No. 103077-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SHAWN LAMAR BELL,

Respondent.

Court of Appeals No. 85684-7-I

Appeal from Pierce County Superior Court No. 19-1-00973-1
The Honorable Stanley J. Rumbaugh

PETITION FOR REVIEW

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I. INTRODUCTION

Shawn Bell attacked the employees of two adult stores. He barged into the first store wearing a Halloween mask, grabbed a terrified worker by the throat, and stole cash and sex toys. Just days later, he raped an employee of the second store while wearing the same mask. A jury convicted Bell of rape, robbery, assault, and burglary.

The Court of Appeals reversed those convictions for the sole reason that the prosecutor did not give formal notice of an intent to exercise a peremptory challenge based on a juror's inattention. But the juror admitted his inattention during voir dire, and the trial judge verified the behavior. Any error in failing to strictly adhere to the procedure of GR 37(i)—where the challenged juror had already provided notice of his inattention—was harmless.

Under this Court's precedent, harmless error analysis applies when an alleged error involves violation of a court rule. The Court of Appeals, however, declined to engage in harmless

error analysis and instead applied automatic reversal—which is reserved for the most egregious constitutional violations—to the alleged procedural error in this case. Automatic reversal is unwarranted when (1) a juror admits his inattention prior to the exercise of a peremptory challenge, (2) the trial court confirms this fact, and (3) an objective observer could not view race as a factor in the exercise of the strike. The Court of Appeals' expansion of automatic reversal to this rule-based harmless error warrants review. RAP 13.4(b)(1).

At a minimum, clarification is needed from this Court regarding whether an alleged procedural violation involving GR 37 requires automatic reversal where there is no substantive violation, i.e., an objective observer could not view race as a factor in the use of a peremptory challenge. A defendant's otherwise valid convictions should not be set aside, requiring rape and assault victims to relive their trauma and testify at yet another trial, when the defendant received a fair trial and any procedural misstep during jury selection was harmless. Leaving

this important issue unresolved will lead to inconsistent outcomes and the unnecessary reversal of criminal convictions in the lower courts. RAP 13.4(b)(4).

The Court of Appeals' opinion also shows no deference to the trial court's factual findings. This Court should clarify the standard of review for challenges under GR 37. RAP 13.4(b)(4).

II. IDENTITY OF PETITIONER

Petitioner, the State of Washington, respondent below, asks this Court to accept review of the Court of Appeals' decision reversing Bell's convictions and remanding for a new trial.

III. COURT OF APPEALS DECISION

The State asks this Court to grant review of the unpublished Court of Appeals decision filed on April 15, 2024, in *State v. Bell*, No. 85684-7-I. *See* Appendix 1-16. The Court of Appeals denied the State's motion for reconsideration of the initial February 5, 2024, opinion but withdrew the opinion and filed a substitute opinion on April 15, 2024. Appx. 17.

IV. ISSUES PRESENTED FOR REVIEW

A. Should this Court grant review under RAP 13.4(b)(1), where automatic reversal for an alleged procedural violation of GR 37(i) involving notice of juror inattention, when the juror admitted inattention, conflicts with this Court's precedent subjecting alleged rule violations to harmless error analysis?

B. Should this Court grant review under RAP 13.4(b)(4) to clarify whether an alleged procedural violation involving GR 37 requires automatic reversal when there is no substantive violation such that an objective observer could not view race as a factor in the use of a peremptory challenge?

C. Should this Court grant review under RAP 13.4(b)(4) to clarify the standard of review for a trial court's factual findings under GR 37?

V. STATEMENT OF THE CASE

A. Bell Violently Attacked Store Employees Late at Night While Wearing a Halloween Mask.

A large man in a distinctive Halloween mask targeted two adult stores within days of each other. He entered the first store seconds before it closed, grabbed an employee by the throat, and demanded she empty the cash registers into his bag. RP 822-26. He stole cash and an assortment of sex merchandise but was thwarted in his attempt to abduct one of the employees. RP 828-

30, 851-52, 856-58. He arrived at the second store after closing, was unable to enter, and raped one employee in front of the other. RP 948-54, 964-70, 1040-49. Both incidents were captured on surveillance video. Exhibits 100, 102.

Police identified Shawn Bell as the masked assailant. *See* RP 1352-56, 1401-06. Bell posted pictures of himself wearing the same Halloween mask online, he left his DNA in the rape victim's mouth, and police located the Halloween mask and stolen sex merchandise in his business/residence. RP 688-89, 783-84, 866-68, 970-72, 1000, 1003, 1325-31, 1340-44, 1347-48, 1375, 1401-03, 1417-19, 1482-84, 1489-93; Exhibit 247.

