SUPREME COURT NO. 101103-2
COA NO. 82455-4-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANYA MONTGOMERY,

Petitioner.

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

The Honorable Catherine Shaffer, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Anya Montgomery asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Montgomery requests review of the decision in State v. Anya Montgomery, Court of Appeals No. 82455-4-I (slip op. filed June 21, 2022), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Prosecutors are forbidden from using peremptory challenges to remove jurors based on race or ethnicity. For one BIPOC[1] juror, the trial court permitted the prosecutor's exercise of a peremptory challenge without even seeking a race-neutral reason for the challenge, instead supplying its own reason, which itself was invalid because it relied on ethnic stereotype. The

[1] "BIPOC" stands for Black, Indigenous, and people of color.

prosecutor successfully exercised a peremptory challenge on another BIPOC juror who had a close relationship with a person who has been stopped and arrested for a crime. Did the trial court and the prosecutor violate the constitutional and GR 37 standards where (1) the trial court overstepped its role in supplying a supposedly race-neutral reason for one juror, which was not race-neutral anyway, and (2) the prosecutor supplied a presumptively invalid reason for the other juror?

2. The critical issue at trial was whether the jury would credit Montgomery's diminished capacity defense. Did the prosecutor undermine that defense and commit reversible misconduct by arguing to the jury that it was contradictory for the defense expert to claim that Montgomery suffered from diminished capacity while being able to tell right from wrong?

D. STATEMENT OF THE CASE

Anya Montgomery spent the first few years of her life in a Russian orphanage, where she suffered traumatic abuse. RP 1060-61, 1073, 1154. Charles and Anne Meis adopted Montgomery when she was four years old and brought her to the United States. RP 1061. She had severe psychological and behavioral issues. RP 1063-64, 1142. She suffered from reactive attachment disorder and post-traumatic stress disorder. RP 1066, 1127, 1310. The Meises decided to get rid of Montgomery, relinquishing their parental rights in 2005 when she was 12 years old. RP 1076-78, 1137.

In July 2016, Montgomery told her therapist that she wanted to kill her former parents. RP 950. The therapist reported this to law enforcement and Montgomery was sent to a hospital for civil commitment. RP 951, 958, 961, 963, 982, 988, 990.

In August 2016, Montgomery ran toward Charles Meis with a knife as he exited his home. RP 1083-84. The two briefly struggled. RP 1086-88; Ex. 8. Montgomery scratched his stomach through his shirt. RP 1009, 1087. He repeatedly hit Anya in the head with a watering can, continuing to beat her after she lay motionless. RP 1088-89, 1101-02, 1121; Ex. 8.

The police arrived and arrested Montgomery. RP 1006-10. While being interrogated by police, Montgomery stated that she had been physically and sexually abused by the Meises when she lived with them and that she had come back to kill them. RP 1011. She had waited outside the Meis home overnight. RP 1011-12. She had been trying to commit "suicide by cop." RP 1206; Ex. 9.

Montgomery was charged with two counts of attempted first degree murder and felony harassment. CP 284-85. Before jury selection, the trial court announced its intention to take an assertive approach in

addressing peremptory challenges against those with minority status:

> The other thing I'm going to do, folks, is something I've always done, and I think you can do it onscreen just as well as you can in person. I try to keep track of people's minority status, you know, if they're indicating to us that they're LGBTQA or plus or that they're of Latino/Latina origin or that they are black or whatever. Okay? I keep track of that myself in my own notes, and I share those observations with you when the jurors aren't around. I've always done this. And I just keep an eye on the peremptories to make sure that I can see a basis for a peremptory that's exercised that does not have to do with minority status. Okay? I think that's my job still, and so that's something I'll be doing, as well, as we work our way through. And we'll talk about that as we go, but it's hard to, you know, predict what it's going to look like. RP 57.

During voir dire, juror 4 expressed discomfort with the responsibility of deciding the case due to her young age and was unsure if she could do it. RP 251, 276, 301, 323-25.

The court asked if anyone had a family member or close friend who had ever been arrested or accused of a crime. RP 441. Juror 39 responded affirmatively, RP 441, explaining his cousin was arrested for "pot" and got in a scuffle with police; "they basically punched his eyes out, and he had to have eye surgery." RP 448.

Later, the prosecutor asked whether anyone knew someone that was civilly committed. RP 460. Juror 39 responded affirmatively, identifying his cousin as being put into a mental institute due to schizophrenia. RP 464, 466. Juror 39 agreed that his cousin's criminal charge was affected by his mental illness. RP 466. When asked if his cousin was treated fairly by the civil and criminal law system, Juror 39 was unsure: "it's kind of hard to see, like, when you're -- a person you're so close to -- you know, his eyes and face is all bruised. And it's such a terrible situation that -- I mean, it's so hard for me to say I could

be unbiased in that situation, but I can't really say -- yeah, so I'm sorry." RP 467.

At the outset of the peremptory challenge phase, the court identified jurors who were part of a racially cognizable group. RP 759-60. The court noted Juror 4 "identifies as Indian and appears to be of color" and that Juror 39 was "Asian." RP 759-60.

As the parties exercised their peremptory challenges, the following took place:

> MR. DERNBACH: State will challenge Juror No. 4.
> THE COURT: Yeah. And I will say right now that Juror No. 4 indicated a huge amount of trouble even making a decision in this case. I thought it was even Steven as to which of you might challenge this juror, but it has nothing to do with her background as Indian American, by which I mean she appears to be of descent from India, from what she told us. All right. So that was the state's fifth, and that brings in Juror No. 59. RP 764.

