requires one elected person to find that another elected person (or one representing an elected person) acted with a discriminatory purpose. This has proved to be an impossible barrier. Further, Batson, by design, does nothing to police jury selection against unconscious racism or wider discriminatory impacts."). Indeed, "[a] growing body of evidence shows that Batson has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges." Id. at 44-45 (lead opinion) (excerpting such evidence).

In light of the failure of Batson, "now is the time to begin the task of formulating a new, functional method to prevent racial bias in jury selection." Id. at 52. Article I, section 21 of the state constitution provides the underpinnings of a more functional method to ameliorate the pernicious

effects of discrimination. It provides, "The right of trial by jury shall remain inviolate . . . ." An analysis of this provision under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), supports the adoption of enhanced judicial scrutiny of peremptory challenges exercised against jurors in protected classes. The Batson standard must be replaced with something more workable and realistic, something less insurmountable.[8] Therefore, Bowman asks that Washington courts deny the exercise of any peremptory strike "if there is a reasonable probability that race was a factor in the exercise of the peremptory . . . ." Saintcalle, 178 Wn.2d at 54. Under this reasonable and more workable standard, this court should reverse Bowman's conviction and remand for a new trial where the State is not permitted to exclude or reasonably probably exclude a juror on the basis of her race.

---

[8] Justice González also aptly pointed out how simple it is for prosecutors to come up with race-neutral explanations. Saintcalle, 178 Wn.2d at 92-93 (González, J., concurring) ("[E]ven if an objection is made, plausible race-neutral reasons are quite easy to conjure up in any given case, regardless of whether the peremptory challenge is actually based on racial discrimination and regardless of whether such racial discrimination is conscious or unconscious."). Furthermore,

> Proffered reasons sometimes involve subtle observations about a prospective juror's appearance or demeanor, which are easily alleged but often extremely difficult to scrutinize. Further, race often will be one of many factors actually motivating a challenge, and thus, race-neutral reasons will be readily available to be included in a true but incomplete explanation. It would be naïve to think that attorneys do not rely on readily available and plausible race-neutral reasons to circumvent Batson. Under our current framework, plausible race-neutral reasons remain readily available and regularly invoked.

Id. at 93 (citations omitted).

a. *Gunwall* requires an independent analysis of the jury trial right under the state constitution and also requires greater protection of this right than the Sixth Amendment provides

The Washington Supreme Court has already recognized that a "Gunwall analysis indicates that the right to a jury trial may be broader under article I, sections 21 and 22 than under the federal constitution."[9] State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003); see also State v. Hobble, 126 Wn.2d 283, 298, 892 P.2d 85 (1995) ("The right to trial by jury under the Washington State Constitution is not coextensive with the federal right."). Washington citizens enjoy a broader right to jury trial that must be especially safeguarded to guarantee juries remain inviolate from the discriminatory practices of the State.

In assessing whether the state constitution provides greater protection of a right than the federal constitution, Gunwall requires consideration of six factors: "(1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." Smith, 150 Wn.2d at 149. "Even if these factors point to greater protection under the Washington Constitution, this court must still determine the extent of that protection." Id.

[9] Article I, section 22 provides, in pertinent part, "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ."

The first Gunwall factor supports a more protective right. Article I, section 21 provides that the right to jury trial "shall remain inviolate." The Washington Supreme Court has already interpreted the word "inviolate" to mean "'free from change or blemish: PURE, UNBROKEN . . . free from assault or trespass : UNTOUCHED, INTACT.'" Smith, 150 Wn.2d at 150 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1190 (1993)). "The term 'inviolate' connotes deserving of the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989) (emphasis added). Article I, section 21's text requires the greatest possible protection of the inviolate right to trial by jury.

The second factor also compels a protective interpretation. The Washington Supreme Court has already so decided: "whereas the federal constitution mentions the right to trial by jury only in the Sixth Amendment, the Washington Constitution contains two provisions regarding this right .... Although the Sixth Amendment and article I, section 22 are comparable, this court has previously found that article I, section 21 has no federal equivalent." Smith, 150 Wn.2d at 151 (citing State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987)). "[T]he fact that the Washington Constitution mentions the right to a jury trial in two provisions instead of one indicates the general importance of the right under our state constitution." Id. The Washington Constitution requires an inviolate right to jury trial

whereas its federal counterpart does not. This requires a broader, more protective interpretation of the right.

The third and fourth Gunwall factors, state constitutional and common law history and preexisting state law, also support greater protection. Prior to the ratification of the state constitution, territorial statutes gave criminal defendants twice as many peremptory challenges than the State. Defendants had 12 peremptories in capital cases, six for offenses punishable by imprisonment, and three for all other prosecutions. CODE OF 1881, ch. 87, § 1079, at 202. In contrast, "[t]he prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors." Id. § 1080. This practice continued after ratification. See, e.g., CODE OF 1897, ch. 11, §§ 6931-32. These provisions in existence before, during, and after the adoption of the Washington Constitution support a more protective right to jury trial for Gunwall purposes. The court practice and procedure familiar to our framers limited the State's use of peremptory challenges in favor of the accused. Article I, section 21 should be interpreted as providing the utmost protection to keep the jury-trial right inviolate.

