Supreme Court No. 101939-4
Division III, No. 38810-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL HOWARD,

Petitioner

PETITION FOR REVIEW FOLLOWING APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Annette S. Plese

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Richard Carl Howard, a Black man, asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for violation of a no-contact order.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on March 28, 2023. A copy of this opinion is attached as "Appendix A."

C. ISSUE PRESENTED FOR REVIEW

Issue 1: Whether the trial court erred in removing a minority member from the jury over objection of defense counsel pursuant to *Batson v. Kentucky*. This issue presents a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b)(3) & (4).

D. STATEMENT OF THE CASE

In the days leading up to July 26th and 27th of 2021, Mr. Howard was in Renton, Washington, standing by his father as

he lay on his deathbed. (RP[1] 337-338). Mr. Howard is a Black man. (Defense Exhibit 101). Sleep-deprived and distraught after several days of keeping vigil, he returned to Spokane in the early hours of July 26th to attend a court hearing. (RP 338-340, 343). Later that day, Mr. Howard found himself in a place he was not supposed to be and did not intend to be—in the home of then-wife, Dusti Jones—not knowing how he had gotten there. (RP 186, 342-343, 349-350, 354). A protection order was in place, which stated Mr. Howard was not to contact Ms. Jones nor be within 1,000 feet of her alleged residence at 521 South Arthur Street. (RP 174-175; State's Exhibit 5).

Ultimately, Mr. Howard was charged by amended information with violation of a no contact order (Count 2).[2] (CP 219-220).

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[1] "RP" refers to Volumes I and II transcribed by Heather Gipson.

[2] The other two counts—residential burglary (Count 1), and obstruction of a law enforcement officer (Count 3)—are not a subject of this petition for review as the jury found Mr. Howard not guilty. (CP 219-220, 259-263; RP 517-518).

A jury trial was held in March of 2022, and witnesses testified consistent with the facts above. (RP 148-407).

During jury selection, defense counsel moved to strike the jury panel on the basis that it lacked minority representation. (RP 66-67). Defense counsel noted it appeared there were only two minority persons present, and no Black males or females. (RP 67). Defense counsel stated, "I believe Mr. Howard has a right to trial by his peers. We have 35 people in here today. I don't think this is an adequate cross section of the panel." (RP 67). The State disagreed, arguing a right to a cross section of the population does not include a guarantee that a certain percent of the population will be the same ethnicity as the defendant. (RP 67). The State also argued the defense could not prevail on its motion unless it could show there was a deliberate effort to exclude certain groups from the panel. (RP 67). The trial court denied defense counsel's motion, stating it knew over 200 subpoenas for jurors were issued and this panel was from random selection. (RP

68). The trial court noted it believed about three panel members were minorities but added "this is a cross section of Spokane County that we send out jurors to." (RP 68).

Also during jury selection, defense counsel challenged a juror[3] for cause due to appearances that he was sleeping or nodding off. (RP 118-119). Defense counsel was concerned this juror would not be able to pay attention. (RP 118). The State did not agree with removal, arguing the juror should stay because the defense wanted a more diverse panel. (RP 119). The trial court denied the challenge for cause, stating that it observed this juror and he did not appear to be sleeping despite closing his eyes once or twice. (RP 120).

Though a little unclear from the transcript, the parties then presumably exercised their peremptory challenges outside the potential jurors' presence. (CP 231; RP 120-121). After a

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[3] During voir dire, this juror was referred to as Juror #2. (RP 14, 69-69, 118-119). Later once the jury was empaneled, he was referred to as Juror #1, and as such is referred to as Juror #1 throughout the remainder of this brief. (RP 122 at lines 7-8, 493).

pause, the trial court noted jurors numbered 13 and 14 were the alternates. (RP 121). The trial court then called in all the potential jurors and seated the selected jurors. (RP 122-124). Juror #2 was now Juror #1.[4] (RP 122 at lines 7-8).

After the close of the evidence, and after the State presented its closing argument but before defense counsel presented his, the trial court excused the jury to discuss Juror #1's conduct during trial. (RP 461). The trial court noted it believed he was sleeping:

> We're on the record without the jury. I wanted to address Juror Number 1 falling asleep. I don't know if you want to address it? He definitely was sleeping just now, and the juror next to him tried to wake him up. I don't know how long he was sleeping, but at least for a few minutes at this point.