The prosecutor also exercised a peremptory on Juror 39:

> MR. DERNBACH: Juror No. 39 and that juror identified as --
> THE COURT: Asian. But that -- also identified as really not wanting to be here because of their systems administration. What's your other concern, if any, about that juror?
> MR. DERNBACH: So that juror had the experience with her cousin who had the mental illness who had --
> THE COURT: That's right.
> MR. DERNBACH: -- been involved in an altercation with police and --
> THE COURT: Right.
> MR. DERNBACH: -- involuntary commitment issues.
> THE COURT: So, again, I see a basis to excuse that is not based on her identification as Asian. RP 763.

Dr. Mark Cunningham, a clinical and forensic psychologist testifying for the defense, opined Montgomery lacked the capacity to form the intent to kill at the time of the offense as a result of being impaired by her reactive attachment disorder and other subsidiary disorders. RP 1254, 1276-77. The jury was instructed on the defense of diminished capacity. CP 198 (Instruction 22). Defense counsel advanced this defense in closing

argument. RP 1662-65. The jury returned guilty verdicts. CP 202-05. The Court of Appeals affirmed. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD TAKE REVIEW BECAUSE THE COURT OF APPEALS MISAPPREHENDED AND MISAPPLIED THE STRINGENT LEGAL STANDARD THAT IS SUPPOSED TO GUARD AGAINST DISCRIMINATION IN THE JURY SELECTION PROCESS.

Racism is the scourge of our criminal justice system. The peremptory challenge process in jury selection is rife with the potential for implicit, unconscious bias. To combat this evil, the Supreme Court modified the traditional constitutional test for measuring discrimination and enacted GR 37. The prosecutor is prohibited from striking a juror if an objective observer who is aware of implicit and institutional racism in jury selection could view race as a factor in the exercise of a peremptory challenge.

At Montgomery's trial, the prosecutor exercised peremptory challenges on two minority jurors. The

prosecutor had the burden to provide a race-neutral explanation for doing so, but the court overstepped its role and supplied a reason for the prosecutor for one of the jurors, and that reason relied on ethnic stereotype. For the other juror, the prosecutor expressed a presumptively invalid reason for removal.

The Court of Appeals nevertheless affirmed, finding no problem with the trial court's actions and no basis to conclude an objective person could view race as a factor in the prosecutor's peremptory challenges. The Court of Appeals misapprehended the standard for assessing these challenges, warranting review under RAP 13.4(b)(3) and (b)(4).[2] The Court of Appeals decision also conflicts with another decision, calling for review under RAP 13.4(b)(2).

[2] The Supreme Court recently granted review in State v. Tesfasilasye-Goitom, No. 100166-5, where the issue is described as such: "In this criminal prosecution for third degree rape, whether the trial court erred in granting the State's motions to peremptorily strike two prospective jurors of color over the defendant's objections on the

a. Overview of the heightened standards designed to prevent discrimination in jury selection.

The law prohibits racial discrimination in jury selection, whether it be by purposeful discrimination, or in the more insidious form of implicit bias. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Jefferson, 192 Wn.2d 225, 229-30, 429 P.3d 467 (2018); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21, 22; GR 37.

Under the modified Batson framework, the relevant question is not whether the proponent of the peremptory strike is acting out of purposeful discrimination, but rather whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." Jefferson, 192 Wn.2d at 249.

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ground that, under GR 37, an objective observer could view race as a factor in the use of those strikes." (available at https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/Jan2022.pdf)

The Supreme Court adopted GR 37 to address deficiencies in the conventional Batson test. Id. at 243. The purpose of GR 37 "is to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). A party, or the court on its own initiative, "may object to the use of a peremptory challenge to raise the issue of improper bias." GR 37(c). After an objection has been raised, the party exercising a peremptory challenge is required to articulate its reasons for doing so. GR 37(d). The court then evaluates the reasons for exercising the challenge under the totality of circumstances. GR 37(e).

If "an objective observer *could* view race or ethnicity as a *factor* in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e) (emphasis added). GR 37(f) defines "objective observer" as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful

discrimination, have resulted in the unfair exclusion of potential jurors in Washington."

b. The court violated Batson and GR 37 in permitting the prosecutor to exercise a peremptory challenge on Juror 39 based on a presumptively invalid reason.

GR 37 lists "presumptively invalid reasons for a peremptory challenge" that have historically "been associated with improper discrimination in jury selection in Washington State." GR 37(h). One presumptively invalid reason is "having a close relationship with people who have been stopped, arrested, or convicted of a crime." GR 37(h)(iii).

That reason is implicated here. Juror 39's concern was with the police who punched his cousin's eyes out over an arrest for marijuana. Juror 39 thought the police treated his cousin poorly. RP 448, 467. Juror 39 had a close relationship with someone who was stopped and arrested for a crime, triggering GR 37(h)(iii).

The prosecutor's reason for exercising a peremptory challenge on Juror 39 was that the "juror had the experience with her cousin who had the mental illness who had . . . *been involved in an altercation with police* and -- involuntary commitment issues." RP 763 (emphasis added). This is a presumptively invalid reason because it involves juror 39 "having a close relationship with people who have been stopped, arrested, or convicted of a crime." GR 37(h)(iii). The court erred in failing to recognize the prosecutor proffered a presumptively invalid reason and permitting the prosecutor to remove this juror.