B. The State Exercised a Peremptory Challenge Against a Juror Who Admitted He Was Not Paying Attention During Voir Dire.

The State charged Bell with robbery in the second degree, attempted kidnapping in the first degree, rape in the second degree, assault in the second degree, and burglary in the first degree. CP 1-4. His case proceeded to jury trial. CP 212.

During the last round of general voir dire, defense counsel called on a juror and asked for the juror's views on the presumption of innocence. RP 616-17. After that juror responded, defense counsel asked the juror sitting next to him, Juror 39, for his views. RP 617 ("Juror 39, what do you think?"); *see also* RP 564, 626. Juror 39 responded, "I wasn't paying attention. I lost track, What was the question?" RP 617. Defense counsel repeated the question for the juror. RP 617.

Immediately after this round of questioning, the parties began to exercise peremptory challenges. RP 622. The State sought to exercise a peremptory challenge against Juror 39. CP 91. Defense objected under GR 37, noting Juror 39 appeared to be a person of color.[1] CP 91; RP 625-26. The State then

[1] Defense counsel stated, "[Juror 39] is the only person of color who was a male who is actually going to make it onto this panel who is not numerically prohibited from making this jury other than Juror No. 1, who, I believe, is also of Asian descent." RP 631-32. Counsel was likely referring to Juror No. 2, who was "first" on the panel during general voir dire, as Juror No. 1 had already been excused for cause. *See* RP 199-200, 355, 564. Juror No. 2 was seated as a juror in Bell's case. CP 104, 109.

explained that the reason for the peremptory challenge was Juror 39's admitted inattention. RP 626-27. The prosecutor explained,

> My concern, obviously, is if he is not paying attention during voir dire to the point that -- I think Mr. Tolzin was on Juror 41, but whoever it was, it was right next to Juror 39. Mr. Tolzin was inquiring of the juror right next to Juror 39.
>
> …I understand under GR 37 in the past the issues have been, you know, a perception that someone is not paying attention or a perception that someone is disengaged.
>
> In this case, this juror overtly said, "I wasn't paying attention," so that's my issue.

RP 626-27.

Defense counsel acknowledged hearing Juror 39's comment about not paying attention. RP 627. Counsel did not raise GR 37(i) and argue the State failed to give notice of its intent to strike Juror 39 for inattention.

The trial court observed that Juror 39 appeared to be a person of color and also confirmed hearing the juror's comment about not paying attention. RP 627-28. The court further noted that Juror 39's comments during voir dire generally "seemed to

demonstrate either a confusion about the circumstances that he was being questioned about or inattention." RP 627.

The court reviewed GR 37(i), which provides that if a party intends to offer juror inattention 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 invalid[ate] the given reason for the peremptory challenge." RP 630.

The trial court found that "Juror 39's inattention was corroborated by his own acknowledgment, and he even said so. It's on the record." The judge further recounted his own observations of the juror during voir dire:

> By his own admission, [Juror 39] wasn't paying attention. My observations of him because he's sitting right in the front row is his mind was drifting throughout the questioning. I didn't focus on relentlessly, but, like I said, he is right in front of my field of vision. I did notice that he was potentially

> staring off and not completely tracking the proceedings.

RP 632.

In addition to corroborating the juror's admitted inattention, the trial court analyzed Bell's objection under GR 37(g). RP 628-29, 632. Based on the total circumstances, the trial court denied Bell's GR 37 objection and allowed the State's peremptory challenge. RP 632. Juror 39 did not sit on Bell's jury. CP 106.

The jury found Bell guilty of second-degree robbery, second-degree rape, second-degree assault, and first-degree burglary. RP 1660-61.

C. The Court of Appeals Reversed Bell's Convictions Due to the State's Failure to Give Notice Under GR 37(i).

Bell appealed his convictions and sentence. CP 62. Among other claims, he challenged the trial court's denial of his GR 37 objection. Appx. 1. The Court of Appeals reversed Bell's convictions and remanded for a new trial, because the State did not follow the procedural requirements of GR 37(i) and give

"reasonable notice" of its intent to strike Juror 39 for inattention. Appx. 1, 6-7. The court did not find an objective observer could view race as a factor in the exercise of the State's peremptory challenge.

The Court of Appeals held,

> GR 37(i) required the State to provide "reasonable notice" to the trial court and Bell "so [juror 39's] behavior [could] be verified and addressed in a timely manner." While juror 39 verified his inattentiveness through his own admission, the State's failure to bring its concerns to the trial court's or defense counsel's attention until after the close of questioning prevented the behavior from being "addressed in a timely manner." GR 37(i). Neither Bell nor the trial court were afforded an opportunity to ask juror 39 about the length, extent, or significance of any inattentiveness. The State failed to follow the requirements of GR 37(i), and this error requires a new trial.