The fifth factor, differences in structure, always supports an independent and more protective interpretation of the state constitution. This is so because "[t]he federal constitution is a grant of limited powers whereas state constitutions limit the otherwise plenary power of the states." Smith,

150 Wn.2d at 151. "This difference favors an independent state interpretation in every Gunwall analysis." State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994).

The state interest and local concern, Gunwall factor six, additionally favors an independent and more protective analysis. Based on Schaaf, 109 Wn.2d at 16, in which the supreme court found that providing jury trials for juveniles was an issue of local concern rather than an issue requiring national uniformity, the Smith court stated, "it would seem that providing jury trials for adult defendants is a matter of particular local concern." 150 Wn.2d at 152. Given the documented disparities in our criminal justice system, discussed above, see Part A.1.a supra, providing juries that have been selected without racial discrimination is a significant state interest and local concern. This is particularly true in light of the Saintcalle decision, which called on counsel and courts to address this serious problem. 178 Wn.2d at 52-53. The sixth Gunwall factor supports a more protective interpretation of the jury-trial right, particularly in the context of preventing racial discrimination in the selection of juries.

All six Gunwall factors favor an independent and more protective treatment of the jury-trial right under the Washington Constitution.

b. The state constitution's greater protection of the jury-trial right supports the adoption of a more workable reasonable probability standard to confront the issue of racial discrimination in jury selection

Generally, "in order to determine the scope of the jury trial right under the Washington Constitution, it must be analyzed in light of the Washington law that existed at the time of the adoption of our constitution." Smith, 150 Wn.2d at 153. "In construing section 21, this court has said that it preserves the right as it existed at common law in the territory at the time of its adoption." City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982) (collecting cases).

There is some support in the law as it existed at the time of ratification to provide greater protection by limiting the State's use of peremptory challenges. The nineteenth century laws discussed above that limited the State's peremptory challenges to half the number of the defense's support broader limitations on the State's use of peremptory challenges now. In addition, Washington vigorously protects the right of a jury of 12 based on article I, section 21. See State v. Stegall, 124 Wn.2d 719, 723-24 & n.1, 881 P.2d 979 (1994) (discussing State v. Lane, 40 Wn.2d 734, 246 P.2d 474 (1952), and State v. Ellis, 22 Wash. 129, 60 P. 136 (1900), which confirmed a defendant's right to have 12 jurors in a felony trial under article I, section 21, and contrasting the lack of such a right under the Sixth Amendment).

Smaller juries are by definition less diverse juries. Ensuring the right to 12 jurors suggests the framers preferred the most diversity available on juries at the time our state constitution was adopted.

However, in the context of racial discrimination and disparity in jury selection, the scope of the more protective jury-trial right cannot come solely from the common law as it existed at the time of ratification. If it were so limited, excluding jurors on the basis of race or sex would present no problem at all. Indeed, "[t]he peremptory challenge . . . was adopted in the Washington Territory without substantial debate, at a time when racial minorities and women were completely ineligible for jury service." Saintcalle, 178 Wn.2d at 75 (González, J., concurring); see id. at 75-76 (discussing territorial cases supporting discrimination against women in jury service). The courts should not be limited to looking backwards to a time of greater discrimination and inequality to inform themselves on how better to prevent discrimination and inequality.

The Saintcalle decision provides a direction forward on ensuring the right to jury remains inviolate from the racial prejudice of prosecutors. The lead opinion lamented the problem of requiring a showing of purposeful discrimination:

> This is problematic because discrimination is often unconscious. A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges

> to accuse attorneys of deceit and racism in order to sustain a Batson challenge. Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism. And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge's findings on appeal. A strict "purposeful discrimination" requirement thus blunts Batson's effectiveness and blinds its analysis to unconscious racism.

Saintcalle, 178 Wn.2d at 53 (citations and footnote omitted). Therefore, "[a]s a first step, we should abandon and replace Batson's 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion." Id. at 53-54. The lead opinion then proposed a rule "to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory . . . ."[10] Id. at 54. Such a standard "would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." Id.

This approach received two definite votes of support from the lead opinion. Justice Chambers, who dissented, would likely embrace such an

[10] It also proposed another rule: "where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised." This is a less useful standard because a defendant's race should not matter when there is a reasonable probability that race was a factor in exercising a peremptory. White defendants and defendants of color alike enjoy an equal protection right to juries selected without racial discrimination. Batson, 476 U.S. at 85-86.

approach, given his view that "Batson ignores the fact that discrimination is discrimination whether it is purposeful or not." Id. at 118 (Chambers, J., dissenting). Justice González, who advocated for elimination of peremptory challenges altogether, would also likely favor a compromise in the meantime that provides at least a better standard than Batson. Chief Justice Madsen, along with one other justice, was reluctant to adopt a new approach because "[w]e have not been asked to reassess or modify the Batson approach or to address any policy-based nonconstitutional analyses or nonpurposeful discrimination based on race during jury selection," suggesting that in another case the "rich tradition of briefing in appellate courts ensures not only that we consider the issues that the parties raise but that we are well informed." Id. at 62-63 (Madsen, C.J., concurring). Even Justice Stephens and the two others joining her, who "sound[ed] a note of restraint amidst the enthusiasm to craft a new solution to the problem," still expressed openness to further exploration of the potential solutions their colleagues offered subject to "observations that g[a]ve [them] pause." Id. at 65-68 (Stephens, J., concurring).