The Court of Appeals nevertheless concluded "the State's reason was not presumptively invalid" and "an objective observer could not view race or ethnicity as a factor in the use of the challenge against Juror 39." Slip op. at 8-9. It opined "[t]his was not an instance where a juror was *simply* connected to a person that had had

some sort of interaction with the police." Slip op. at 9 (emphasis added). "The similarities between Montgomery and Juror 39's cousin's mental health coupled with the escalated altercation with the police are reasons to strike the juror that *go above and beyond merely* 'having a close relationship with people who have been stopped [or] arrested.' GR 37(h)(iii)." Slip op. at 9 (emphasis added).

The Court of Appeals misapprehended and misapplied the law. Nothing in GR 37 requires a presumptively valid reason to be the sole reason before it operates to bar a peremptory challenge. By its plain language, a peremptory challenge is not permitted if "an objective observer *could* view race or ethnicity as *a factor* in the use of the peremptory challenge." GR 37(e) (emphasis added). This is part of the constitutional standard as well. Jefferson, 192 Wn.2d at 249 (adopting GR 37 as part of modified Batson framework). The operative standard is "a factor," not the sole factor.

Even if the prosecutor's concern about the cousin's involvement in civil commitment were considered to be a race-neutral reason for removing Juror 39, that reason does not erase the presumptively invalid one and cleanse the strike of racial impetus. "Combining a race-neutral justification with a presumptively invalid one is not 'race neutral.'" State v. Orozco, 19 Wn. App. 2d 367, 377, 496 P.3d 1215 (2021).

An objective observer could view race or ethnicity as a factor in removing Juror 39 based on the presumptively invalid reason that Juror 39 had a close relationship with someone who had been arrested and had a bad experience with police. GR 37(h)(iii). The Court of Appeals decision conflicts with Orozco.

The Court of Appeals noted, "In addition, Juror 39 clearly communicated that they were not sure that they could be unbiased in deciding this case." Slip op. at 9. The prosecutor, not having moved to excuse Juror 39 for

cause, did not identify bias as a reason for the peremptory strike. RP 763. The Court of Appeals manufactured an additional reason on appeal why Juror 4 might have been struck even though the prosecutor did not advance this reason below. This is impermissible. See Miller-El v. Dretke, 545 U.S. 231, 52, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) ("A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

c. The court violated Batson and GR 37 in supplying its own reason for the peremptory challenge to Juror 4 that was based on stereotype.

The judge identified Juror 4 as Indian (a person from the country of India) but did not seek an explanation from the prosecutor for seeking to remove Juror 4. RP

759, 764. Instead, the judge supplied her own reason, stating the prosecutor's challenge to Juror 4 "has nothing to do with her background as Indian American" because Juror 4 had "a huge amount of trouble even making a decision in this case." RP 764.

The prosecutor, not the judge, is the one who exercises a peremptory strike. The prosecutor, not the judge, is the one who must defend it. A court's sua sponte speculation about the prosecutor's reason for exercising a peremptory challenge contravenes the Batson procedure. Johnson v. Martin, 3 F.4th 1210, 1224 (10th Cir. 2021).[3]

[3] See also Paulino v. Castro, 371 F.3d 1083, 1089-90 (9th Cir. 2004); Commonwealth v. Fryar, 414 Mass. 732, 739, 610 N.E.2d 903, 908 (Mass. 1993); People v. Madrid, 494 P.3d 624, 631 (Colo. Ct. App. 2021); State v. Dupree, 304 Kan. 43, 61, 371 P.3d 862, 876 (Kan. 2016); Graham v. State, 738 N.E. 2d 1096, 1100 (Ind. Ct. App. 2000); Hopkins v. Commonwealth, 53 Va. App. 394, 400, 672 S.E. 2d 890, 893 (Va. Ct. App. 2009).

The reason given by the judge was invalid anyway. Juror 4 expressed discomfort with serving as a juror due to her youth and lack of experience and education, having just turned 18 years old. RP 249-50, 276, 301, 323-25.

Consider State v. Lahman, where "the prosecutor claimed to strike Juror 2 based on his young age and lack of experience with domestic violence and limited life experience." State v. Lahman, 17 Wn. App. 2d 925, 936, 488 P.3d 881 (2021). This fed into a common stereotype of Asia Americans that they are strong in academics to the detriment of interpersonal skills, and left open "the possibility that the prosecution implicitly and unsuitably relied on a stereotype in deciding Juror 2, an Asian American, lacked the frame of mind to side with the State." Id. at 937. The reason given by the court for striking Juror 4 — the one that the State says was "likely" the prosecutor's reason — is not race-neutral under Lahman.

Although defense counsel did not object, a trial court may raise a Batson issue sua sponte. State v. Evans, 100 Wn. App. 757, 759, 998 P.2d 373 (2000). GR 37 expressly permits the trial court to raise an objection to the use of a peremptory challenge on its own. GR 37(c). The trial court here did not literally say "I object" but in substance did raise an objection by noting the minority status of the challenged jurors and then directly moving to the question of whether a race-neutral reason existed for the challenges. RP 760, 762.