Appx. 6-7. Absent from the court's analysis was any mention of the trial judge's observations which corroborated Juror 39's admitted inattention. *See* RP 632 (trial judge's observations).

The State filed a motion for reconsideration urging the Court of Appeals to apply harmless error analysis. *See* State's

Motion for Reconsideration. The court denied the State's motion. Appx. 17.

VI. REASONS REVIEW SHOULD BE GRANTED

A. The Court of Appeals' Decision Conflicts With This Court's Precedent Regarding Harmless Error Review.

The Court of Appeals' decision applying automatic reversal to an alleged procedural violation of GR 37(i) conflicts with this Court's precedent subjecting such errors to harmless error review. This Court should grant review. RAP 13.4(b)(1).

As this Court has recognized, a criminal defendant "is entitled to a trial free of prejudicial error, not one that is totally error free." *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981); *accord Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (a defendant is entitled to a fair trial, not a perfect one). For this reason, trial errors requiring automatic reversal are "rare and encompass only the most egregious constitutional violations," *i.e.,* those which "deprive defendants of basic protections by which a trial cannot reliably

function as a fair determination of guilt or innocence."[2] *In re Pers. Restraint of Lewis*, 200 Wn.2d 848, 857-58, 523 P.3d 760 (2023) (citations and quotation marks omitted). But "most constitutional errors are presumed to be subject to harmless error analysis," *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003), and "most such errors are indeed harmless." *State v. Coristine*, 177 Wn.2d 370, 389, 300 P.3d 400 (2013) (González, J., dissenting) (citing *United States v. Hasting*, 461 U.S. 499, 509, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983)).

When, as here, an alleged error involves a court rule, then harmless error analysis applies. *State v. Robinson*, 153 Wn.2d 689, 697, 107 P.3d 90 (2005); *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002); *see also State v. Grenning*, 169

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[2] Examples of errors requiring automatic reversal include "improper courtroom closure, complete lack of counsel, and racial discrimination in grand jury selection," as well as "double jeopardy violations," "failure to require the State to prove its case beyond a reasonable doubt," and "conflict of interest resulting in deprivation of counsel." *In re Pers. Restraint of Meredith*, 191 Wn.2d 300, 309-10 422 P.3d 458 (2018).

Wn.2d 47, 58, 234 P.3d 169 (2010) (violation of a court rule is generally not considered constitutional error for purposes of harmless error analysis); *State v. Scherf*, 192 Wn.2d 350, 375, 429 P.3d 776 (2018) ("A violation of a court rule is harmless if there is no reasonable probability that the error materially affected the outcome of the trial."); *State v. Lupastean*, 200 Wn.2d 26, 53, 513 P.3d 781 (2022) ("There is no longer a presumption of prejudice for nonconstitutional errors, and there is no longer any basis to elevate peremptory challenges over other nonconstitutional trial rights.").

Despite this precedent, the Court of Appeals applied the harshest of remedies—automatic reversal—to a procedural violation of a court rule. GR 37(i) provides, "If any party intends to offer [juror conduct] 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."

The Court of Appeals reversed Bell's convictions solely because the State did not give formal notice of its intent to strike a juror based on the juror's admitted inattention. Critically, the Court of Appeals did *not* find an objective observer could view race as a factor in the exercise of the peremptory challenge. The court did not even find a lack of corroboration. The court *only* found a violation of the procedural requirement of GR 37(i), which requires notice. Under *Robinson*, *Templeton*, and the other authorities cited above, harmless error analysis applies to this type of alleged error, and any error here was indeed harmless in light of the juror's admission and the trial court's corroboration verifying the juror's inattention. The Court of Appeals' decision finding otherwise and holding that violation of GR 37(i) requires reversal conflicts with this Court's binding authority and warrants review under RAP 13.4(b)(1).

B. This Court Should Clarify Whether Automatic Reversal is Required When an Alleged Error Implicates GR 37 but an Objective Observer Could Not View Race as a Factor in the Exercise of a Peremptory Challenge.

The Court of Appeals' decision in this case demonstrates the confusion among lower courts regarding the effect when an alleged error implicates GR 37 but does not violate the substance of the rule. Clarification is needed from this Court. RAP 13.4(b)(4).