Bowman advocates a new standard now based on his Gunwall analysis of the article I, section 21 jury-trial right and the Saintcalle opinions recognizing the need for a better standard. Based on the greater protection of the right to jury trial article I, section 21 provides—protection that requires

this right to remain inviolate—this court should instruct trial courts to sustain Batson challenges when there is a reasonable probability that race was a factor in the exercise of a peremptory challenge.

c. It was reasonably probable that race was a factor in peremptorily challenging Juror 5

When the State exercised its peremptory challenge of Juror 5, there was a reasonable probability that race was a factor for all the reasons discussed in Part 1 above.

The State's reliance on Juror 5's nephew's incarceration for murder shows that race was probably a factor in the challenge because a nonblack juror also had a family member in prison for murder. Other jurors had family members in prison for other serious crimes. Race was probably a factor in the exercise of the peremptory based on Juror 5's purported difficulty sitting in judgment of others where similar concerns were voiced by other members of the venire. When the State exercises a peremptory against an African American juror for characteristics, opinions, or difficulties shared by white jurors, as a matter of common sense it is reasonably probable that race was a factor in exercising the peremptory.

The prosecution's statement that Juror 5 believed she had an innocent nephew in prison for murder was not supported by the record. The same goes for the prosecution's attribution to Juror 5 that she would not

"make a good juror," given that Juror 5 never actually said this. Proffered reasons for exercising a peremptory strike that are not supported by the record give rise to a reasonable probability that, but for Juror 5's race, the State would not have challenged her.

The State's concerns about Juror 5's discussion of the Apple commercial, her employment, and her inability to track were inconsistent with the State's actual questioning of Juror 5 during voir dire. If the State had truly been concerned about these issues, it would have chosen to follow up in detail about them. Instead, it remained focused on Juror 5's nephew.

The State's disparate questioning of Juror 5 also makes it reasonably probable that race was a factor in challenging her. When the State gives greater attention to a juror of color than to nonminority jurors, and then challenges that juror of color, it suggests race is a factor within a reasonable probability.

Had the trial court considered the defense challenge under the reasonable probability standard rather than under Batson, it would have sustained the defense challenge. The trial court recognized "excluding jurors based on race" was a serious issue and noted "there's a high percentage of minority people that are charged with crimes and yet predominantly we have nonminorities sitting on juries." 11RP 69-70. This "sensitiv[ity] to the issue," 11RP 70, shows the likelihood that the trial court would have likely

sustained the defense's challenge under a reasonable probability standard rather than the more demanding and elusive Batson standard.

In sum, article I, section 21 provides greater protection of the right to trial by jury. This greater protection commands a better standard to begin addressing the real and pernicious reality of racial bias in jury selection. Bowman asks this court to adopt such a standard. If there is a reasonable probability that race was a factor in a peremptory challenge, the peremptory challenge must be denied. In this case, it is clear that race was probably a factor in the State's challenge of Juror 5. This court should reverse and remand for retrial.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT MAKING HIS OWN STRATEGIC DECISION ABOUT WHETHER TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS

When the issue of lesser included offenses arose, defense counsel indicated, "I need to think about this and research it a little bit, but I'm thinking we might want to have a colloquy on the record with Mr. Bowman as to lesser included[s]." 19RP 174. Defense counsel opined, "it's ultimately his decision, not mine. So I need to look into that with him." 19RP 174.

The next court day, the State argued, "The State does not believe that a lesser is warranted, but we would like a statement that that is a strategic

decision. It is ultimately counsel's decision under [State v. Grier,] 171 Wn.2d 17[, 246 P.3d 1260 (2011)]." 20RP 168. Defense counsel stated, "We have not offered any lesser included instructions at the direction of my client." 20RP 168. The State responded, "And I really do want to deal with the lesser included issue as well because [Grier] is quite clear it's counsel's decision. Not defendant's." 20RP 168. Then the following exchange occurred, further elucidating the State's and defense counsel's positions:

> THE COURT: Counsel indicated that he made that choice [not to request a lesser].
>
> [PROSECUTOR]: No. I heard him say at the direction of his client. I just want to make sure the record is clear. That's all.
>
> THE COURT: Well, what in addition to what [defense counsel] said do you think --
>
> [PROSECUTOR]: It's strategic or a tactical decision by [defense counse] not to offer the lesser.
>
> [DEFENSE COUNSEL]: No. It's not. It's my client's decision, and it's his decision ultimately to.
>
> [PROSECUTOR]: 171 Wn.2d 17. If Court could take a look at that.
>
> THE COURT: Will do.

20RP 168-69.

The following day, the court recited its understanding of Grier's holding: "the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her

counsel, but ultimately rests with defense counsel." 21RP 4. The State asserted, "the record needs to show that Mr. Browne has in consultation with his client made this decision, and agrees with the decision, and there's perfectly legitimate reasons to do that." 21RP 4. The State continued, "It's certainly consistent with a defense in this case to not offer a lesser included." 21RP 4-5. Defense counsel stated,

> I read the case. And I read the A[B]A's citation. I have discussed, the record should reflect, that Mr. Lee and I and Mr. Bowman have consulted this issue many times in depth. And as my personal opinion is that ultimately that decision is the defendant's. So Mr. Bowman has made that decision. We all know that he is certainly capable intellectually of making decisions, and I think it could be characterized easily as a tactical decision. One that he has made that because he has made it, I agree with it.

