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COURT OF APPEALS NO. 79734-4-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION ONE

ARLAND ABBOTT,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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

The Honorable Samuel S. Chung, Judge

PETITION FOR REVIEW

JAMES R. DIXON
Attorney for Appellant

Dixon & Cannon, Ltd.
601 Union Street, Suite 3230
Seattle, WA 98101
(206) 957-2247

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A. IDENTITY OF PETITIONER

Petitioner Arland Abbott, appellant below, ask this Court to review the decision of the court of appeals referred to in Section B below.

B. COURT OF APPEALS DECISION

Division One of the court of appeals affirmed Mr. Abbott's conviction for indecent liberties. *State v. Arland Abbott,* (Slip Op. No. 79734-4-I, filed November 9, 2020).

C. INTRODUCTION TO THE CASE AND ISSUES PRESENTED

Arland Abbott is a black American. He worked as a massage therapist. His coworker, a white female, alleged that Mr. Abbott touched her genital area while giving her a massage. The State charged Mr. Abbott with indecent liberties.

Out of jury venue of approximately 80 potential jurors, only one was a black American. He was excused early in the process for a hardship. Outside the presence of the jury, defense counsel repeatedly noted and objected to the absence of black American jurors. The court responded that it would be too difficult to bring in additional jurors. As a result, there were no black jurors participating in the jury selection process, a fact that caused one of the potential jurors to express her concern during voir dire.

These issues are presented for review:

1. "Implicit racial bias is a unique problem that requires tailored solutions."[1] This is particularly problematic in sex cases involving black American men, where wrongful convictions are much higher for black defendants. Studies reveal that the presence of black jurors in the jury process significantly reduce the risk of wrongful convictions. This petition raises the issues of whether the absence of black jurors deprives a criminal defendant of his right to a fair trial, or whether the outdated "systemic exclusion" test must be satisfied to establish a constitutional violation. Is review appropriate under RAP 13.4(b)(1), (2) & (4)?

2. Defense counsel introduced evidence that the complaining witness had successfully sued the owners of the massage studio and Mr. Abbott, receiving a $60,000 settlement. This left the jury with the impression that Mr. Abbott had conceded wrongful conduct when he paid the complaining witness. In a close case, was Mr. Abbott deprived of his Sixth Amendment right to the effective assistance of counsel?

3. In closing argument, the prosecutor minimized proof beyond a reasonable by equating it with mere belief. Confused, the jury sent out a question on the meaning of abiding belief, to which the judge referred them

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[1] *State v. Berhe*, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019).

back to the instructions. Did the prosecutor's misconduct and defense counsel's failure to object deprive Mr. Abbott of his constitutional right to a fair trial?

D. STATEMENT OF FACTS

1. Overview of Trial Testimony

It was May of 2017 and APR was not happy. She was working at Elements Massage in Bellevue as a licensed massage therapist. A recent graduate from massage school, she had been unemployable for two months before getting this job at Elements a little more than a year ago. RP 404. This was her first and only massage job since graduation. *Id.*

She had liked working at Elements, but recently things were not going too well for her. RP 530-31. She claimed that she was being sexually harassed by Aaron Hutchinson, another massage therapist at Elements, and that her complaints were not being taken seriously. RP 478. APR had also recently received a note from another therapist at Elements named Arianna, who was refusing to give her a massage. APR did not like the tone of the note. She was upset and complained to the manager that Arianna was being standoffish to her. RP 531. There was a work meeting coming up in a few days and APR was afraid she would lose her job. RP 530.

Before that meeting occurred, however, APR claimed that yet another massage therapist at Elements had mistreated her. This time she

asserted that Arland Abbott had "swiped" his hand across the underwear covering her genital area. RP 532. She did not make this claim at the time. Rather, following the massage, Mr. Abbott and APR left the studio together. RP 600. In fact, she waited for him at the front desk to give him a lift while he cleaned up the room. RP 539. Serena Tang, who was working the front desk saw them leave together. She observed that everyone was happy and APR was smiling as she left. Ms. Tang was pretty sure APR left a gratuity for Mr. Abbott. RP 600-601.

When APR was later asked about why she said nothing to anybody at the time, APR responded, "I didn't realize I had been sexually assaulted until I had time to process it." RP 439. According to APR, she drove Mr. Abbott to a dispensary, the bank, Starbucks, and then back to Elements. This was inaccurate, however, as Ms. Tang was working the front desk that day and Mr. Abbott did not come back to Elements after he left with APR. RP 601.