The Court of Appeals concluded GR 37 was not violated because "neither of the parties nor the court objected to the challenge." Slip op. at 11. This is an unfair reading of the record. In response to the prosecutor's peremptory challenge on Juror 4, there would be no reason for the court to identify the challenged juror as a BIPOC juror and then give a reason for the

challenge if the issue of discrimination was not being considered.

The trial judge took an assertive, hand-on approach to the issue, notifying the parties before jury selection started that she was going to keep track of the minority status of jurors, saying it was her job to "keep an eye on the peremptories to make sure that I can see a basis for a peremptory that's exercised that does not have to do with minority status." RP 57.

Then, when it came time for the peremptory challenges, the judge followed through on her stated intention by noting when a peremptory challenge had been exercised on a minority juror and then offering an explanation for why the State's challenges were supposedly race-neutral, with the State giving its own explanation for Juror 39. RP 763, 764. The judge did not even wait to see if defense counsel had an objection.

The judge acted as if a Batson/GR 37 objection had been made, in keeping with her intent to monitor the issue closely on her own authority. In fact, when Montgomery's counsel used a peremptory on one juror, the judge asked counsel to provide an explanation for the strike "because this juror is Asian American" without waiting to see if the State had an objection. RP 760, 762. This reinforces the point that the trial court was keenly aware of the Batson/GR 37 issue and worked proactively to address it. The parties knew exactly what was at stake.

The Court of Appeals contrasted the strike on Juror 4 with the strike on Juror 39, where "the court clearly stated the race of the juror and then the court asked the State to share its reasoning." Slip op. at 10. But the trial court considered the challenges to Juror 39 and Juror 4 to stand on the same footing: "So, *again*, I see a basis to excuse that is not based on her identification as Asian." RP 763 (emphasis added).

Even if the trial court hadn't raised the issue below, Batson errors may be raised for the first time on appeal under RAP 2.5(a)(3). State v. Beliz, 104 Wn. App. 206, 214, 15 P.3d 683 (2001); State v. Wright, 78 Wn. App. 93, 103, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995); State v. Burch, 65 Wn. App. 828, 838-39, 830 P.2d 357 (1992). The Court of Appeals did not address this authority.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED MONTGOMERY'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Montgomery presented a diminished capacity defense, offering an expert witness in support. In closing

argument, the prosecutor sought to discredit the expert's opinion by conjuring a false contradiction between diminished capacity and the insanity standard, which requires a person be unable to tell right from wrong. In so doing, the prosecutor committed prejudicial misconduct by arguing outside the bounds of the court's instructions and misstating the law. Montgomery seeks review under RAP 13.4(b)(3).

On cross-examination of Dr. Cunningham, the prosecutor elicited that Montgomery told the detective that she knew killing the Meises was wrong. RP 1456.

On redirect, defense counsel asked Dr. Cunningham how Montgomery could know what she did was wrong but still lack the capacity to form the intent to commit the charged crime. RP 1506. Cunningham answered the two can co-exist: "Wrongful awareness or knowledge of something being illegal is a separate issue from capacity to form intent." RP 1506.

On re-cross, the prosecutor pursued the matter, juxtaposing Montgomery's awareness that what she was doing was considered illegal with Cunningham's opinion that she did not intend to kill anyone. RP 1509. Cunningham answered that they were different "psycho legal " issues. RP 1509. "I'm not saying she was not guilty by reason of insanity. I'm saying she lacked capacity to form intent. Those are two different issues with different standards." RP 1509. The prosecutor bore down, daring Cunningham to agree that Montgomery's awareness that what she was doing was illegal was inconsistent with not intending to kill the Meises. RP 1510. Cunningham disagreed because "it involves two different things." RP 1510.

In closing argument, the prosecutor attacked Dr. Cunningham's expert opinion as contradictory:

> He contradicted himself which was to say at the end of his testimony he described for you how Ms. Montgomery understood and

recognized that killing the Meises was wrong. She appreciated that what she was doing was wrong while at the same time trying to tell you that she could not form the intent to do that wrong thing, which was to kill Charles and Anne Meis. That opinion is not consistent within itself. It is not consistent with the facts.

MS. TRAN: Your Honor, I'm going to object at this point. If -- it's misstating the different standards in the law.

THE COURT: I'm going to let you respond to that, but I will point out, ladies and gentlemen, that there's an instruction on the mental health defense in your instructions, which is 22. To the extent that you find that argument from the attorneys differs from the legal instructions, you follow my instructions. Back to you, Mr. Dernbach.

MR. DERNBACH: And that actually reminds me -- when we're talking about what is in these instructions and what's not in these instructions, there was a point when Dr. Cunningham was talking about an insanity defense; indicated that that was not the opinion that he was coming down with was an insanity defense. In case any of you were thinking about, why is the word "insanity" not in these instructions, again, Dr. Cunningham ultimately opined that was not what applied.

We were having that discussion, and he was again talking about appreciating that wrongfulness of the conduct and, again, his opinion was she -- she did. That's why an insanity defense, in his opinion, didn't apply. But the fact that she could appreciate, again,

> killing somebody was wrong, which was why, and he based that on the fact that she was concealing from his adopted sister what she was going to be doing that night, again, is inconsistent with her failing to have the capacity to form the intent to kill the Meises. Those two things are wildly inconsistent in Dr. Cunningham's opinion. RP 1638-39.