(RP 461). The State agreed Juror #1 was sleeping, stating:

> Your Honor, there are at least three different instances where the juror next to him tried to nudge him with mixed results. I heard him snoring at least three different times both before and after Your Honor addressed the issue with the juror when it became obvious to the room that he was

[4] *See* fn. 2.

> snoring. I do realize that this came up during selection, and I did confer with Ms. Kopp and Officer Cochrane, and they didn't notice him sleeping. They saw him looking down, but they didn't think he was asleep so we didn't support [defense counsel's] attempt to strike the juror at the time, but in the conversation that just happened off the record, numerous people have said that yeah, he's been sleeping consistently throughout the trial. So having received that information and with what just happened, we ask to strike that juror and let one of the alternates take his place on the panel.

(RP 461-462). Defense counsel objected to this request to remove Juror #1, stating:

> I mean, at this point, I actually don't agree, but I mean, he's one of the few minority members of the jury. So I would object to that at that point and do that with a *Batson*, issue, as well.

The trial court responded:

> But it was clear through this closing argument that he was asleep and he was snoring. If I could hear it, that's why I looked up, and when the juror tried to wake him up and he wasn't waking up. So even with the minority issue, the fact that I don't know how much he missed. I don't know what he missed, and I don't want to go back and try to figure out what we would have to replay. So it's clear that he was sleeping.

> Even though he is a minority, I didn't want to lose him. When you brought that up during selection, I had looked at him several times. He closed his eyes and sat back, but some people listen better with their eyes closed when they're listening to questions. He was clearly snoring this time. So I don't know how long he was sleeping, and that concerns the Court. I know he was writing sideways on that ledge so I couldn't tell much until I heard the snore, and then it got silent, and that juror had trouble waking him up. I think at this point, I could just use him basically not excuse him, have him come back in and then when we say that we have two alternates and I have to excuse the alternates, we can just make him an alternates and say you're excused. 1 and 14 you're our alternates.
> …
> I just don't want him to feel bad about it because I mean.

(RP 462-463). The parties agreed with this option of removing Juror #1 as an alternate after all closing arguments were complete, though defense counsel renewed his objection under *Batson*. (RP 463-465). After the closing arguments, the trial court dismissed Juors #1 and #14 as alternates. (RP 493).

The jury acquitted Mr. Howard of Counts 1 and 3, but found him guilty of the misdemeanor violation of the no contact

order (Count 2). (CP 259-263; RP 517-518). Mr. Howard appealed. (CP 323-324). In an unpublished opinion, the Court of Appeals affirmed Mr. Howard's conviction, holding it was not discriminatory to excuse a minority juror without first inquiring whether the juror was sleeping. *State v. Howard*, No. 38810-7-III, 2023 WL 2657671 (Wash. Ct. App. Mar. 28, 2023); *see* Appendix A.

Mr. Howard now seeks review from this Court.

E. ARGUMENT

Particularly in recent years, this Court recognizes the pervasive discrimination which exists in our judicial system and permeates jury selection:

> Twenty-six years after *Batson,* a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only "purposeful discrimination," *whereas racism is often unintentional, institutional, or unconscious*. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.

State v. Saintcalle, 178 Wn.2d 34, 35–36, 309 P.3d 326 (2013), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) (emphasis added). This Court added:

> From a practical standpoint, studies suggest that compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives… more diverse juries result in fairer trials.

Saintcalle, 178 Wn.2d at 50 (citations omitted).

Mr. Howard's jury did not contain any members of his racial minority group. (RP 67). And, of the few minority jury members, the trial court removed one of the minority jurors without conducting an inquiry of the juror or verifying by testimony that juror was in fact sleeping. (RP 67, 462).

After a jury was empaneled and halfway through closing arguments, the trial court called a recess to discuss the conduct of Juror #1 who was possibly sleeping during trial. Without further inquiry of the juror and without placing testimony on the record and relying solely upon what the State

and trial court had observed, the trial court removed Juror #1 by making Juror #1 an alternate juror. Defense counsel objected to this removal pursuant to *Batson*. Given the heightened standards applicable to minority jury members, especially in recent years and with the implementation of GR 37, the trial court abused its discretion by failing to conduct a further inquiry to determine whether removal of the juror was proper. Mr. Howard requests this Court grant review.