According to APR, Mr. Abbott told her in the car that the last part of the massage was not an accident. RP 474. He then told her he was joking. RP 476, 544. She was not sure what to believe. When she arrived home, she spoke with her fiancé who insisted that she report it. RP 393. She did so, which led to the police investigation. The owner of Elements Massage contacted Mr. Abbott and informed him that an accusation had been made

against him. RP 553. Mr. Abbott was polite, very gracious, and adamant he had done nothing inappropriate. *Id.*

2. Voir Dire

Mr. Abbott is a black American. RPVD 23. On December 4, 2018, fifty potential jurors were brought to the courtroom. CP 58, RPVD 23. Outside the presence of the jury, defense counsel expressed concerned at the lack of black American members in the jury pool.

> One thing maybe I should put on the record at this point. The jury pool that we've had, it – it appears that there may be two or three people of color on the panel. It appears that there is only one person who is an African American on the entire panel of 50 that we have today. Obviously, for the record I just need to make sure it's clear that my client is African American.
>
> I have grave concern that the panel that we have does not represent the community, and that therefore, would deny my client his constitutional right to a fair trial of his peers. And so I just thought it was appropriate that I put that – those facts on the record at this point.

RPVD 23. Defense counsel noted that because additional jurors were being brought in the next day to supplement the jury pool, the problem might be resolved. *Id.* The court responded, "we'll see how we do tomorrow." *Id.*

Unfortunately, the racial compensation of the new jurors brought in the next day did little to alleviate defense counsel's concern. Defense counsel again raised an objection:

> Additionally, Your Honor, I rose yesterday a concern about the jury pool. And as I indicated yesterday, my – my client

> is African American. It appears – it raised an issue regarding the lack of diversity on the panel yesterday. The – the additional 30 jurors that we have today, it appears that there's only one person of color in the rest of the 30. Again, I have concerns regarding the make-up of – of the – the panel that we have. *And I need to preserve that objection and concern for the record, You Honor.*

RPVD at 91-92 (emphasis added) The trial court did not respond other than to note the objection with an "all right." *Id.*

During voir dire, Juror number 68 stated that she would be concerned if she was sitting in the defendant's shoes:

> *Juror Number 68*: Yeah, I've got to – I've got to say if I was sitting in that seat and I looked around, and everybody was a different color than me, I'd be nervous.
>
> *Mr. Peaquin*: Why?
>
> *Juror Number 68*: Because, it's just human nature. We all have implicit biases. I mean we – we're going to try our best. By all the answers I've heard, we sound like pretty reasonable people. But come on, I would be nervous.
>
> . . .
>
> *Juror Number 68*: There's supposed to be a juror – a jury of your peers, right?
>
> *Mr. Peaquin*: Uh huh.
>
> *Juror Number 68*: Peers usually look like you.

RPVD 318-19. Voir dire continued. Before preemptory strikes began, defense counsel requested a side bar at which he again objected to the lack of black American jurors in the pool. RP 146, 150-51. After the jury was

selected. With the jurors now gone, the court made a record of the defense side bar:

> *The Court*: Mr. Peaquin asked for a side bar on the issue of the jury pool again. And I told Mr. Peaquin that I begged to differ on the issue of having any African American jurors, because I think that we had one juror from Arkansas who stated that he was harassed by the police for not being–the wrong side of town.
>
> *Mr. Peaquin*: Actually, Your Honor, I think that individual was actually – he appeared to me to be Caucasian. I believe he was referring to in Arkansas, he was a white person going into a black neighborhood and he was stopped.
>
> *The Court*: You know, it's hard to tell from this angle what color or race he is. But you know, you can make the record, I made the record from what I understood. Anything else?
>
> *Mr. Peaquin*: That's it. Your Honor, the only thing I just wanted to indicate, there had originally one person who appeared to be African American, but on our pool, I believe he was excused for hardship yesterday. So on the pool we have now, I think there are maybe a few people who are of color, but none those individuals appear to be African American. I just wanted to make sure our record was clear on that.

RP 150-51. After more discussion, the court stated that it was very difficult to supplement a panel at this point. RP 152.