GR 37 is a court rule which "prescribes juror selection procedures" but also "implicates substantial constitutional rights." *State v. Jefferson*, 192 Wn.2d 225, 247, 429 P.3d 467 (2018). The purpose of the rule is to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). Procedurally, a party or the court may object to the use of a peremptory challenge to raise the issue of improper bias. GR 37(c). The rule then requires the party exercising the peremptory challenge to "articulate the reasons the peremptory challenge has been exercised." GR 37(d). The trial court must then evaluate the

justification for a peremptory challenge "in light of the totality of circumstances." GR 37(e). If, after this evaluation, 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 should be denied." *Id.*

The totality of the circumstances analysis applies to GR 37(i), which concerns peremptory challenges based on juror demeanor or conduct. Again, if a party intends to offer juror conduct or demeanor, such as inattention, as the justification for a peremptory challenge, then that party "must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed." GR 37(i). "A lack of corroboration by the judge or the opposing counsel verifying the behavior" invalidates the reason given for the peremptory challenge. *Id.*

While GR 37(i) requires the party exercising the peremptory challenge to give reasonable notice, the notice requirement is simply the procedure by which the trial court can ensure the juror's alleged behavior is verified. Notice provides

the court and opposing counsel the opportunity to observe the juror, verify the alleged conduct, and address it as needed.

The overall purpose of GR 37(i) is to address instances whereby a party may use juror conduct as a pretext for racial or ethnic discrimination. *See* GR 37(i) (listing examples of juror conduct that have "historically been associated with improper discrimination in jury selection"). To serve this purpose, corroboration of the juror's alleged demeanor or conduct is required. The rule's intent—corroboration—is apparent from the last sentence of GR 37(i), which specifies that the validity of the reason given for the peremptory challenge hinges on corroboration.[3]

There is a difference between a substantive violation of GR 37, where a trial court erroneously allows a peremptory

[3] GR 37(i) does *not* say that lack of notice invalidates the reason for the peremptory challenge. This Court presumably could have included such language in the rule but chose not to do so. Based on the plain language of the rule, it is only lack of corroboration which invalidates the given reason for the peremptory challenge.

challenge such that an objective observer could view race as a factor in the exercise of the challenge, *see* GR 37(e), and a procedural violation of the rule, which does not implicate the same equal protection and constitutional fairness concerns, *e.g.*, notice under GR 37(i). The former is violative of the spirit and purpose of GR 37, which provides that if the public perceives discrimination in the jury selection process, then reversal is required. *See State v. Tesfasilasye*, 200 Wn.2d 345, 361-62, 518 P.3d 193 (2022); *State v. Lahman*, 17 Wn. App. 2d 925, 932, 488 P.3d 881 (2021); *accord Rivera v. Illinois*, 556 U.S. 148, 161, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (citing *Batson v. Kentucky*, 476 U.S. 79, 86-87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

The latter, however, does not fit within the "narrow" class of per se reversible errors requiring a new trial. Washington courts have found that even in the context of GR 37, automatic reversal is not required when a trial court erroneously denies a peremptory challenge and empanels a juror the defendant

attempted to strike from the panel. *See, e.g., State v. Hale*, 28 Wn. App. 2d 619, 622, 641, 537 P.3d 707 (2023), *review denied,* 2 Wn.3d 1026 (2024); *State v. Booth*, 22 Wn. App. 2d 565, 580-85, 510 P.3d 1025 (2022). This is consistent with *Robinson* and *Templeton* that alleged violations of court rules are subject to harmless error analysis, and with this Court's decision in *Meredith* that a court rule violation involving peremptory challenges does not amount to "structural" error.[4] *In re Meredith*, 191 Wn.2d at 311-12. An alleged violation of a procedural component of GR 37, such as the notice requirement of GR 37(i), should also be subject to harmless error review.

Here, the Court of Appeals improperly reversed all of Bell's convictions by applying the wrong remedy of automatic

[4] It is also consistent with United States Supreme Court precedent. *See Rivera v. Illinois*, 556 U.S. 148, 151-52, 160-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (the erroneous denial of a peremptory challenge is not per se reversible error); *Davis v. Ayala*, 576 U.S. 257, 285-86, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (holding any constitutional error in excluding defense counsel from part of *Batson* hearing was harmless).

reversal. The Court of Appeals appeared to interpret this Court's opinion in *Tesfasilasye* as requiring reversal *whenever* there is a GR 37 violation. Appx. at 5, 7. Such a broad interpretation is inconsistent with this Court's precedent, demonstrates the confusion among lower courts regarding how to apply GR 37, and will lead to further unnecessary conviction reversals on appeal.

"Upholding fair criminal convictions 'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Coristine*, 177 Wn.2d at 388 (González, J., dissenting) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986)). Clarifying whether an alleged procedural violation of GR 37 requires automatic reversal is a matter of substantial public interest that warrants review under RAP 13.4(b)(4).