Issue 1: Whether the trial court erred in removing a minority member from the jury over objection of defense counsel pursuant to *Batson v. Kentucky*. This issue presents a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b)(3) & (4).

Review is merited in this case because it presents a significant question of constitutional law: whether it is a violation of a defendant's constitutional right to a fair and impartial jury when a trial court removes a minority member juror when the trial court did not verify through a colloquy or testimony that the juror was in fact sleeping. U.S. Const. amend. VI; Wash. Const. art. I, sec. 22; RAP 13.4(b)(3).

Review is also merited because ensuring a fair trial through diverse juries is an issue of substantial public interest. RAP 13.4(b)(4); *Saintcalle*, 178 Wn.2d at 50.

"Criminal defendants are guaranteed the right to a fair and impartial jury." *State v. Orozco*, 19 Wn. App.2d 367, 373, 496 P.3d 1215 (2021) (citing U.S. Const. amend VI; Wash. Const. art. I, sec. 22). A defendant has the "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky*, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (citations omitted). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group or not qualified to serve as jurors . . . ." *Id*. at 86 (citations omitted). A juror may be excluded if they are unfit, but a person's race does not render them unfit as a juror. *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 227, 66 S. Ct. 984, 90 L. Ed. 1181 (1946); *see also*

Batson, 476 U.S. at 87. Potential jurors have a constitutional right to not be excluded from jury service due to discrimination. *Orozco*, 19 Wn. App. 2d at 373 (citation omitted).

The removal of a juror during trial is governed by RCW 2.36.110:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. Similarly, CrR 6.5 states if "at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury." CrR 6.5. Thus, the trial court has a continuing obligation to remove any juror who is unfit and unable to perform the duties of a juror. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). No mandatory format for the trial court exists in how to determine whether to remove

a juror. *Id*. at 229. The trial court has discretion to "hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." *Id*. But the trial court has fact-finding discretion, similar to when it weighs the credibility of potential jurors in a for-cause challenge. *Id*. (citations omitted).

In general, a trial court's decision to replace a juror with an alternate juror is reviewed for an abuse of discretion. *State v. Johnson*, 90 Wn. App. 54, 72, 950 P.2d 981 (1998); *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290 (2014). A trial court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *Berniard*, 182 Wn. App. at 118 (citations and internal quotations omitted). "A court acts on untenable grounds if its factual findings are unsupported by the record and acts for untenable reasons if it has used an incorrect standard and its decision is manifestly unreasonable if its decision is outside the range of acceptable choices given the

facts and legal standards." *Berniard*, 182 Wn. App. at 118 (citations and internal quotations omitted).

Batson sets forth a three-part analysis for determining whether a peremptory strike unconstitutionally discriminates based on race. *Orozco*, 19 Wn. App. 2d at 373-374 (citing *City of Seattle v. Erickson*, 188 Wn.2d 721, 726-27, 398 P.3d 1124 (2017)). This three-part analysis is as follows:

> First, the defendant must establish a prima facie case that gives rise to an inference of discriminatory purpose. Second, if a prima facie case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral justification for the strike. Finally, if a race-neutral explanation is provided, the court must weigh all relevant circumstances and decide if the strike was motived by racial animus.

Orozco, 19 Wn. App. 2d at 373-374 (citing *Erickson*, 188 Wn.2d at 726-27 (citations omitted) (internal quotation marks omitted)).

"Though the United States Supreme Court provided this framework [in *Batson*], it left the states to establish rules for the 'particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.'" *Erickson*, 188 Wn.2d

at 727 (quoting *Batson*, 476 U.S. at 99). Our Supreme Court "has great discretion to amend or replace the *Batson* requirements if circumstances so require." *Id*. Recently, our Supreme Court has exercised its discretion to do so on two occasions. *See Erickson*, 188 Wn.2d at 734; *see also State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018).

First, "the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." *Orozco*, 19 Wn. App.2d at 374.