3. The Civil Settlement

Defense counsel told the court that he wanted to introduce evidence that APR filed a lawsuit against the massage studio where Mr. Abbott worked and received a $60,000 settlement. Defense counsel was not concerned about a negative inference against Mr. Abbott because he was

not a party to the civil suit. The State indicated that it would not introduce the evidence, unless the defense intended to do so. The court expressed concern:

> But you know, obviously both of you know that it – it has impacts on the jurors' mind as about culpability issues, and liability issues, even though Mr. Abbott may not have been involved. So I'm just concerned about how this will play out in front of the jury. And you know, $60,000 is not chump change, it's a significant sum for a lot of these jurors. So we'll have to see.

RP 32. The parties returned to the issue on December 6th, before voir dire was complete. The defense had been provided a copy of the civil complaint by the prosecutor and saw that Mr. Abbott had been named, but it appeared he had not been served. RP 139-40. Defense counsel did not withdraw his intent to use the evidence.

The prosecutor told the jury they would hear that APR "filed a civil lawsuit against Mr. Abbott and Elements Massage, and that case settled. It settled out of court for $60,000." RP 301. The defense did not mention the lawsuit in its opening statement.

In direct testimony, APR testified that she filed a civil suit against the two owners and Mr. Abbott and that the case settled for $60,000. RP 486-87. Following APR's direct examination, defense counsel expressed concern to the court because "the jury is left with the conclusion that somehow Mister—Mr. Abbott was making some type of an admission by

making a civil settlement." RP 493. Defense counsel, however, did not ask any follow up questions clarifying that Mr. Abbott was not served and did not pay any part of that settlement.

4. The Abiding Belief Instruction and Closing Argument

The court instructed the jury with the standard WPIC 4.01 reasonable doubt instruction, with the bracketed "abiding belief" language included. CP 84.

In closing, the prosecutor relied upon this instruction to equate a mere belief in a witness's testimony to proof beyond a reasonable doubt. She told the jury in rebuttal that if they believe APR that is enough:

> That is different than might. That is different than maybe. That is I believe her. This happened, and that is an abiding belief. And an abiding belief is beyond a reasonable doubt.

RP 652. Despite the fact that the prosecutor just described the civil standard of proof, defense counsel did not object.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The absence of black Americans in the jury venue deprived Mr. Abbott of a jury of his peers under the state and federal constitutions.

How courts think about the role of race in jury trials continues to evolve. Initially, only systematic exclusion of an entire class was prohibited. *See Swain v. Alabama*, 380 U.S. 202, 222, 85 S. Ct. 824, 837, 13 L. Ed. 2d 759 (1965). Then the courts prohibited peremptory strikes against

individual jurors based on an attorney's subjective racial animus. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Washington courts modified this to permit such a finding based on a single striking of a black juror. *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008).[2]

Batson and its federal progeny have focused upon "purposeful discrimination." In recent years, this Court has become increasingly concerned with this approach as it ignores the reality that "racism is often unintentional, institutional, or unconscious." *State v. Saintcalle,* 178 Wn.2d 34, 36, 309 P.3d 326 (2013)*, abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). To better protect against racial bias, this Court abandoned the requirement of a subjective discriminatory intent in favor of an objective standard. *State v. Jefferson,* 192 Wn.2d 225, 252, 429 P.3d 467 (2018). The question became whether "an objective observer *could* view race as *a* factor" in the attorney's decision. *Id.* (emphasis added).

This Court's sensitivity to unconscious racial bias in the court room is not limited to attorney conduct. With increased awareness, this Court in *State v. Berhe* recognized the special dangers posed by conscious or subconscious racial bias in jury deliberations. *State v. Berhe*, 193 Wn.2d

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[2] Mr. Abbott's briefs at the court of appeals document this development in more detail.

647, 657, 444 P.3d 1172, 1178 (2019) ("implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness."); See also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 Duke L.J. 345 (2007) ("implicit racial biases affect the way judges and jurors encode, store, and recall relevant case facts.") This has led to special rules for evaluating claims of racial bias or prejudice during jury deliberation. As this Court explained, "Implicit racial bias is a unique problem that requires tailored solutions." *Id.* at 663.

In the opening brief, Mr. Abbott argued that the Washington Constitution provided greater protection in this area than the federal constitution. The court of appeals, however, refused to consider these arguments in the absence of a *State v. Gunwall*, 106 Wn.2d 529, 940 P.2d 546 (1997) analysis. In so ruling, the court of appeals ignored cases from this Court holding that repeated applications of *Gunwall* are unnecessary. *See e.g. Madison v. State*, 161 Wn.2d 85, 94–95, 163 P.3d 757 (2007) ("Once this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, it is unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis.")