C. Lower Courts Need Guidance Regarding the Proper Appellate Standard of Review for Claims Involving GR 37.

GR 37 does not address the proper standard of review on appeal. In *Tesfasilasye*, this Court applied de novo review to a GR 37 claim and observed that "most courts have effectively applied de novo review because the appellate court 'stand[s] in the same position as does the trial court' in determining whether an objective observer could conclude that race was a factor in the peremptory strike." *Tesfasilasye*, 200 Wn.2d at 355-56 (quoting *Jefferson*, 192 Wn.2d at 250). In that case, "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." *Id.* at 356.

The Court left open the possibility that a trial court's factual findings under GR 37 may be entitled to deference. *Id.* The Court stated, "[W]e leave further refinement of the standard of review open for a case that squarely presents the question based on a well-developed record." *Id.* at 356. This case is an

appropriate vehicle for refining the standard of review under GR 37.

GR 37(i) invites trial courts to make factual findings regarding juror conduct. *See* GR 37(i) ("A lack of corroboration by the judge or opposing counsel verifying the [juror's] behavior shall invalidate the given reason for the peremptory challenge."). If a trial judge's observations can validate or invalidate the given reason for a peremptory challenge, then those observations are entitled to deference. Such deference is consistent with United States Supreme Court precedent which recognizes the importance of trial court corroboration when analyzing a peremptory challenge based on juror demeanor under *Batson*. *See Thaler v. Haynes*, 559 U.S. 43, 48, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010) (observing "where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire."); *Snyder v. Louisiana*, 552 U.S. 472,

477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (noting that a trial court has a "pivotal role in evaluating *Batson* claims," and when the explanation for a peremptory challenge "invoke[s] a juror's demeanor," the trial judge's "firsthand observations" are of great importance).

The Court of Appeals here applied strict de novo review and gave no deference to the trial court's factual findings which corroborated the juror's inattention. The trial judge observed Juror 39's behavior during voir dire and found the juror's behavior matched his admitted inattention. *See, e.g.*, RP 632 ("My observations of [Juror 39] because he's sitting right in the front row is his mind was drifting throughout the questioning…he is right in front of my field of vision. I did notice that he was potentially staring off and not completely tracking the proceedings."). This factual finding is entitled to deference, and such deference validates the State's race-neutral reason for its peremptory challenge. The Court should grant review to

provide much needed guidance regarding the appropriate standard of review on appeal. RAP 13.4(b)(4).

VII. CONCLUSION

Review in this matter is warranted under RAP 13.4(b)(1) and (4). For the foregoing reasons, the State respectfully requests this Court grant review of the Court of Appeals' decision in this case.

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RESPECTFULLY SUBMITTED this 15th day of May, 2024

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Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

5-15-24	*s/Therese Nicholson*
Date	Signature

APPENDIX

FILED
4/15/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHAWN LAMAR BELL, Appellant.	No. 85684-7-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Following two incidents at retail stores in Puyallup and Tacoma, the State charged Shawn Bell with robbery, assault, rape, attempted kidnapping, and burglary. A jury convicted Bell on all counts except attempted kidnapping. Bell appeals, asserting among other alleged errors that the trial court erred by allowing the State to exercise a peremptory challenge contrary to GR 37. We agree, and for this reason we reverse Bell's convictions and remand for a new trial. Bell also argues substantial evidence does not support his rape and burglary convictions. We hold that substantial evidence exists. We do not reach Bell's other assignments of error.

I

A

Bell's trial began March 7, 2022 with the following two and a half days dedicated to individual voir dire. The trial court then presided over general voir dire of the entire panel.

During general voir dire, the State asked juror 39, "How do you determine whether somebody is telling the truth? What do you look for?" Juror 39 responded, "Their body or eye contact, the way they speak, evidence and facts." Later, the State asked the prospective jurors as a group who had served on a criminal trial before and juror 39 answered affirmatively by raising his placard. Juror 39 stated his previous jury service occurred about four years before, and he did not think there were any law enforcement officers who testified at that trial.

Defense counsel spent time discussing the presumption of innocence with several jurors. After questioning another juror, defense counsel turned to juror 39 and asked, "Juror 39, what do you think?" Juror 39 responded, "I wasn't paying attention. I lost track. What was the question?" The following exchange then took place between defense counsel and juror 39:

> MR. TOLZIN: If I sit down, after I get [done] talking to you, and I don't say another word for the rest of this trial, what impact do you think that's going to have on the presumption of innocence for you?
>
> Would you think that's a con that my client did it?
>
> PROSPECTIVE JUROR: Like if the person kind of gave up?
>
> MR. TOLZIN: Yes, so would you hold that against my client?
>
> PROSPECTIVE JUROR: Yeah, because I wouldn't hear all of the information on everything.
>
> MR. TOLZIN: If I said a few words but he himself didn't say anything, would that be a problem for you?
>
> PROSPECTIVE JUROR: He might incriminate himself and put himself into something.