In addition to the three-part analysis under *Batson*, as modified by *Erickson* and *Jefferson*, effective April 24, 2018, our Supreme Court adopted GR 37. *Jefferson*, 192 Wn.2d at 244-45; *see also State v. Berhe*, 193 Wn.2d 647, 664, 444 P.3d 1172 (2019) (discussing our Supreme Court's adoption of GR 37). Thus the third step of the *Batson* test was modified to include GR 37, the application of which is reviewed de novo. *Orozco*, 19 Wn. App. 2d 374. The process of jury selection

includes the option for parties to exercise peremptory challenges and GR 37 seeks to avoid and correct any removal for racial bias. *Orozco*, 19 Wn. App. 2d at 373; GR 37. "The purpose of [GR 37] is to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). The review is focused on whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" in which case the peremptory would be denied. *Orozco*, 19 Wn. App. 2d 374-375. The rule "applies prospectively to all trials occurring after GR 37's April 24, 2018 effective date." *Jefferson*, 192 Wn.2d at 249.

Under GR 37, "[a] party may object to the use of a peremptory challenge to raise the issue of improper bias." GR 37(c). "The objection must be made before the potential juror is excused, unless new information is discovered." GR 37(c). "Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory

challenge has been exercised." GR 37(d). After these two steps, the court must make a determination:

> The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. 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. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

GR 37(e).

In making its determination, the court should consider, but is not limited to, the following factors:

> (i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;
> (ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
> (v) 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).

The following reasons, among others, are reasons for peremptory challenges that have been historically associated with improper discrimination in jury selection in Washington State:

> …allegations that the prospective juror *was sleeping, inattentive, or staring or failing to make eye contact*… If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties *so the behavior can be verified and addressed in a timely manner*. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

GR 37(i) (emphasis added).

Here, the issue addressed within this brief is not based on a peremptory challenge, but rather the removal of a juror the trial court deemed unfit pursuant to RCW 2.36.110. However,

GR 37, *Batson*, and attendant peremptory case law is appropriate to cite as persuasive authority in this case. This is particularly true given our State Supreme Court's recent opinion in *State v. Sum*. *State v. Sum*, 199 Wn. 2d 627, 511 P.3d 92 (2022). There, the Court took guidance from GR 37, and held courts "must consider the race and ethnicity of the allegedly seized person as part of the totality of the circumstances when deciding whether there was a seizure for purposes of article I, section 7" despite GR 37 itself having nothing to say about search and seizure law. *Sum*, 199 Wn.2d 627, 656.

Taking guidance from GR 37, and RCW 2.36.110, and viewing the totality of the circumstances, the trial court erred in dismissing Juror #1 from the jury. Historically, no stringent framework or method exists for determining whether a juror is no longer fit to serve. RCW 2.36.110; *Jorden*, 103 Wn. App. at 229. However, given the situation here where defense counsel raised awareness via a *Batson* challenge that the trial court

would be removing a minority member from the jury, the trial court should have conducted further inquiry. *See* GR 37(g) (listing circumstances a court should consider when determining whether to exclude a potential minority member juror).

In this case, the State and the trial court represented that they noticed instances of Juror #1 snoring and sleeping. (RP 461-462). Citing to conversations the State had with "numerous people" off the record during recess, the State noted Juror #1 had been "sleeping consistently throughout the trial." (RP 462). Defense counsel did not comment on the issue of Juror #1's conduct either way but stated he did not agree to the removal of Juror #1 as he was one of the few minority members on the panel.[5] (RP 462). The trial court then stated it was clear that "he was sleeping" but it did not want Juror #1 to "feel bad about it." (RP 461-463). But the trial court never examined

[5] Defense counsel had also earlier pointed to the lack of diversity on the panel when requesting the panel be stricken. (RP 66-67).

Juror #1 about the situation, stating it did not want to "go back and try to figure out what we would have to replay" since it was unclear what Juror #1 may have missed. (RP 462).

Since the trial court never asked Juror #1 about his conduct, however, it will remain an unknown as to what was missed. And given allegations of sleeping are historically associated with improper discrimination pursuant to GR 37, it would have been logical to inquire of Juror #1 and his conduct. GR 37(g) & (i). In general trial courts have not been required to inquire about a juror's conduct before removal for unfitness, but especially in this situation where the particular juror in question was a minority, defense counsel objected, and the recent heightened scrutiny placed upon removal of minority members from jury panels, the trial court abused its discretion in not inquiring further of Juror #1's conduct. GR 37; *Jorden*, 103 Wn. App. at 229; *Batson*, 476 U.S. 79; *see Sum*, 199 Wn.2d 627, 656; *see also Berhe*, 193 Wn. 2d at 666 (holding trial court abused its discretion by failing to conduct sufficient inquiry

before determining defendant had not met a prima facie showing racial bias influenced the jury's verdict).