In *State v. Hicks*, *supra*, the Washington Supreme Court addressed a trial court could find a prima facie pattern of racial bias when the prosecutor excluded the single black juror. Under the federal cases construing *Batson*, more was required. In support of the defense, the American Civil Liberties Union of Washington submitted an amicus brief containing an analysis of Article 1, section 22. *State v Hicks,* 163 Wn.2d at 492. This Court specifically recognized the state constitution provided greater protection:

> The increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group.

Id. *See also, Saintcalle,* 178 Wn.2d at 5 ("We can also extend greater-than-federal *Batson* protections to defendants under the greater protection afforded under our state jury trial right, a fact we recognized in *Hicks")*.

Because this Court has already recognized that the state constitution provides greater protection than its federal counterpart in ensuring a trial free of racial bias, a *Gunwall* is not needed. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (rigid *Gunwall* approach resembles "antiquated writ system where parties may lose their constitutional rights by failing to incant correctly").

The court of appeals decision to the contrary makes review appropriate under RAP 13.4(b)(1).

Moreover, if additional analysis of the state constitution law is needed to determine protection against racial bias, then *Gunwall*, with its historical focus, would be a poor instrument for making that determination. As Justice Gonzales explained, "A long standing but antiquated legal tradition should never bind us to the paramount need to ensure that our trial procedures are just. *Nor should any progress we have made blind us to the need for further progress*." *Saintcalle*, 178 Wn.2d at 75-76 (Gonzales concurring) (emphasis added).

As this Court recently noted in a letter to the judiciary and legal community, "Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed." This Court continued, "Too often in the legal profession, we feel bound by tradition and the way things have "always" been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly."[3] In this context, the historical focus of a *Gunwall* analysis shines

[3] Letter from the Wash. State Supreme Court to the Members of the Judiciary and the Legal Cmty. 1 (June 4, 2020) (addressing racial injustice).

little light on whether the Washington constitution provides additional protection against racial bias.

The one *Gunwall* factor that remains relevant to this issue is factor six, which looks at state interest and local concern. As recent cases from this Court make clear, there is a particularly strong local concern given the documented racial disparities in Washington's criminal justice system, and the need for this state to have the freedom to remedy both racial bias in the jury. The answer is not in a national standardized procedure, as that is unlikely to occur. The answer must lie with lawyers and judges in each state determining what steps must be taken to ensure a bias free jury. The state constitution provides that necessary protection.

And that protection is certainly needed to address racial bias. Multiple studies and scholarly articles have demonstrated that the harmful stereotypes and biases against black Americans result in a high rate of false convictions, particularly as to sex offenses.[4] Fortunately, studies have documented how the presence of even one black American significantly reduces the risk of wrongful convictions. For instance, a Michigan Law Review article cited studies demonstrating that white subjects "were more

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[4] *See e.g.,* https://www.law.umich.edu/special/exoneration/Documents/RaceReport2.7.pdf (University of Michigan Law School study revealing a black prisoner serving time for a sexual assault is 3.5 times likely to be innocent than a white sexual assault convict.)

likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty," but that after deliberation between juror members of different ethnic groups, "the jurors' ethnicity no longer exerted a significant influence on their verdicts." Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1626-29 (1985) (citing Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 Hispanic J. Behav. Sci. 275, 282 (1983)). See also, Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 81 (1993) (Diverse racial backgrounds can influence a juror's judgment of whether any given story is a reasonable explanation of events.)

As discussed in Mr. Abbott's earlier briefs, the focus of state and federal cases involving racial bias have changed over time. Initially, the focus was on systemic issues of prejudice. This evolved into an examination of whether implicit bias impacted the justice system in an individual case.

The State and Mr. Abbott present competing views of the Court's role and state constitution in ensuring a fair trial. Is the Court's goal to simply prevent discrimination by attorneys during voir dire, or is it to promote jury trials free of racial bias? While the State wishes to focus on the former, the Washington Supreme Court's decision in *State v. Berhe*, *supra*, reveals a commitment to the latter. Caselaw should be interpreted

and applied in a way that promotes bias-free, fair trials. The court of appeals failed to do so. In addition to violating Mr. Abbott's rights under the federal and state constitution, the issue presented in this appeal is an issue of great public importance. Review is appropriate under RAP 13.4(b)(1), (3) & (4).

2. Informing the jury that a successful civil suit had been brought against Mr. Abbott and the owners of the massage studio resulting in a $60,000 settlement was not a "reasonable defense trial strategy."