The jury was not instructed on the legal standard for insanity. The prosecutor nonetheless took it upon himself to tell the jury that Montgomery's diminished capacity defense, expressed through Dr. Cunningham's expert opinion, was inconsistent with the legal standard for insanity. That was misconduct. The prosecution's statements to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972); Davenport, 100 Wn.2d at 760.

The Court of Appeals believed there was no misconduct "because the defense expert raised the issue and the prosecutor's reference to the insanity defense was simply explaining that it did not apply." Slip op. at 13.

The State deliberately goaded Dr. Cunningham into invoking the concept of insanity on re-cross examination. RP 1509-10. The State is responsible for the insanity standard being injected into this case. The State deliberately elicited that testimony. The State then exploited its effort in closing argument by arguing about an insanity standard that the jury was not instructed on to discredit the defense expert. RP 1638-39.

Further, "[a] prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). The prosecutor misstated the law in arguing it was contradictory to claim an ability to tell right from wrong under the insanity standard while simultaneously claiming diminished capacity.

For an insanity defense, there must be proof that the defendant was "unable to tell right from wrong with regard to that act." State v. Box, 109 Wn.2d 320, 322,

745 P.2d 23 (1987). For a diminished capacity defense, "a defendant must produce expert testimony demonstrating that a mental disorder, *not amounting to insanity*, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (emphasis added).

The insanity defense and the diminished capacity defense embody different legal standards. State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028, review denied, 112 Wn.2d 1026 (1989). One can be sane and yet still have diminished capacity, as the diminished capacity defense arises from a mental condition that does not rise to the level of insanity. Atsbeha, 142 Wn.2d at 914; State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993); State v. White, 60 Wn.2d 551, 588, 374 P.2d 942 (1962).

Contrary to the prosecutor's argument, a person can tell right from wrong in relation to the particular act

charged while still lacking the capacity to form the requisite mental state for a diminished capacity defense. There is no contradiction between the two legal standards. The prosecutor in Montgomery's case therefore misstated the law in arguing it was contradictory for the defense expert to concede Montgomery knew that killing the Meises was wrong while maintaining she could not form the intent to kill them. RP 1638-40.

The Court of Appeals, however, said the prosecutor did not misstate the law because he did "not imply that a defendant must establish insanity to establish diminished capacity." Slip op. at 14-15. The prosecutor argued it was contradictory to maintain Montgomery had diminished capacity while knowing right from wrong. That is not the law.

The Court of Appeals found any misconduct harmless because the court told the jury that "there's an instruction on the mental health defense in your

instructions, which is 22. To the extent that you find that argument from the attorneys differs from the legal instructions, you follow my instructions." Slip op. at 15; RP 1638-39. The jury was in no position to know whether the prosecutor's argument juxtaposing the insanity standard with the diminished capacity standard differed from the instructions because no instruction dealt with the comparison drawn by the prosecutor. The court's comment cured nothing.

F. CONCLUSION

For the reasons stated, Montgomery respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4,914 words excluding those portions exempt under RAP 18.17.

DATED this 20th day of July 2022.

Respectfully submitted,

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FILED
6/21/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANYA MONTGOMERY, Appellant.	No. 82455-4-I DIVISION ONE UNPUBLISHED OPINION

SMITH, A.C.J. — Anya Montgomery was convicted of attempted murder in the first degree and sentenced to 240 months in confinement. Montgomery appeals, contending that the trial court erred in permitting the State to exercise peremptory challenges on two jurors who identify as being from BIPOC[1] communities. Additionally, Montgomery contends that the prosecutor committed prosecutorial misconduct by misstating the law in his closing argument. Because the State's peremptory strikes on Jurors 39 and 4 did not violate GR 37 and there was no prosecutorial misconduct, we affirm the decisions of the trial court.

FACTS

Anya Montgomery was adopted by Charles and Anne Meis when she was about four and a half years old. In 1997, a therapist diagnosed Montgomery with reactive attachment disorder and post-traumatic stress-disorder. Montgomery stayed with the Meises until they relinquished their parental rights in 2005, when

[1] "BIPOC" stands for Black, Indigenous, and people of color.

Montgomery was 12 years old. In July 2016, Montgomery told her therapist that she wanted to kill her former parents. The therapist reported this to law enforcement and Montgomery was sent to a hospital for civil commitment.

Soon after, on August 22, 2016, Montgomery waited outside the Meis house and as soon as Charles Meis exited his home, Montgomery charged toward Charles with a knife. Montgomery scratched Charles's stomach through his shirt. Charles grabbed a plastic watering jug and hit Montgomery with it repeatedly to subdue her. Anne Meis eventually came outside of the house and she used pepper spray against Montgomery. After 14 minutes, the police arrived and arrested Montgomery.

While being interrogated by police, Montgomery stated that she had been physically and sexually abused by the Meises when she lived with them and that she had come back to kill them. Montgomery also told them that she had been trying to commit "suicide by cop."

Montgomery was charged with two counts of attempted murder in the first degree and felony harassment. The case proceeded to a jury trial. Before voir dire, the court announced its intention

> to keep track of people's minority status, you know, if they're indicating to us that they're LGBTQA or plus or that they're of Latino/Latina origin or that they are black or whatever. Okay? I keep track of that myself in my own notes, and I share those observations with you when the jurors aren't around. I've always done this.
>
> And I just keep an eye on the peremptories to make sure that I can see a basis for a peremptory that's exercised that does not have to do with minority status.