21RP 5. The trial court responded, "I think I'm going to leave it there." 21RP 5.

These exchanges demonstrate that Bowman, not his attorneys, ultimately made the decision to forgo lesser included offense instructions. Thus, on the question of lesser included instructions, Bowman was deprived of an attorney's decision on the issue. In light of Grier, this amounts to ineffective assistance of counsel.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish an ineffective assistance claim, counsel's performance must have been deficient and the deficient performance must

have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

a. Defense counsel's performance was deficient

Counsel rendered deficient performance when he left the ultimate decision not to request lesser included offense instructions to his client. As the State pointed out repeatedly below, "The decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and [his] counsel but ultimately rests with defense counsel." Grier, 171 Wn.2d at 32 (emphasis added). Despite this controlling precedent, defense counsel stated he disagreed with it and therefore refused to make the decision about requesting a lesser included offense. 20RP 174; 21RP 5. Instead, he let Bowman, who is not an attorney, decide. Indeed, defense counsel's comments indicated he would have followed his client's instructions on this issue even in spite of his own contrary opinion. This was not a legitimate tactic or strategy but an unreasonable decision to deprive his

client of his lawyer's professional judgment that the Grier decision contemplates. By refusing to exercise his own judgment as to whether to request lesser included instructions, defense counsel's performance fell below an objectively reasonable standard.

Moreover, there is no reasonable tactic in failing to request lesser included instructions in a self defense case where the attorney plans to argue road rage gone awry. See 21RP 97-98, 111, 115-17. Bowman's testimony was that Noll pursued him through Seattle streets, threw objects at him, swore at him, yelled at him, and made violent and threatening gestures. 19RP 41-66, 138. Bowman also stated Noll appeared to be reaching for something Bowman thought was a gun. 19RP 66. Bowman described being in fear for his life. 19RP 66. Bowman also could not clearly remember the shooting, indicating he experienced a surreal moment that faded in and out at the time of the shooting. 19RP 67-68.

This was the evidence supporting the defense's self defense theory. Under such a theory, "a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, 'but recklessly or negligently used more force than was necessary to repel the attack,' is entitled to an instruction on manslaughter." State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998) (quoting State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)). Based on Bowman's description of the events, the

jury could have believed Bowman acted in the reasonable belief he was in imminent danger, but could have also believed he used more force than necessary to respond to the perceived threat. The evidence that Bowman could not remember the shooting clearly, was in a haze, and shot the gun multiple times supports the manslaughter self defense theory as well. Cf. Schaffer, 135 Wn.2d at 358 ("The additional evidence—that Schaffer shot the victim five times including twice in the back—was sufficient to support a finding that he recklessly or negligently used excessive force to repel the danger he perceived."). But because it had no lesser included instruction on manslaughter, the jury had no option to determine that Bowman acted merely recklessly or negligently and therefore was guilty of a lesser crime than murder in the first degree. The failure to request the instruction was not a reasonable defense strategy under the circumstances.

Moreover, if the court had rejected a proffered manslaughter instruction, this court would reverse under Schaffer. This also strongly demonstrates that counsel's performance fell below an objectively reasonable standard—counsel failed to ask for an instruction that was the most consistent with the self defense theory he advanced.

Counsel was likewise deficient for failing to request a second degree intentional murder instruction. The defense evidence supported a theory that Bowman had not premeditated the murder, even if he still intended to kill

Noll. See State v. Gregory, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006) (holding premeditation element request State to prove "deliberate formation of and reflection upon the intent to take a human life" involving "thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short") (quoting State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991)), overruled in part on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). Bowman stated Noll was chasing him, throwing items, yelling, and making threatening gestures, scaring Bowman and creating a stressful situation. 19RP 41-66. Bowman stated he was fading in and out and could not remember the shooting, only to open his eyes and find a gun in his hand and broken glass after seeing Noll reaching for something Bowman thought was a gun. 19RP 68-69, 73. This evidence supports an argument that even if Bowman had intentionally shot Noll, it was not premeditated. Because defense counsel did not request the lesser included second degree murder instruction consistent with its theory, however, the jury did not have the option of considering whether Bowman was merely guilty of the lesser crime of second degree murder. With the evidence the defense presented, it was not a reasonable strategy not to request a lesser second degree intentional murder instruction.

Defense counsel's performance was deficient for not requesting lesser included instructions on manslaughter and second degree intentional murder.

b. Counsel's deficient performance in not exercising professional judgment regarding lesser included instructions severely undermines confidence in the outcome of trial

The failure to request lesser included instructions creates a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

i. Bowman could have received lesser included second degree murder and manslaughter instructions

Had Bowman requested lesser included instructions, the trial court would have granted the request. In State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), the Washington supreme court established a two-part test to determine whether a party is entitled to a lesser included offense instruction under RCW 10.61.006. First, the court asks whether the lesser included offense consists solely of elements necessary to convict of the greater, charged offense; this is the legal prong of Workman. Id. Second, under Workman's factual prong, the court asks whether the evidence

presented at trial supports an inference that only the lesser offense was committed to the exclusion of the greater, charged offense. Id. at 448. If the answer to both prongs is yes, the requesting party must receive the lesser included offense instruction. Id.