The federal and state constitutions guarantee all criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The judge tried to warn defense counsel this settlement evidence was dangerous for the defense case. The judge told defense counsel that even without Mr. Abbott being named in the suit, a jury might well draw inferences of guilt based on a $60,000 settlement offer. RP 32. Of course, unbeknownst to defense counsel due to a lack of investigation, Mr. Abbott was a defendant in the civil suit. As a result, the jury heard Mr. Abbott had

apparently acknowledged his guilt. As the judge pointed out, "$60,000 is not chump change, it's a significant sum for a lot of these jurors."

The court of appeals characterized this as a defense strategy to establish APR's financial motive. While this was unquestionably a defense strategy, "not all defense counsel's strategies or tactics are immune from attack." *In re Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

A jury would naturally see the $60,000 payment as evidence of guilt. See e.g., *States v. Hays*, 872 F.2d 582, 589 (5th Cir. 1989) ("It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back.")

But even if the jury believed the owners of the business had paid the money, the evidence would still be highly damaging to the defense. A jury would assume that no company would pay that sum of money unless they had first investigated the matter and concluded that Mr. Abbott had committed the offense. As described in the opening brief, putting aside the fact that it was a white woman accusing a black man, this was not a strong case for the State. APR was not a credible witness. But even with this

damning settlement evidence admitted, the jury still took two days to return a guilty verdict. There is a reasonable probability that, but for defense counsel's serious mistakes, the jury would not have returned a guilty verdict. Ineffective assistance of counsel denied Mr. Abbott of his Sixth Amendment right to the effective assistance of counsel. Review is appropriate under RAP 13.4(b)(3).

3. The prosecutor deprived Mr. Abbott of a fair trial when she misrepresented the standard of proof necessary for a conviction.

The presumption of innocence and corresponding burden of proof beyond a reasonable doubt are the "bedrock[s] upon which [our] criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *accord In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To mislead the jury regarding these fundamental principles is prejudicial because it reduces the State's burden of proof and undermines a defendant's rights to due process. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). To do so violates both the state and federal constitutions.

Here the prosecutor told the jury that the State has met its burden if the jury believed APR:

> That is different than might. That is different than maybe. That is I believe her. This happened, and that is an abiding belief. And an abiding belief is beyond a reasonable doubt.

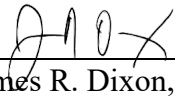
RP 607. With this argument, the prosecutor subtly transforms proof beyond a reasonable doubt into the preponderance of the evidence standard used in a civil case. To prevail in a civil case, the plaintiff must establish that a particular act occurred. Not "maybe" or "might have." Rather, the jury must find that the act occurred. In other words, the same standard as what the prosecutor was characterizing as proof beyond a reasonable doubt.

The definition supplied by the prosecutor lacks the hallmarks of proof beyond a reasonable doubt. There is no discussion as to the strength of the belief or that it is a belief that will endure. The prosecutor simply removed the word abiding, making proof beyond a reasonable doubt nothing more than a mere belief in a witness's testimony. This obviously confused the jury, as evidence by the jury question asking for a more complete instruction on "abiding belief." By undercutting the meaning of proof beyond a reasonable doubt, the prosecutor watered down the proof required for a conviction. By not objecting, defense counsel deprived Mr. Abbott of a fair trial. Review is appropriate under RAP 13.4(b)(3).

F. CONCLUSION

Petitioner respectfully asks this Court to accept review.

Respectfully submitted: December 9, 2020



James R. Dixon, WSBA 18014
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARLAND DECASTRO ABBOTT, Appellant.	No. 79734-4-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The State charged Arland Abbott with indecent liberties. Only one potential juror in his venire, and no empaneled juror, was African American. The jury found Abbott guilty as charged. Abbott appeals.

To demonstrate that a jury does not represent a fair cross-section of the community, a defendant must establish that systematic exclusion led to the underrepresentation of a distinctive group. Abbott does not satisfy this requirement. Nor does he establish his claims of ineffective assistance of counsel or prosecutorial misconduct. We affirm.

BACKGROUND

Abbott worked as a massage therapist. His coworker alleged that he touched her genital area while giving her a massage. The State charged Abbott with indecent liberties.

Abbott is African American. During voir dire, Abbott's counsel noted to the trial court that, of the jurors in the pool, only "two or three" appeared to be people

of color, and that only one person appeared to be African American. Defense counsel stated that he had "grave concern that the panel . . . does not represent the community, and that therefore, would deny [Abbott] his constitutional right to a fair trial of his peers." Abbott did not move to supplement the venire, and the trial court did not do so. Once the court empaneled the jury, defense counsel noted for the record that a few jurors appeared to be people of color, but none appeared to be African American.