The trial court abused its discretion by acting on untenable grounds. *Berniard*, 182 Wn. App. at 118. "A court acts on untenable grounds if its factual findings are unsupported by the record and acts for untenable reasons if it has used an incorrect standard and its decision is manifestly unreasonable if its decision is outside the range of acceptable choices given the facts and the legal standard." *Id*. at 118 (citation and internal quotations omitted). Given the heightened standards of scrutiny in removing minority members from the jury, the trial court should have conducted further inquiry of Juror #1 and placed witness testimony on the record to verify the juror's conduct was not suited to continue in trial. It was unreasonable not to do otherwise as the trial court should have verified from independent sources and testimony that minority member Juror #1 was unfit to serve.

And while defense counsel in this case noted Juror #1 was one of the only minorities and not the only minority on the jury, a *Batson* violation can occur despite other minority members remaining on the panel. *Erickson*, 188 Wn.2d at 733. "*Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury…. A *Batson* violation can occur if even one juror is struck." *Erickson*, 188 Wn.2d 721 at 733. While there may have been another minority members of the jury—as suggested by defense counsel's statement that Juror #1 was *one of* the only minority members of the panel—this factor alone does not cure a *Batson* issue. (RP 462); *Erickson*, 188 Wn.2d 721 at 733. Moreover, during jury selection defense counsel objected to the panel representing a fair cross section of the community, noting the lack of a minority presence to begin with. (RP 67).

Given the presumptive discrimination of removing a minority member of the jury—despite the appearances of inattentiveness or sleeping as set forth in GR 37(i)—the trial

court would have been wise to question the juror about this allegation. The trial court did not want to, however, embarrass the juror by alerting him the parties and court suspected he was sleeping. (RP 462-463). Although GR 37(i) is not directly on point because it applies specifically to peremptory challenges, the general purpose the rule is to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a) (Policy and Purpose). Washington courts have referred to GR 37 for guidance when addressing whether removal of a minority member from a jury was improper. Here, removal was an abuse of discretion without further inquiry.

The Court of Appeals should have reversed Mr. Howard's conviction for violation of the no contact order and remanded the case for a new trial. *Orozco*, 19 Wn. App. 2d at 377 (setting forth this remedy); *see Berhe*, 193 Wn.2d at 650.

Contrary to the Court of Appeal's opinion, implicit bias may have permeated the trial court's decision to discharge the minority member juror. *Howard*, No. 38810-7-III at *7; *see*

Appendix A. The Court of Appeals failed to address how *State v. Berhe* may apply, and *Berhe* held the trial court failed to conduct sufficient oversight and failed to conduct sufficient inquiry into whether a prima facie showing of racial bias influenced the jury's verdict. *Berhe*, 193 Wn. 2d 647. *Berhe* held the situation required an evidentiary hearing and failure to hold one was an abuse of discretion. *Id*. Here, failure to conduct an evidentiary hearing in Mr. Howard's case was an abuse of discretion, as well, this case is not only presents a significant question of law under both constitutions, but also involves an issue of substantial public interest. *Berhe*, 193 Wn. 2d at 650; GR 37(i); RAP 13.4(b)(3) & (4).

F. CONCLUSION

This Court should establish a protective procedure for trial courts to apply when determining whether minority members of a seated jury may be removed, as no mandatory format currently exists. *Jorden*, 103 Wn. App. at 229; GR 37. This Court should extend the applicability of GR 37 to apply to

the removal of seated jurors, as GR 37 was similarly extended by this Court in the case of *Sum*. *Sum*, 199 Wn.2d 627, 656.

For the reasons stated herein, Mr. Howard requests this Court grant review.

I certify this document contains 4,700 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of April, 2023.

Laura M Chuang

Laura M. Chuang, WSBA #36707

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner vs. RICHARD CARL HOWARD Appellant/Respondent	) Supreme Court No.) _____)) COA No. 38810-7-III)) PROOF OF SERVICE)

I, Laura M. Chuang, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 27, 2023, having obtained prior permission, I served a copy of the Petition for Review on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 27th day of April, 2023.

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APPENDIX A

FILED
MARCH 28, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. RICHARD CARL HOWARD II, Appellant.	)))))))))	No. 38810-7-III UNPUBLISHED OPINION

PENNELL, J. —Richard Howard appeals his conviction for violation of a no-contact order, arguing the trial court erred by constructively discharging a sleeping juror from the petit jury. We affirm.