Had Bowman requested a lesser included instruction on second degree intentional murder, the court would have given the instruction. As for the first Workman prong, the Washington Supreme Court recently concluded, "Second degree (intentional) murder is a lesser included offense with respect to aggravated first degree (premeditated) murder under the legal test, because it consists solely of elements that are necessary to conviction of that greater offense." State v. Candon, 182 Wn.2d 307, 318-19 & n.4, 343 P.3d 357 (2015). There can be little question that the first Workman prong is satisfied.

As for the factual prong, the evidence supported an inference that only second degree murder was committed to the exclusion of the charged first degree premeditated murder. Premeditation requires the State to prove "'deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" Gregory, 158 Wn.2d at 817 (alteration in original) (quoting Hoffman, 116 Wn.2d at 82-83). Bowman does not dispute there was evidence from which

a jury could infer premeditation. However, there was also evidence presented that gave rise to an inference that there was no premeditation. No one witnessed the shooting. Bowman testified he did not remember shooting Noll. 19RP 65. He recalled being crouched down, ducking in his car, while Noll angrily yelled. 19RP 64-66. He then remembered Noll turning away and "doing something in his passenger side." 19RP 66. Bowman stated,

> So I remember him -- he was ruffling -- or searching for something and then when he came back -- and I remember him kind of turning back towards me and kind of feeling like that was -- this was the moment, and I -- I was watching his lips as he was yelling at me and then I stopped hearing things. It just went completely quiet. And then a moment, like a -- a half moment later, it just went -- I stopped seeing what was going on . . . . It was . . . completely surreal in, like, a nightmare where you fade from one -- like, there's some horrible thing happening and then it just kind of ends.

19RP 67-68. Bowman then testified his "next memory" was "opening my eyes, seeing that I had the gun in my hand, and . . . my window was broken, and I could see there was . . . a lot of broken glass inside my car." 19RP 68-69. From this testimony, the jury could have inferred that while Bowman may have intended to take Noll's life, everything happened so quickly that he did not have the opportunity to reflect on or weigh his decision to shoot Noll. The jury could have found no premeditation.

Based on this same evidence, Bowman also could have requested and received manslaughter instructions. As discussed above, "[A] defendant

who reasonably believes he is in imminent danger and needs to act in self-defense, 'but recklessly or negligently used more force than was necessary to repel the attack,' is entitled to an instruction on manslaughter." Schaffer, 135 Wn.2d at 358 (quoting Jones, 95 Wn.2d at 623). Bowman testified in detail that Noll was pursuing him from I-5 onto Seattle surface streets, throwing bottles at him, making gun gestures, and yelling, "you're going to get yourself fucked up." 19RP 41-66, 138. From this, alongside Bowman's descriptions of Noll reaching for something, the defense evidence supported a reasonable inference that Bowman, despite not meeting the self defense standard, "acted in the reasonable belief he was in imminent danger" and "recklessly or negligently used excessive force to repel the danger he perceived." Schaffer, 135 Wn.2d at 358.

A request for a lesser included instructions on second degree murder and manslaughter would have compelled the trial court to give them.

ii. *Grier*'s reasoning with respect to *Strickland* prejudice is incorrect and harmful, as the Ninth Circuit recently illustrated

Defense counsel's unreasonable position that it was Bowman's ultimate choice whether to seek lesser included instructions undermines confidence in the outcome of trial.

Our supreme court's decision in Grier essentially foreclosed any showing of Strickland prejudice for failure to request lesser included

instructions. Grier's reasoning, however, is invalid, as the Ninth Circuit Court of Appeals recently recognized. The Strickland prejudice analysis provided in Grier is incorrect and harmful, and this aspect of Grier should be overruled. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

In Grier, the Washington Supreme Court stated,

> Nor can Grier establish prejudice under the second prong of Strickland. Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial. See Strickland, 466 U.S. at 694 ("a court should presume . . . that the judge or jury acted according to law"); Autrey [v. State], 700 N.E.2d [1140,] 1142 [(Ind. 1998)] (availability of manslaughter would not have affected outcome where jury found defendant guilty of murder beyond a reasonable doubt).

Grier, 171 Wn.2d at 43-44. Grier's analysis of Strickland prejudice makes no sense because it eliminates *all* ineffective assistance of counsel claims for failure to request lesser included instructions.

As the Ninth Circuit Court of Appeals recently recognized,

> The Washington Supreme Court's methodology is a patently unreasonable application of Strickland . . . . Strickland did instruct reviewing courts to presume that trial juries act 'according to law,' but the Washington Supreme Court . . . has read far more into that instruction than it fairly supports and, as a result, has sanctioned an approach to

> Strickland that sidesteps the reasonable-probability analysis that Strickland's prejudice prong explicitly requires.

Crace v. Herzog, 798 F.3d 840, 847 (9th Cir. 2015). Strickland "does not require a court to presume . . . that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both." Id. "The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury *necessarily* would have reached the same verdict even if instructed on the an additional lesser included offense." Id. at 847-48.

As the Crace court noted, the infirmity in Grier is that it conflates sufficiency of the evidence and Strickland's prejudice inquiry:

> [U]nder the Washington Supreme Court's approach, a defendant can only show Strickland prejudice when the evidence is insufficient to support the jury's verdict . . . . And conversely, if the evidence is sufficient to support the verdict, there is *categorically* no Strickland error, according to the Washington Supreme Court's logic. By reducing the question to sufficiency of the evidence, the Washington Supreme Court has focused on the wrong question here—one that has nothing to do with Strickland.