Before trial, defense counsel, the State, and the court discussed a $60,000 settlement between the victim and Abbott's employer. Defense counsel said that he considered the settlement evidence relevant because it supported an inference that the victim had a financial motive for her allegations against Abbott, and that he planned to ask her about it on cross-examination. Defense counsel also said that he did not believe that Abbott was a party to the suit underlying the settlement. The State indicated that if Abbott's counsel planned to ask the victim about the settlement, it would bring it up during its case in chief and ask the victim about the settlement on direct examination. The trial court warned defense counsel that the jury might infer guilt based on the settlement.

Later, but still before trial, defense counsel learned that Abbott was a named party to the suit but had not been served. Defense counsel did not move to exclude the settlement evidence.

The State referred to the settlement in its opening statement, stating: "You're also going to learn from [the victim] that she filed a civil lawsuit against

Mr. Abbott and [his employer], and that case settled. It settled out of court for $60,000." In his opening statement, defense counsel implied the victim had a financial motivation for her allegations. During direct examination of the victim, the State asked about the settlement and who she sued—the victim responded that she sued Abbott, among others.

Then, outside the presence of the jury, defense counsel expressed concern to the court that the jury may have the impression that Abbott was served with the suit and contributed to the $60,000 payment. Defense counsel asked the court for permission to ask the victim if she knew if Abbott had been served with the suit or if he had contributed to the payment. The trial court stated it would allow those questions if the victim knew the answers. The trial court also warned that asking such questions risked opening the door to prejudicial information. Abbott's counsel ultimately did not ask the victim any questions about the settlement.

During closing argument, defense counsel continued to pursue the financial motivation theory and stated that there were "60,000 reasons" why the victim might have made her allegations. The State, in its closing argument, indicated that the jury could find Abbott guilty if it believed the victim's testimony about his conduct.

The jury found Abbott guilty as charged.

ANALYSIS

Abbott makes three claims that he says warrant reversal of his conviction. First, he says that his jury was unconstitutionally under representative of the community. Second, he says that his trial counsel performed ineffectively with respect to evidence of the $60,000 settlement. And third, he says that the State committed prosecutorial misconduct in closing argument.

A. Jury Composition

Abbott says that the trial court violated his state and federal constitutional right to a jury of his peers because only one of the potential jurors was African American. The State responds that Abbott has no constitutional right to a jury of any particular composition and that he has not shown the jury composition violated his constitutional rights. We conclude that Abbott has not borne his burden of establishing that its composition violated his constitutional rights.

Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has a right to a jury that is representative of their community. State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977) (citing Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); Smith v. Texas, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940)). The defendant bears the burden of establishing that the jury selection process—in this context, meaning how the court selects potential jurors from the community—is constitutionally invalid. Hilliard, 89 Wn.2d at 440.

To demonstrate that a jury is not a fair cross-section of the community in violation of the federal constitution, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

State v. Cienfuegos, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001) (quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)). A mere showing of underrepresentation is insufficient to establish that the representation is not "fair and reasonable." In re Pers. Restraint of Yates, 177 Wn.2d 1, 20–21, 296 P.3d 872 (2013). And a showing of underrepresentation does not establish systematic exclusion of the group in the jury selection process. Duren, 439 U.S. at 366, 99 S. Ct. 664. To show systematic exclusion, the defendant must establish that the underrepresentation is inherent in the jury selection process used, as by showing that venires, over time, are continually under representative. See id. (concluding that the defendant established women's underrepresentation where he showed they were underrepresented in every weekly venire for over a year).

The parties do not dispute that African Americans are a distinctive group in King County. But even assuming unfair and unreasonable representation of African Americans, Abbott has not established that any disparity flows from

systematic exclusion.[1] He claims that "the disparity between the black population of King County and the number of black jurors in the pool speaks for itself in establishing systematic exclusion." But again, underrepresentation on its own does not establish systematic exclusion of the group in the jury selection process. Duren, 439 U.S. at 366, 99 S. Ct. 664.[2] To demonstrate systematic exclusion, the claimant must show that the underrepresentation inheres in the jury selection process, and Abbott does not attempt to do so. See Duren, 439 U.S. at 366, 99 S. Ct. 664. Because Abbott has not established this element, his fair cross-section claim fails.