> MR. TOLZIN: Do you think the fact that he doesn't say a word, that I make a decision that he isn't going to say anything, do you think that in any way incriminates him in this case?
>
> PROSPECTIVE JUROR: Maybe he gives you the power to say that.

Neither party asked juror 39 any additional questions.

At the end of voir dire, the State exercised a peremptory challenge against juror 39. Bell objected under GR 37. The State responded indicating "the issue" it had with juror 39 was "the same as we had" with another juror, that in response to defense counsel's questioning juror 39 "kind of registered a stunned reaction and said, 'Sorry. I wasn't paying attention.' " The State attributed its concern to juror 39 "overtly" stating he was not paying attention. The trial court believed juror 39 to be a person of color and "[Juror 39's] comments that he made during the voir dire process, limited though they may be, seemed to demonstrate either a confusion about the circumstances that he was being questioned about or inattention." Defense counsel noted juror 39 was the only male person of color who was not numerically prohibited from being seated for the remainder of the trial.

GR 37(i) provides as follows:

> The following reasons for peremptory challenges also have historically been 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.

Citing GR 37(i), the court commented, "Juror 39's inattention was corroborated by his own acknowledgement, and he even said so. It's on the record." The trial court denied Bell's GR 37 challenge and granted the State's peremptory challenge to juror 39.

B

Bell argues the trial court erroneously granted the State's peremptory challenge to juror 39 over his GR 37 objection. We agree.

Washington appellate courts have applied de novo review under GR 37 when addressing whether an objective observer could conclude that race or ethnicity was a factor in a peremptory challenge. State v. Tesfasilasye, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022). In Tesfasilasye, the Supreme Court applied de novo review because "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." Id. Tesfasilasye left open the possibility that a standard of review other than de novo could apply in some GR 37 cases, but it did not define the circumstances in which this would be appropriate. Neither party asserts that we should depart from the decisional law applying de novo review.

The United States and Washington State Constitutions require an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; Tesfasilasye, 200 Wn.2d at 356. The parties and the jurors have the right to a trial process free from discrimination. Powers v. Ohio, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The constitutions require nothing else, but tradition, statutes and court rules created peremptory challenges. Tesfasilasye, 200 Wn.2d at 356. Parties

may use these challenges to strike a limited number of otherwise qualified jurors without providing a reason. See RCW 4.44.130, .140; CrR 6.4(e). Peremptory challenges have a history of being used based on racial stereotypes. Tesfasilasye, 200 Wn.2d at 356. GR 37 was created to address this misuse of peremptory challenges and to overcome the shortcomings of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Tesfasilasye, 200 Wn.2d at 357.

Under GR 37(c), a party or the court may object to the use of a peremptory challenge to raise the issue of improper bias. Upon objection to the exercise of a peremptory challenge pursuant to the rule, the party exercising the challenge must articulate the reasons that the peremptory challenge was exercised. GR 37(d). Then, the trial court must evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. GR 37(e). GR 37(g) outlines a nonexhaustive list of several circumstances the trial court should consider. State v. Listoe, 15 Wn. App. 2d 308, 321-22, 475 P.3d 534 (2020); State v. Lahman, 17 Wn. App. 2d 925, 936, 488 P.3d 881 (2021).

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 must be denied, and the trial court should explain its ruling on the record. GR 37(e). The remedy for a GR 37 violation in a criminal case is reversal of the conviction. Tesfasilasye, 200 Wn.2d at 362; Lahman, 17 Wn. App. 2d at 938. This remedy applies regardless of the strength of the State's case or the hardship to victims or witnesses. Lahman, 17 Wn. App. 2d at 932.

The State concedes[1] it never gave notice of its intent to challenge juror 39 based on his being "inattentive," despite the command of the rule that a party wishing to rely on this or another ground listed in GR 37(i) "must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner." In State v. Hillman, the defendant exercised a peremptory challenge against the lone Black person from the jury venire because defense counsel deemed the juror's demeanor as reflective of inattention and disinterest. 24 Wn. App. 2d 185, 189-90, 196, 519 P.3d 593 (2022). The prosecutor agreed that the juror did not seem animated, but disagreed that the juror lacked interest in the proceeding and objected to the peremptory challenge under GR 37, which the trial court sustained. Id. at 190. The Hillman court noted defense counsel failed to bring his concerns regarding the juror's demeanor until after the close of juror questioning. Id. at 196. Citing GR 37(i), Hillman held defense counsel's failure to bring these concerns to the attention of the court and opposing counsel prior to the close of questioning invalidated the purported justification for the peremptory strike. Id. at 196-97.