Crace, 798 F.3d at 849.

Crace's reasoning is sound whereas Grier's is not. Grier is incorrect. Grier is also harmful because it categorically forecloses challenges to defense counsel's ineffective assistance whenever sufficient evidence supports a guilty verdict. The Grier reasoning removes defense counsel's

unreasonable and unsupportable decisions—and therefore clients' constitutional right to effective assistance of counsel—from judicial scrutiny. Grier's Strickland prejudice analysis must be overruled.

Defense counsel's deficient performance regarding whether to request lesser included instructions undermines confidence in the outcome of trial. Bowman's defense was self defense, based on his version of events. Bowman testified in detail that Noll was chasing him through north Seattle, throwing objects at him, and threatening him with words and gestures. 19RP 41-66. This culminated in Bowman seeing Noll grab for something. 19RP 66. Bowman stated he was scared and that if he did not do something right then, he was going to die. 19RP 66. He described Noll's anger as "just purely violent, wants to kill you, that sort of anger, that's what I got from him." 19RP 67.

Based on Bowman's description of events, defense counsel argued that this was a road rage incident that became out of control. 21RP 97-98, 111, 115-17. Law enforcement witnesses acknowledged they had first believed the shooting was a road rage incident, giving some credence to this theory. 14RP 87-88; 15RP 26; 17RP 98-99; 18RP 128, 137, 170-71. Defense counsel focused on road rage "because road rage by definition is not premeditated." 21RP 98. Defense counsel likewise argued road rage as a way to undermine the State's thrill kill, premeditation theory: "But see, they

know it's a road rage incident. The government does. And they know that they have to come up with another theory. So now they are coming up with this theory about Mr. Bowman in his . . . journal." 21RP 111.

Had defense counsel obtained lesser included instructions for second degree intentional murder or manslaughter, its arguments would have reached much farther. Defense counsel would have been able to argue that even if the jury believed Bowman's actions exceeded a reasonably necessary amount of force, that Bowman had merely acted recklessly or negligently. See Schaffer, 135 Wn.2d at 358. Or defense counsel could have argued that everything happened so quickly that Bowman did not have the moment in time required to form premeditated intent, thereby supporting a lesser conviction of second degree intentional murder.

The jury's only option aside from convicting Bowman of first degree premeditated murder was to acquit him outright. But because the evidence amply supported inferences of both the lesser included offenses of second degree intentional murder or first or second degree manslaughter, there is a reasonable probability that, but for counsel's deficient performance, the jury would have convicted Bowman of one of these lesser crimes. This reasonable probability undermines confidence in the outcome of Bowman's trial. Defense counsel's ineffective assistance requires reversal.

4. THE JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

Bowman's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 25; see also 9RP 15 (preliminary instruction defining reasonable doubt as "one for which a reason exists"). WPIC 4.01 is constitutionally defective.[11]

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.[12]

---

[11] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

[12] See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167

The error in WPIC 4.01 is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of "presume" to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word in instruction).

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable

---

Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

under these definitions it must be rational, logically derived, and have no conflict with reason.[13]

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. However, WPIC 4.01 requires "a reason" for the doubt, which greatly differs from a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on

---

[13] Cf. Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The "doubt for which a reason exists" language in WPIC 4.01 does

just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments "improper impl[y] that the jury must be able to articulate its reasonable doubt" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments sprang directly from WPIC 4.01's plain text. In Anderson, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant

is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Bowman does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the

proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d at 585. This conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" because it "puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case").

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least "until a better instruction is approved." 161 Wn.2d at 318. In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 585. The Kalebaugh court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at

oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt "for which a reason exists" language in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the

unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

Forty years ago, Division Two addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Thompson, 13 Wn. App. at 5.

Thompson's cursory statement is untenable. The first sentence defining reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the

obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat. It did not confront the problem with thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: "It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and

prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).[14] However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[15]

So our supreme court in Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper.

---

[14] The relevant portion of the note cited by Harras is appended to this brief.

[15] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Kalebaugh, 183 Wn.2d at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, "The expression, 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The court explained the meaning of reasonable doubt:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In upholding the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." While the Harsted court noted some courts had disapproved of similar language, it was "impressed" with the view

adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference

between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See 21RP 47 (no defense exceptions to jury instructions). However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 was structural error and requires reversal of Bowman's conviction and a new trial.[16]

5. THE TRIAL COURT'S ERRONEOUS VIEWS OF THE LAW AND THE EVIDENCE DEPRIVED BOWMAN OF HIS RIGHTS TO PRESENT A DEFENSE AND TO COUNSEL

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The defendant, "through counsel, ha[s] a right to be heard in summation of the evidence from the point of view most favorable to him." Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed. 2d

[16] Recently, in State v. Lizarraga, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 8112963 (Dec. 7, 2013), this court upheld WPIC 4.01 against a challenge that it undermined the presumption of innocence and burden of proof. In doing so, this court merely cited Bennett and State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995). Lizarraga, 2015 WL 8112963, at *20. As discussed above, however, Bennett does not dispose of these arguments. Nor does Pirtle, which merely dealt with a challenge to the last sentence of WPIC 4.01, which provided that, if jurors did not have an "abiding belief" in the truth of the charge, they were not satisfied beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656-58.