BACKGROUND

Mr. Howard's appeal is based solely on events that happened during trial. The facts leading to his arrest and prosecution are not relevant to our analysis. Of particular significance to this appeal is a juror, who we identify as "Juror B."

Mr. Howard was charged with one count of residential burglary, one count of obstructing a law enforcement officer, and one count of violating a no-contact order. He exercised his right to a jury trial.

During voir dire, the prosecutor disclosed a potential connection to Juror B. The prosecutor explained that Juror B's stepmother had occasionally testified for the State

as an expert witness in other cases. The court questioned Juror B about this connection and he reported no difficulties with impartiality.

Before the close of voir dire, Mr. Howard moved to strike the entire venire based on inadequate racial diversity. The court denied the motion.

After both sides finished questioning the venire, defense counsel moved to strike Juror B for cause. Counsel explained his justification:

> I appreciate [the prosecutor] bringing . . . up . . . the close relative that testifies as a DV [domestic violence] expert . . . .
>
> One of my other concerns *actually more so than that* is I noticed a number of times [Juror B] appeared to be sleeping during the voir dire. He'd have his eyes shut. I thought he was actually taking a nap at some point, and I have concerns about his ability to pay attention.

Rep. of Proc. (RP) (Mar. 8, 2022) at 118 (emphasis added).

The State objected to the strike, explaining it would make the jury less racially diverse because Juror B was one of the few people of color in the venire. The trial court denied the challenge, explaining:

> I did watch [Juror B]. I did notice him close his eyes once or twice, but I kind of watched him a little bit. He didn't appear to be sleeping to me. I'm trying to watch all 33 of them at the same time, but at this point, there's not enough to strike him for cause.

Id. at 120.

Defense counsel did not use a peremptory strike against Juror B and Juror B

was seated on the petit jury as juror 1. The court seated 14 jurors, noting outside the jury's presence that jurors 13 and 14 would be excused if their service was not needed. The judge later explained it is not their practice to let the jury know the identity of the alternates at the outset, to ensure everyone pays attention.

During the State's closing argument, the trial court interrupted, apparently concerned about Juror B:

> THE COURT: Can you nudge him just a little bit? It's all right. I wanted to make sure you're okay.
> JUROR [B]: Yeah, I'm good.

RP (Mar. 10, 2022) at 452.

After the State concluded its closing argument, the court took a recess and the jurors were excused. The court addressed Juror B's conduct, and the following colloquy ensued:

> THE COURT: We're on the record without the jury. I wanted to address Juror [B] falling asleep. I don't know if you want to address it? He definitely was sleeping just now, and the juror next to him tried to wake him up. I don't know how long he was sleeping, but at least for a few minutes at this point.
> [PROSECUTOR]: Your Honor, there are at least three different instances where the juror next to him tried to nudge him with mixed results. I heard him snoring at least three different times both before and after Your Honor addressed the issue . . . when it became obvious to the room that he was snoring.
> I do realize that this came up during selection, and I did confer with [co-counsel and the case agent] and they didn't notice him sleeping [at that

> time]. They saw him looking down, but they didn't think he was asleep, so we didn't support [defense counsel's] attempt to strike the juror at the time, but in [a] conversation that just happened off the record, numerous people have said that yeah, he's been sleeping consistently throughout the trial.
>
> So having received that information and with what just happened, we ask to strike that juror and let one of the alternates take his place on the panel.

Id. at 461-62. The court then turned to defense counsel and asked if they had any objection:

> [DEFENSE COUNSEL]: I mean, at this point, I actually don't agree, but I mean, he's one of the few minority members of the jury. So I would object to that at that point and do that with a *Batson*,[1] issue, as well.
>
> THE COURT: But it was clear through this closing argument that he was asleep and he was snoring. If I could hear it, that's why I looked up, and when the juror tried to wake him up and he wasn't waking up.
> . . . I don't know how much he missed. . . .
> . . . I don't know how long he was sleeping, and that concerns the Court.
> . . . I couldn't tell much until I heard the snore, and then it got silent, and that juror had trouble waking him up.
>
> I think at this point, I could just . . . basically not excuse him, have him come back in and then when we say that we have two alternates and I have to excuse the alternates, we can just make him an alternate and say you're excused. [Juror B] and 14, you're our alternates.