Juror 39 identified as Asian and they were concerned about participating in jury duty because of their job duties as a systems administrator. During voir dire, Juror 39 shared that their cousin "had, like, schizophrenia. So, basically, many times he'd always have to be put into the mental institute."

When the prosecutor asked the jurors how they felt about being a juror in a case where they would be dealing with the intersection of mental health and criminal law, Juror 39 shared that the same cousin had had an altercation with police, stating "I think five, six years ago, he got in a scuffle with the police, and they – I think he tried to grab their mace or something. And then they basically punched his eyes out, and he had to have eye surgery."

The prosecutor asked Juror 39 if they thought that their cousin was treated fairly by the civil and criminal legal systems and Juror 39 said:

> I'm not sure. It's just, I guess, how I feel the situation is, even to this day, it's kind of hard to see, like when you're—a person you're so close to—you know, his eyes and face is all bruised. And it's such a terrible situation that—I mean, it's so hard for me to say I could be unbiased in that situation, but I can't really say—yeah, so I'm sorry.

The State exercised its fourth peremptory challenge on Juror 39. The court raised that the juror was "Asian. But that—also identified as really not wanting to be here because of their systems administration." The court then asked the State, "What's your other concern, if any, about that juror?" The State answered that "that juror had the experience with her cousin who had the mental illness who had . . . been involved in an altercation with the police and . . . involuntary

commitment issues." To which the court responded, "So, again, I see a basis to excuse that is not based on her identification as Asian."

Juror 4 identified as Indian American. During voir dire, Juror 4 mentioned that she had just turned 18, that she didn't have a lot of experience, and that she wasn't sure if she was ready to figure out whether the State had proved its case beyond a reasonable doubt. The court asked the jurors if they understood that they would not be informed of the consequences resulting from the jury decision and to share their thoughts. Juror 4 shared that:

> Like, if it's due to a mental illness, there's going to be negative consequences on both sides, despite, like what we rule. And, like, I just don't know if I feel comfortable, like, if we say—like, that Ms. Montgomery's guilty then, like there's going to be negative consequences on her side; and if we say she's not guilty, there could be negative consequences on the other side, and we could end up hurting people, despite—and that's just what I'm really concerned about for myself. And I just don't want that burden on me.

The State exercised its fifth peremptory challenge on Juror 4. The court responded:

> Yeah. And I will say right now that Juror No. 4 indicated a huge amount of trouble even making a decision in this case. I thought it was [even-steven] as to which of you might challenge this juror, but it has nothing to do with her background as Indian American, by which I mean she appears to be of descent from India, from what she told us.
>
> All right. So that was the state's fifth, and brings in Juror No. 59.

There no were no further comments by the State or Montgomery about Juror 4.

At trial, Montgomery presented a diminished capacity defense. She presented testimony from Dr. Mark Cunningham that Montgomery did not intend to kill the Meises, but was instead acting out a "victim-to-superhero role play."

On cross examination, Dr. Cunningham acknowledged that Montgomery told police that she had tried to kill the Meises and that she knew killing them was wrong. The prosecutor and Dr. Cunningham later had this exchange:

> Q: . . . I mean, she understood that what she was going over there to do was considered to be illegal, but your opinion is that she didn't intend to actually assault or attempt to kill anybody. Correct?
>
> . . . .
>
> A: That's correct. There are two different psycho legal [sic] issues. I'm not saying she was not guilty by reason of insanity. I'm saying she lacked capacity to form intent. Those are two different issues with different standards.
>
> Q: All right. That's not what I asked, and now that you've brought up the issue of insanity, you are not opining that she was insane at the time legally. Correct?
>
> A: That's correct.
>
> Q: Okay. But the point being, again, that her awareness that her—what she was doing was illegal is not consistent with not intending to do anything illegal; i.e., kill the Meises. Correct?
>
> A: That's not correct.

In his closing argument, the prosecutor contended that Dr. Cunningham's opinion was inconsistent because Dr. Cunningham stated that Montgomery "appreciated that what she was doing was wrong while at the same time trying to tell you that she could not form the intent to do that wrong thing, which was to kill Charles and Anne Meis. That opinion is not consistent within itself." He noted that the Dr. Cunningham had opined that an insanity defense did not apply, which was why there was no jury instruction discussing the insanity defense. He then stated:

> We were having that discussion, and he was again talking about appreciating that wrongfulness of the conduct and, again, his

> opinion was she—she did. That's why an insanity defense, in his opinion, didn't apply. But the fact that she could appreciate, again, killing somebody was wrong, which was why, and he based that on the fact that she was concealing from [her] adopted sister what she was going to be doing that night, again, is inconsistent with her failing to have the capacity to form the intent to kill the Meises.

The jury found Montgomery guilty on two counts of attempted murder in the first degree. Montgomery was sentenced to 240 months of confinement.

Montgomery appealed.

ANALYSIS

Peremptory Challenges

Montgomery contends that the trial court erred in permitting the State to exercise peremptory challenges on two jurors who identify as being from BIPOC communities. The State claims that the challenges were valid and non-discriminatory, and it requests that the panel affirm the trial court's decision. We conclude that the challenge on Juror 39 was not based on race or ethnicity. Additionally, no GR 37 issue was raised for Juror 4 because there was no objection by either party or the court.

"A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror." RCW 4.44.140. "Either party may challenge the jurors. The challenge shall be to individual jurors, and be peremptory or for cause." RCW 4.44.130.

"Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason . . . the Equal Protection Clause[2] forbids the prosecutor to challenge potential jurors solely on account of their race." Batson

[2] U.S. CONT. Amend XIV.

v. Kentucky, 476 U.S. 79, 79-80, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The three-part Batson test is used to determine whether a peremptory challenge was racially motivated:

> The defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of race.

Batson, 476 U.S. at 80. "The peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of a racial discrimination requiring a full Batson analysis." Seattle v. Erickson, 188 Wn.2d 721, 724, 398 P.3d 1124 (2017). After the objecting party makes a prima facie showing of discrimination, the burden shifts to the challenging party to provide a neutral reason for their strike. Batson, 476 U.S. at 80.

Batson's purposeful discrimination requirement became an issue because the problem is not usually a "conscious desire to discriminate," it is often "negative stereotypes and assumptions" that lead people to discriminatory decision-making. State v. Lahman, 17 Wn. App. 2d 925, 933, 488 P.3d 881 (2021). Therefore, in 2018, the Washington Supreme Court adopted GR 37 to address unconscious bias and difficulties in meeting the Batson three-part test. Id. GR 37 modifies the third step of Batson. State v. Orozco, 19 Wn. App. 2d 367, 374, 496 P.3d 1215 (2021).

Under GR 37, the court or either party "may object to the use of a peremptory challenge to raise the issue of improper bias." GR 37(c). After an objection is made, the challenging party "shall articulate the reasons the peremptory challenge has been exercised." GR 37(d). The court then evaluates the reasons given for the challenge, "in light of the totality of circumstances." GR 37(e). And "if the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e).

When assessing the circumstances, the court considers a number of factors such as, "whether a reason might be disproportionately associated with race or ethnicity and . . . whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases." GR 37(g)(iv)-(v). There are also presumptively invalid reasons that disqualify a peremptory challenge such as "having a close relationship with people who have been stopped, arrested, or convicted of a crime." GR 37(h)(iii).

"We review the third step of Batson and the application of GR 37 de novo." Orozco, 19 Wn. App. 2d at 374. "The remedy for the erroneous exclusion of a juror from service on the basis of race or ethnicity is reversal and remand." Lahman, 17 Wn. App. 2d at 929.

1. Juror 39

Montgomery claims that the challenge on Juror 39 was based on the juror having a close relationship with a person who had been stopped or arrested of a crime, a presumptively invalid reason under GR 37(h)(iii). We conclude that the

State's reason was not presumptively invalid and that an objective observer could not view race or ethnicity as a factor in the use of the challenge against Juror 39.

As an initial matter, the State contends that Montgomery never objected to their strike on Juror 39 and that therefore the burden never shifted to the State to provide a race-neutral reason. We disagree. Under GR 37(c), the parties *or* the court may raise an objection "by simple citation to this rule." Here, after the State struck Juror 39 the court immediately stated that Juror 39 was Asian and then asked the State, "What's your other concern, if any, about that juror?" We conclude that the comment by the court and its subsequent request that the State articulate its reasons were sufficient to constitute an objection under GR 37.

The court is required to view the "proffered justification in light of the totality of the circumstances." Orozco, 19 Wn. App. 2d at 375. This was not an instance where a juror was simply connected to a person that had had some sort of interaction with the police. Juror 39 detailed the fact that their cousin had their eye punched by the police and had to have surgery. Juror 39 also discussed that their cousin battled with schizophrenia and that their cousin had to be put into a mental institute many times. Additionally, Juror 39 clearly communicated that they were not sure that they could be unbiased in deciding this case. The similarities between Montgomery and Juror 39's cousin's mental health coupled with the escalated altercation with the police are reasons to strike the juror that go above and beyond merely "having a close relationship with people who have

been stopped [or] arrested." GR 37(h)(iii). Evaluated in light of the totality of the circumstances, an objective observer could not view race or ethnicity as a factor in the use of the peremptory challenge on Juror 39.

Montgomery relies on Orozco to contend that "combining a race-neutral justification with a presumptively invalid one is not 'race neutral.'" 19 Wn. App. 2d at 377. In Orozco, the defense objected to the State's challenge on Juror 25 (the only African American female juror) and the prosecutor reasoned that they had personally prosecuted Juror 25 for minor crimes and that they had seen the juror in police reports associated with people in criminal activity. Id. at 372. Because one of the reasons offered by the State was a presumptively invalid reason (Juror 25's association with people in criminal activity), under GR 37(h)(iii), the challenge on Juror 25 was reversed. Here, the State has not offered a presumptively invalid reason for the challenge on Juror 39.

We conclude that the peremptory challenge on Juror 39 did not violate GR 37.

2. Juror 4

Montgomery contends that the court violated Batson[3] and GR 37 by offering its own non-discriminatory reason for the challenge on Juror 4. As

[3] In their initial briefs, the parties disputed whether the State's use of peremptory challenges on Jurors 4 (the only juror of Indian descent) and 39 (one of the final jurors of Asian descent) established a prima facie case of discrimination. A defendant "may establish a prima facie case of purposeful discrimination" by showing that the challenged juror is the last member of a racially cognizable group. Batson, 476 U.S. at 80. But as Montgomery acknowledged, "under GR 37, there is no longer any requirement of making a prima facie showing of racial discrimination and 'simple citation' to the rule is sufficient to compel an analysis pursuant to its provisions." State v. Listoe, 15

detailed above, GR 37 requires an objection by either party or the court and a simple citation to the rule. GR 37(c). But, because neither of the parties nor the court objected to the challenge, we conclude that the court did not violate GR 37.