The present case is analogous. GR 37(i) required the State to provide "reasonable notice" to the trial court and Bell "so [juror 39's] behavior [could] be verified and addressed in a timely manner." While juror 39 verified his inattentiveness through his own admission, the State's failure to bring its concerns to the trial court's or defense counsel's attention until after the close of questioning

[1] Wash. Court of Appeals oral argument, State v. Bell, No. 85684-7-I (Nov. 15, 2023), at 8 min., 33 sec. to 8 min., 59 sec., https://tvw.org/video/division-1-court-of-appeals-2023111168/.

prevented the behavior from being "addressed in a timely manner." GR 37(i). Neither Bell nor the trial court were afforded an opportunity to ask juror 39 about the length, extent, or significance of any inattentiveness. The State failed to follow the requirements of GR 37(i), and this error requires a new trial.

II

Although we reverse and remand because of the GR 37 violation, we address Bell's sufficiency of the evidence arguments as to his burglary and rape convictions.

Due process requires the State to prove " 'beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [a defendant] is charged.' " State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (alterations in original) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). "Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture." Id. Sufficiency of the evidence is a question of constitutional law that we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A

Bell argues the State failed to prove that he entered or remained in the "Lovers" store unlawfully. We disagree.

1

The State put on evidence that on March 8, 2019, Carolyn Nance and Alisha Marquez were closing Lovers, a Puyallup adult store. Nance was at the front when someone entered the store. Nance went to greet the customer but "very quickly found out that it was not a customer," because the person had a mask on his face and "he was approaching me with his hands up and was coming for me." Nance described the mask as shiny, orange, "very streaky looking," and "was a costume mask, a Halloween mask." Nance observed the person wore "baggy, hooded clothes." Marquez described the mask as a "jack o'lantern mask." The masked man put his hands on Nance and backed her against a wall with his hands around her throat. With one hand on Nance's throat and another on the back of her neck, the masked man guided Nance to the cash register.

The masked man asked if Nance was alone in the store, and Nance said there was an associate in the back. After directing her to open the register and put the money in a bag he was carrying, Nance testified he "kind of [dragged] me back to the back of the store where the other associate was." Nance testified she did not feel like she had a choice to do this and was not in a safe situation because "he had put his hands on me." Marquez testified she was in the back of the store closing her register when she saw Nance come to the back with somebody in a mask holding her neck. The masked man instructed Nance and Marquez to put

the store's phones, the deposit that was being prepared, and their personal cell phones into his bag. On their way out, the masked man took several items from the store, including battery operated vibrators, performance enhancement pills, and dildos. When they reached the store entrance, the masked man said, " 'You're coming with me,' and [Marquez] said, 'No, the fuck she's not,' " then she grabbed Nance's arm and pulled her back. The masked man left.

Michelle Lund, a police administrative support specialist at Tacoma Police Department, testified that she heard about the Lovers store incident on the news. Lund watched Lovers store surveillance video the Puyallup Police Department posted on their Facebook page, and the suspect's orange, metallic-looking mask caught her attention. Together with the mask and the suspect's body size and type, Lund believed the suspect to be Bell.

Nance testified exhibit 91 was the mask the man wore. Exhibit 91 was obtained from execution of a search warrant at Bell's business.

2

"A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1). A person "enters or remains unlawfully" in or on the premises when he or she is not then licensed, invited, or otherwise privileged to so enter. RCW 9A.52.010(2). "A license or privilege to enter or remain in a building which is only partly open to the public is

not a license or privilege to enter or remain in that part of a building which is not open to the public." Id.

The license to enter or remain may be limited as to time, place, or purpose and may be revoked. State v. Lambert, 199 Wn. App. 51, 73, 395 P.3d 1080 (2017). Depending on the "actual facts of the case," a limitation on or revocation of the privilege to be on the premises may be inferred from circumstances. State v. Collins, 110 Wn.2d 253, 255, 261, 751 P.2d 837 (1988) (defendant remained unlawfully on the premises, because he exceeded the scope of his invitation and committed crimes).