Id. at 462-63.

The court then pondered aloud that instead of designating Juror B as an alternate, Juror B could be pulled aside and excused immediately. The prosecutor responded that

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

they would prefer the option of Juror B becoming an alternate because "[t]hat seems to be cleaner." *Id.* at 463. The court responded, "I just don't want him to feel bad about it." *Id*. Defense counsel agreed with the court's chosen procedure, but nevertheless preserved the objection to Juror B's removal. After the conclusion of summation, Juror B was excused as an alternate along with juror 14.

The jury acquitted Mr. Howard of residential burglary and obstruction of a law enforcement officer, but convicted him of violation of a no-contact order. Mr. Howard was sentenced to time served. He now appeals.

ANALYSIS

A trial court's decision to discharge an impaneled juror, or to replace a juror with an alternate, is reviewed for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009); *State v. Johnson*, 90 Wn. App. 54, 73, 950 P.2d 981 (1998). A trial court abuses its discretion if its decision is based on untenable grounds or for untenable reasons. *Depaz*, 165 Wn.2d at 852.

Trial court judges have a duty to discharge manifestly inattentive jurors and this duty extends through the end of trial. *See* RCW 2.36.110; CrR 6.5. A juror who sleeps during trial is not fit to serve. *See State v. Jorden*, 103 Wn. App. 221, 224-26, 230, 11 P.3d 866 (2000). A judge who allows a sleeping juror to deliberate on the parties' case

may imperil the right to a fair proceeding. *See State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 146, 385 P.3d 135 (2016).

Mr. Howard does not dispute that Juror B was sleeping. He argues the trial court should have conducted additional investigation before deciding to discharge Juror B. We disagree.

Our case law recognizes that there is no particular format judges must follow in dismissing a sleeping juror. *Jorden*, 103 Wn. App. at 229. Where the record shows a juror has been sleeping, the court may reasonably decide to excuse the juror without conducting an examination of the juror. *See id*. at 228-29. Questioning a juror about what they missed while asleep would be a futile exercise. Little would be accomplished besides unnecessary embarrassment. *See id.* at 228.

Mr. Howard also argues we should take guidance from GR 37 in analyzing the trial court's decision to excuse Juror B. GR 37 modifies the three-part *Batson* framework used to analyze alleged racial discrimination in the exercise of peremptory strikes. GR 37 states that a trial court must deny a peremptory strike if "an objective observer[2] *could* view

[2] The rule defines an "objective observer" as someone who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f).

race or ethnicity as a factor in the use of the peremptory challenge."[3] GR 37(e) (emphasis added). GR 37(h) lists seven "reasons for peremptory challenges" that are "presumptively invalid." GR 37(i) addresses a nonexhaustive list of additional reasons advanced that "have historically been associated with improper discrimination in jury selection," including "allegations that the prospective juror was sleeping [or] inattentive." Mr. Howard points to this language and suggests that implicit bias may have permeated the trial court's decision to discharge Juror B.

Mr. Howard's analogy to GR 37 fails. Even assuming GR 37's approach to analyzing bias applies in this context, there is no showing of bias here.

GR 37(i) does not state that it is improper or presumptively improper to remove a juror who is found to have slept during trial. The rule's text disapproves of unsubstantiated "allegations" of misconduct such as sleeping. GR 37(i). An allegation that a prospective juror has been sleeping can be difficult to prove after the fact and may serve as pretext for bias. Thus, GR 37 requires this type of allegation to be verified in a "timely manner" through "corroboration." *Id*. If the court verifies a juror has been sleeping, GR 37 does not prohibit excusing the juror from service. *Cf. State v.*

[3] This standard does not require a finding of purposeful discrimination. *See* GR 37(e).

Tesfasilasye, 200 Wn.2d 345, 359, 518 P.3d 193 (2022) (Jurors who have manifested unfitness to serve "simply should not be seated.").

Juror B's sleeping was corroborated. Defense counsel first noted Juror B had fallen asleep during voir dire. The judge then observed Juror B sleeping during summation. Juror B audibly snored. His behavior was noticed not only by the court but also by the prosecutor, at least one other juror, and others in the courtroom. It is not discriminatory to excuse a sleeping juror, regardless of the juror's race or ethnicity. The trial court did not abuse its discretion in designating Juror B as an alternate and then excusing him from service.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

NORTHWEST APPELLATE LAW

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