Abbott also claims that the composition of his jury violated Washington law. But no law he cites establishes a separate state law standard for fair-cross section claims. Abbott cites GR 37, which seeks to prevent use of peremptory challenges to exclude potential jurors based on their race or ethnicity; but he does not claim error in the State's use of peremptory challenges. Abbott also cites State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019), which addresses allegations that a juror's racial bias affected the verdict; but he does not allege the jurors who served on his jury held racial bias. These authorities do not

[1] Abbott also says that courts have "moved away" from the inquiry of whether systematic exclusion has occurred. But no law establishes that he need not show systematic exclusion in the context of a fair cross-section claim.

[2] See also State v. Lopez-Ramirez, noted at 2 Wn. App. 2d 1032, 2018 WL 827172 at *6 ("A mere showing of underrepresentation does not establish systematic exclusion of the group in the jury selection process."); State v. Suarez, noted at 143 Wn. App. 1020, 2008 WL 501927 at *1–2 (rejecting systemic exclusion claim where claimant offered no evidence besides underrepresentation); State v. Sherman, noted at 166 Wn. App. 1039, 2012 WL 629434 at *5 (same); but see GR 14.1 ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.")

establish that a separate state constitutional standard exists for fair cross-section claims. And as noted by the State, Abbott does not argue for a separate state constitutional standard under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). See, e.g., State v. Brown, 132 Wn.2d 529, 594, 940 P.2d 546 (1997) ("Whether the Washington Constitution should be independently analyzed as granting more protection than the federal constitution is determined by examining six nonexclusive factors set forth in State v. Gunwall.").[3]

B. Counsel's Performance

Abbott says that his counsel performed ineffectively with respect to the $60,000 settlement. He says that defense counsel should have investigated whether Abbott was a named party in the suit. He also says that upon learning that Abbott was a named party, counsel should have either moved to exclude the settlement evidence or introduced evidence showing that Abbott did not pay the settlement. The State counters that Abbott's trial counsel pursued a reasonable but unsuccessful strategy. We conclude that Abbott has not shown his trial counsel's performance fell below an objective standard of reasonableness.

We presume effective representation, and the defendant bears the burden of showing ineffective assistance. State v. Chavez, 162 Wn. App. 431, 437–38,

[3] Abbott cites State v. Saintcalle for the proposition that a Gunwall analysis is unnecessary here. 178 Wn.2d 34, 51, 309 P.3d 623 (2013), abrogated by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1112 (2017). In Saintcalle, our Supreme Court stated that it had the ability to expand Batson (Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)) protections beyond a federal minimum but chose not to do so. 188 Wn.2d at 51–55. Saintcalle does not stand for the proposition that state courts may expand state constitutional rights beyond a federal minimum without first conducting a Gunwall analysis.

257 P.3d 1114 (2011). To prevail on such a claim, a defendant must show their "lawyer's representation fell 'below an objective standard of reasonableness' and the 'deficient representation prejudiced the defendant.'" Id. at 438 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). We will not conclude that trial counsel performed ineffectively if "the actions of counsel complained of go to the theory of the case or to trial tactics." In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 141, 385 P.3d 135 (2016) (quoting State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). But where the claimant shows that no conceivably legitimate tactic explains counsel's performance, they may overcome the presumption that counsel performed effectively. Caldellis, 187 Wn.2d at 141.

Abbott claims his trial counsel failed to investigate whether he was a named party in the lawsuit from which the settlement arose, and that this failure constituted ineffective assistance. He also claims the failure to move to exclude the evidence after this discovery constituted ineffective assistance. We disagree.

A failure to investigate may constitute ineffective assistance of counsel. State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). But Abbott's argument fails because, before trial, defense counsel discovered that Abbott was a party to the lawsuit. And despite this knowledge, defense counsel continued to pursue his conceivably legitimate strategy of portraying the victim as having a financial motive for her allegations. Thus, we conclude that Abbott has not established deficient representation under this theory.

Abbott also claims his trial counsel performed ineffectively by failing to introduce evidence that he did not contribute to the settlement. But the trial court warned Abbott's trial counsel that he risked opening the door to additional prejudicial evidence if he asked the victim about the settlement on cross-examination:

> I'm assuming that if the [victim] could answer [whether Abbott was served and paid the settlement], that will be fine with this Court, with me. And—and to the extent that she knows—she may not know whether he was served or he paid any portion of it. But I think those are fair questions.
>
> But if you ask [the victim] why did you file a lawsuit and she starts talking about other complaints that—that may have been alleged against [Abbott], I think you have to watch out for that. And I can't stop her from talking about that. . . . So it's up to you what questions to ask. And when she starts talking about it, I mean I think you are opening your own door that you can't argue prejudice based on that.