After the State exercised its challenge on Juror 4, the court stated that Juror 4 "indicated a huge amount of trouble even making a decision in this case" and in regards to the challenge, "it has nothing to do with her background as Indian American." The State was never asked to articulate its reasons behind the peremptory challenge on Juror 4.

Rather than being an objection to the challenge, the comments by the court were more in line with the court's announced intentions, before voir dire, to track jurors who identify as being from the BIPOC community and to monitor the reasons for peremptory challenges. There was no simple citation to GR 37 by either party or the court. By contrast, after the strike on Juror 39, the court clearly stated the race of the juror and *then* the court asked the State to share its reasoning. The conversational exchange related to Juror 39 is an example of a raised objection under GR 37(c) followed by the call to articulate reasons as required by GR 37(d). Such an objection is not present here, and without an objection, GR 37 is not implicated.

Montgomery contends that by offering a reason for the peremptory challenge, the court was improperly taking on the "role" of the prosecutor, citing State v. Moreno, 147 Wn.2d 500, 509, 58 P.3d 265 (2002). This argument is

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Wn. App. 2d 308, 321, 475 P.3d 534 (2020) (quoting GR 37(c)). We therefore need not address the issue.

flawed because the court was not taking on the prosecutor's role of articulating their reason for the challenge, rather it was just explaining why it was not objecting.

We conclude that the peremptory challenge on Juror 4 did not violate GR 37.

Prosecutorial Misconduct

Montgomery contends that the prosecutor committed misconduct in his closing argument by referencing the standard for an insanity defense, which the jury did not receive instructions about, and by misstating the law regarding diminished capacity. We disagree.

"To prevail on a claim of 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) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). "The burden to establish prejudice requires the defendant to prove that '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). "When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case." Id. at 443.

"At trial, 'counsel are permitted latitude to argue the facts in evidence and reasonable inferences' in their closing argument." Dhaliwal, 150 Wn.2d at 577 (quoting State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)). Prosecutors can use witness testimony to draw inferences in their closing arguments and their statements are proper if they are based on evidence presented at trial. Id. at 579.

"If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict" to require reversal. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61.

Montgomery first challenges the prosecutor's reference to the insanity defense in his closing argument. "It is the rule in this state that statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions of the court." State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). But the prosecutor's mere reference to the insanity defense was not misconduct, because the defense expert raised the issue and the prosecutor's reference to the insanity defense was simply explaining that it did not apply. See State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (prosecutor violated Estill rule by arguing in closing argument an alternate theory

that defendant was an accomplice, despite the lack of any instructions on accomplices).

Montgomery also contends that the prosecutor misstated the law in closing argument by "arguing it was contradictory to claim an ability to tell right from wrong under the insanity standard while simultaneously claiming diminished capacity."

To establish an insanity defense, "the defendant must prove that at the time of the offense he or she was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong with regard to that act." State v. Box, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). By contrast, to establish a diminished capacity defense, "a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Montgomery claims that the prosecutor wrongly characterized diminished capacity as being impossible to establish if a defendant could tell right from wrong with regard to the act. She points to the prosecutor's characterization of Dr. Cunningham's testimony as saying that Montgomery "appreciated that what she was doing was wrong while at the same time trying to tell you that she could not form the intent to do that wrong thing, which was to kill Charles and Anne Meis. That opinion is not consistent within itself." But this statement does not imply that a defendant must establish insanity to establish diminished capacity. Instead, the prosecutor argues that Montgomery not only knew murder was

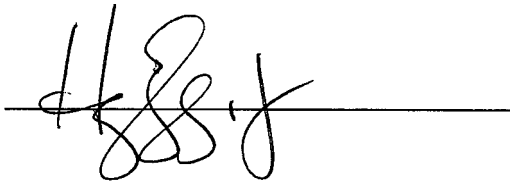
wrong but knew specifically that killing the Meises was wrong, and that this implied that she knew what she was doing and intended to kill them. The prosecutor's comments did not misstate the law, but instead drew an inference from the testimony of Dr. Cunningham and the evidence presented at trial.

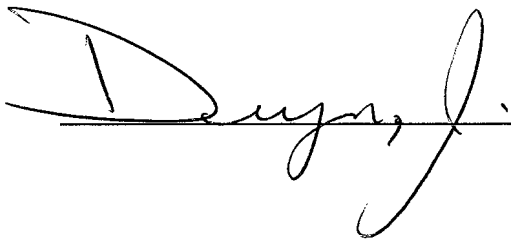
Moreover, Montgomery cannot show that any misconduct would have a "substantial likelihood of affecting" the verdict. Emery, 174 Wn.2d at 760. Montgomery objected to the prosecutor's characterization of Dr. Cunningham's testimony, and the court noted to the jury that the mental health defense was explained in the jury instructions. It directed them, "[t]o the extent that you find that argument from the attorneys differs from the legal instructions, you follow my instructions." In light of the court's instruction and Montgomery's consistent statements before and after the incident that she intended to kill the Meises, Montgomery cannot show that the prosecutor's characterization of Dr. Cunningham's testimony likely affected the verdict.

We affirm.

Smith, A.C.J.

WE CONCUR:





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