593 (1975); accord State v. Woolfolk, 95 Wn. App. 541, 549-50, 977 P.2d 1 (1999).

a. The trial court erroneously precluded defense counsel from arguing that, for purposes of assessing Bowman's self defense claim, the jury had to "view things from Mr. Bowman's standpoint"

The standard for evaluating self defense claims "incorporates both objective and subjective elements." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). "The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done." Id. (citing State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)).

The jury was instructed that homicide was justifiable according to this hybrid subjective/objective analysis when "the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident." CP 33 (Instruction 11) (emphasis added). This instruction made clear that the jury must "keep in mind this is all subjective, because you have to view things from Mr. Bowman's

standpoint," as defense counsel argued. 21RP 104. When defense counsel made this proper argument on behalf of his client, the State objected, "This is a misstatement," and the trial court sustained the objection. 21RP 105.

Defense counsel was arguing from the jury instructions that the State bore the burden of proving beyond a reasonable doubt that the homicide was not justifiable and that in assessing the State's proof, the jurors must view the facts and circumstances subjectively from Bowman's point of view. This was an accurate statement of the law. Bowman hoped to legitimately argue that the jurors should place themselves in Bowman's shoes, consider the facts and circumstances Bowman described, and assess the reasonableness of Bowman's use of force from Bowman's perspective.

By sustaining the State's objection, the trial court gave jurors the impression that there was no subjective component to a self defense claim. The trial court confused the issue for the jury, affirmatively misleading jurors into not considering Bowman's self defense claim from Bowman's perspective. This deprived Bowman of the opportunity to present his defense Herring, 422 U.S. at 864.

The self defense claim was central to disputing the State's case, and thus the State cannot show the error was harmless beyond a reasonable doubt. See Woolfolk, 95 Wn. App. at 551 (holding error not harmless because had counsel fully advanced the defense theory, a reasonable jury

might have reached a different result). The trial court's deprivation of counsel and Bowman's right to present a defense requires reversal.

b. The trial court erroneously precluded defense counsel from arguing the State's evidence did not show Bowman was a "student of murder"

In closing, defense counsel also argued,

> If Dinh Bowman was a student of murder because he possessed this manual, and this book, he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car.

21RP 117. The prosecutor stated, "I'm going to object. This is facts not in evidence." 21RP 117. The court sustained the objection.

Again the trial court erred by depriving defense counsel of the opportunity to dispute the State's theory of the case in closing argument. The State's case for premeditation—that this was a thrill kill Bowman had planned in advance—was based primarily on materials it selected out of a reference library on a computer to which Bowman had access. These materials contained information about forensic investigations, how to overcome police investigations and interrogations, and how to avoid detection of criminal activity. See 17RP 61-71; Exs. 249-50. The State cross-examined Bowman regarding the contents of The Death Dealer's Manual and Murder, Inc., attempting to draw parallels between the materials' contents and the contents of one of Bowman's journals. 20RP 73-

95. Bowman repeatedly stated he had not read several of the materials offering advice on how to kill people. 20RP 57, 75, 86-87.

Bowman testified he used his credit card contrary to Murder, Inc.'s advice not to "leave a paper trail. And don't use a check or credit when in transit." 20RP 88-90; Ex. 249, ch. 10.[17] He also testified he had a revolver and about using a semiautomatic rather than a revolver to shoot Noll, contrary to the advice contained in the State's evidence: "if I had thought about something like that and said I didn't want to leave evidence, I think you would be a fool to choose anything but a revolver." 21RP 41-42.

In closing, defense counsel attempted to bolster this line of defense against the State's theory, arguing that Bowman did not follow the advice contained in certain materials to support Bowman's claim that he never read the materials and was not a student of murder.

The State objected to arguments that the materials in question advised, "Don't do anything in broad daylight" and "don't do anything in heavy traffic." 21RP 117. Although Murder, Inc. did not state anything about daylight or heavy traffic, it counseled to avoid identification and eyewitnesses at all costs. Ex. 249, ch. 10. It was a fair defense argument to assert doing "anything in broad daylight" or in "heavy traffic" would increase the risk of eyewitness identification and being noticed, contrary to

[17] Because Exhibit 249 contains no page numbers, this brief refers to its chapter numbers instead.

Murder, Inc.'s advice Counsel also argued, "Three, don't do anything in a flashy car." 21RP 117. This argument contrasted Bowman's driving an expensive BMW convertible with Murder Inc.'s advice, "As a general rule you must always plan to avoid looking out of place, strange, or unexpected. As far as is possible, try to look normal." Ex. 249, ch. 10. Counsel advanced legitimate arguments to dispute the State's characterization of Bowman as a student of murder. The trial court erred in depriving Bowman of the opportunity to present these arguments in his defense.

When it sustained the State's objection, the trial court undermined defense counsel's further arguments about how Bowman did not follow the advice in Murder, Inc. Although defense counsel "continue[d] talking about the factors that do not apply to Mr. Bowman," 21RP 117-18, the trial court's agreement with the State that defense counsel was mischaracterizing the evidence indicated to jurors that defense counsel was not making reasonable arguments or drawing inferences from the evidence that Bowman did not follow the lessons prescribed in the State's evidence. The trial court's limitation on defense counsel's arguments requires reversal.