The State also indicated that asking further questions about the settlement might open the door to prejudicial information. It asserted that the civil complaint stated that others had made complaints about Abbott's conduct and that her complaint alleged negligence against the employer, presumably for their treatment of those complaints. And indeed, introducing evidence that Abbott did not contribute to the settlement would risk opening the door to prejudicial information, such as why the victim would accept such a resolution of the civil matter. Given the trial court's warning, defense counsel had a conceivably legitimate purpose in deciding not to introduce evidence about who paid the settlement amount.

Nor did defense counsel perform deficiently by pursuing the financial motivation theory even though doing so yielded the testimony about Abbott being

a party to the lawsuit. When the parties discussed this issue before trial, the State did not indicate that it would ask who the victim sued. Only once the State elicited such testimony did the potential need to distance Abbott from the settlement arise. Also, the jury was never told whether Abbott was a party to the settlement agreement, or contributed to the settlement, and the jury instructions told them to apply the law to the facts in evidence.

Because Abbott has not shown his trial counsel performed unreasonably with respect to the settlement evidence, we need not reach the question of prejudice.[4]

C. State's Rebuttal Argument

During the State's rebuttal at closing argument, it stated:

> [I]f you believe her when she says he touched my vagina, if you believe her when she says he asked me, do you feel violated, if you believe her when she says that he told her it was just an accident—it was not an accident, if you believe her, that is testimonial evidence and that is enough [to convict Abbott].
>
> *That is different than might. That is different than maybe. That is I believe her. This happened, and that is an abiding belief. And an abiding belief is beyond a reasonable doubt.*

(Emphasis added.) Abbott says that in making this argument, the State misrepresented its burden of proof, thereby committing prosecutorial misconduct. In the alternative, he says that any failure by his trial counsel to object to the

[4] To show prejudice, a claimant must show the result below would have been different but for the deficient representation. Chavez, 162 Wn. App. at 438. Here, other evidence corroborated the victim's claims, including her testimony about Abbott's assaulting her, and her prompt disclosures to a friend, her fiancé, her manager, and police.

claimed prosecutorial misconduct constituted ineffective assistance of counsel. We disagree.

To show prosecutorial misconduct, "the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). The defendant must prove "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Thorgerson, 172 Wn.2d at 442–43 (alteration in original) (quoting Magers, 164 Wn.2d at 191). "The 'failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Defense counsel's failure to object to allegedly improper remarks made by a prosecutor "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to [the defendant] in the context of the trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

Abbott says that the State's comments transformed its burden of proof beyond a reasonable doubt to a burden of the preponderance of the evidence—

that if the jury believed the victim, it could properly convict him. Abbott did not object to the State's remarks at trial.

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). But no law cited by Abbott shows that this comment was improper or misstated the State's burden. He cites Lindsay, in which our Supreme Court held it was improper for the State to tell the jury to "speak the truth." Id. at 437. And he cites State v. Berube and State v. Emery, in which we and our Supreme Court held the same, respectively. 171 Wn. App. 103, 120–21, 286 P.3d 402 (2012); 174 Wn.2d 741, 760, 278 P.3d 653 (2012). His attempt to equate "speak the truth" with an argument telling the jury that they could find proof beyond a reasonable doubt based on testimonial evidence is unavailing. And RCW 9A.44.020(1) establishes that a jury may base its verdict solely upon an alleged victim's uncorroborated testimonial evidence in an indecent liberties case. See also State v. Johnson, 9 Wn. App. 766, 768, 514 P.2d 1073 (1973).

Even if the comment were improper, we would not conclude that it prejudiced Abbott. We note that Abbott's trial counsel did not object to the claimed misconduct at trial, which strongly suggests that the defense did not view the comment to be critically prejudicial. This court has recognized that a misstatement of the burden of proof may constitute flagrant and ill-intentioned

misconduct. See, e.g., State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). But here, the State did not misstate its burden of proof.

Abbott also says that his trial counsel's failure to object to the statements comprising the claimed misconduct constituted ineffective assistance of counsel. "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). But because the State's remarks were not improper, Abbott's ineffective assistance of counsel claim fails.

We affirm.

Chun, J.

WE CONCUR:

DIXON CANNON, LTD

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