6. CUMULATIVE ERROR DEPRIVED BOWMAN OF A FAIR TRIAL

Courts reverse a conviction for cumulative error "when there have been several errors that standing alone may not be sufficient to justify

reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Bowman's trial abounded with errors, including the denial of a Batson challenge, ineffective assistance of counsel with regard to requesting lesser included offense instructions, a constitutionally defective instruction on reasonable doubt, and deprivation of Bowman's opportunity to make legitimate closing arguments. If these errors each alone do not require reversal of Bowman's conviction, the cumulative effect of them does.

7. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BY FAILING TO CONSIDER BOWMAN'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS

State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015), held that RCW 10.01.160(3) requires consideration of an individual's ability to pay before imposing discretionary LFOs. "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engage in the required inquiry." Id. at 838; cf. CP 87 (boilerplate). The "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Blazina, 182 Wn.2d at 838.

The trial court failed to make any inquiry into Bowman's current or future ability to pay $665 in discretionary LFOs. Yet the trial court determined Bowman was indigent and permitted him to proceed in forma

pauperis on appeal. CP 104-06. This order stated, "the defendant is unable by reason of poverty to pay for any of the expenses of appellate review." CP 104. Yet the trial court did not consider this indigency when it imposed discretionary LFOs, as RCW 10.01.160(3) mandates.

Instead, the trial court entered a boilerplate finding that "[h]aving considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely ability to pay the financial obligations imposed." CP 87. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. Bowman accordingly asks this court to vacate the LFOs and remand for resentencing.

The State might ask this court to decline review given the Blazina court's statement that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). 182 Wn.2d at 834. Nevertheless, the Blazina court concluded that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id. Asking this court to decline review is asking this court to ignore the serious harms caused by LFOs.

Moreover, if Bowman's claim was waived, it was the result of ineffective assistance of counsel. Counsel's failure to object to the imposition of discretionary LFOs fell below the standard for effective representation. There was no reasonable strategy for not requesting the trial

court to comply with the requirements of RCW 10.01.160(3). E.g., Kyllo, 166 Wn.2d at 862 (counsel has duty to know relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel deficient for failing to recognize and cite appropriate case law).

Counsel's failure to object was prejudicial. As discussed, LFOs cause numerous harms. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have difficulty securing stable housing and employment. LFOs exacerbate these difficulties. Id. at 836-37. There is a substantial likelihood that the trial court would have waived discretionary LFOs had defense counsel objected. This court should vacate the discretionary LFOs and remand for resentencing.

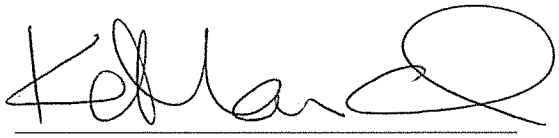
D. CONCLUSION

This court should reverse and remand for a new and fair trial.

DATED this 22d day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Appellant

APPENDIX

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

and no other person, committed the offense:
It is, therefore, error to instruct the jury,
the defendant guilty, although they may not
e, and no other person, committed the alleged
Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

.—In a case where the evidence as to the de-
mstantial, the evidence must lead to the con-
ly as to exclude every reasonable hypothesis
n a case of that kind an instruction in these
fendant is to have the benefit of any doubt.
iblished necessarily lead the mind to the con-
ugh there is a bare possibility that he may
d him guilty." It is not enough that the
mind to a conclusion, for it must be such as
. Men may feel that a conclusion is necessar-
assured, beyond a reasonable doubt, that it is
v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429.
evidence must produce "in" effect "a" rea-
f defendant's guilt is probably as clear, prac-
ordinary juror as if the court had charged
ice "the" effect "of" a reasonable and moral
h a charge is not error: *Loggins* v. *State*, 32
v. *Shaeffer*, 89 Mo. 271, 282, the jury were
ying the rule as to reasonable doubt you will
e facts and circumstances proven can be rea-
heory other than that the defendant is guilty;
in another form, if all the facts and circum-
t be as reasonably reconciled with the theory
at as with the theory that he is guilty, you
favorable to the defendant, and return a ver-
This instruction was held to be erroneous, as
le in a civil case, and not in a criminal one.
fit of a reasonable doubt in criminal cases is
a defendant has in a civil case, with respect
nce. The following is a full, clear, explicit,
capital case turning on circumstantial evi-
you in convicting the defendant in this case,
st not only be consistent with his guilt, but
h his innocence, and such as to exclude every
at of his guilt, for, before you can infer his
lence, the existence of circumstances tending
compatible and inconsistent with any other
at of his guilt"; *Lancaster* v. *State*, 91 Tenn.

fine a reasonable doubt as one that "the jury
or to tell them that it is a doubt for which a
evidence, or want of evidence, can be given,
irts have approved: *Vann* v. *State*, 83 Ga. 44;
Am. St. Rep. 145; *United States* v. *Cassidy*,
ferson, 43 La. Ann. 995; *People* v. *Stubenvoll*,
State, 96 Ala. 93; *United States* v. *Butler*, 1
Jones, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73069-0-I
	)	
THOMASDINH BOWMAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REVISED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMASDINH BOWMAN
DOC NO. 379719
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JANUARY, 2016.

X Patrick Mayovsky