In Lambert, a jury found the defendant guilty of first degree burglary of the residences of his parents and grandparents. 199 Wn. App. at 68-69. Trial evidence showed the defendant entered his family's residences with permission, before attacking and killing his paternal grandfather and maternal grandfather. Id. at 56-58. The defendant argued his burglary convictions were supported by insufficient evidence because he did not enter or remain unlawfully in a family member's residence. Id. at 72. Lambert held, "A jury could also reasonably infer that any invitation to enter and remain in the house was revoked when Lambert attacked [his paternal grandfather]." Id. at 73. Viewing the evidence in the light most favorable to the State, a jury could reasonably infer the invitation to the defendant to enter the house was limited to a single purpose—to visit his grandfather. Id.

Bell relies on State v. Miller, in which the court reversed and dismissed a second degree burglary conviction because the defendant did not enter or remain

unlawfully in a car wash. 90 Wn. App. 720, 723, 730, 954 P.2d 925 (1998). The defendant entered a self-service car wash, washed his truck, and broke into several coin boxes in three wash bays. Id. at 723. The car wash, open for business 24 hours a day, consisted of wash bays with a roof, side walls, and no doors. Id. Miller reasoned it was immaterial whether the defendant formulated the intent to steal the contents of the coin boxes before he entered the car wash or after he was already present. Id. at 725. "Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime." Id.

The defendant in Miller did not assault an employee, did not enter an employee-only area of the business, and did not prevent an employee from contacting law enforcement. Evidence taken in the light most favorable to the State showed Bell did all of these things at the Lovers store. Any license to enter was revoked when Bell committed an assault against Nance by grabbing her, placing his hands on her throat and neck, and forcing her to place store property into his bag. The evidence was sufficient to support a first degree burglary conviction.

B

Bell argues the evidence was insufficient to prove he committed second degree rape because the State could not prove forcible compulsion. We disagree.

1

The State put on evidence that in the early morning hours of March 11, 2019, Joseph Marco and B.C. were closing the Castle Megastore, an adult store

in Tacoma. Marco testified that after closing and exiting the store out the store's back door and into the loading area with B.C., "[p]retty immediately we saw somebody come from behind the dumpster and come towards us." Marco described the individual as wearing black sweats, a black hoodie pulled up, a backpack, and an orange mask that was "bright and shiny." B.C. testified the man was in all black and wore an orange, shiny, metallic mask. The masked man grabbed Marco by his collar, demanding to let him into the store. Marco lied and said he did not have store keys because he "didn't want this to go any further." The masked man punched Marco in the face, causing Marco's glasses to fly off so Marco "was pretty much disabled at that point in time."

B.C. testified they walked away from the street and lower down into the loading dock area. B.C. testified the masked man grabbed her t-shirt, brought her face close to his face, and told her that he "would fuck me in the parking lot, right there in the parking lot." Marco testified that after the masked man punched him, the masked man "basically said that he was going to fuck [B.C.] because he couldn't get in the store," and "[h]e was frustrated." Marco did not remember B.C. saying much, but he tried pleading with the masked man and said, " 'Please don't hurt us.' " Marco testified the masked man then said, " 'Suck my dick.' "

B.C. testified, "[The masked man] was going to make me suck him off. At that point he had put his hands on my shoulders and kind of pushed me down to the ground." B.C. clarified, "It was just he pushed me lightly." B.C. did not feel like she could run away because she "just didn't want to take the chance of not getting away" and did not feel she was able to just leave on her own. B.C. testified the

masked man "pulled down his pants, and he forced me to perform oral sex on him," and "[h]e forced his penis into my mouth. I had kind of stopped at one point, and he made the comment to suck it like I mean it." The masked man continued to force B.C. to perform oral sex "[b]y pressing himself in [her] mouth." Eventually the masked man stopped, pulled up his pants, and told B.C. and Marco to run and that he would be back the following night. At some point, the masked man demanded B.C.'s phone, she gave it to him, and he threw her phone in the street.

B.C. and Marco testified exhibit 91 was the mask the man wore that night.

On cross-examination, when asked, "[The man] never threatened you, right," B.C. responded, "Not with a weapon no." Other than when the man threatened "to F [her]," B.C. agreed the masked man did not "make any threats towards [her] at all the entire time."

Forensic scientist Jennifer Hayden completed a DNA analysis on oral swabs collected from B.C. during a sexual assault exam and testified it was 870 octillion times more likely the profile was the result of B.C. and Bell than B.C. and an unknown individual.

2

A person is guilty of second degree rape when the person engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped. RCW 9A.44.010(3).

The required physical force must have been force that was " 'directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration.' " State v. Gene, 20 Wn. App. 2d 211, 224, 499 P.3d 214 (2021) (quoting State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). " 'Forcible compulsion is not the force inherent in any act of sexual touching, but rather is that used or threatened to overcome or prevent resistance by the [victim].' " Id. (alteration in original) (internal quotation marks omitted) (quoting State v. Corey, 181 Wn. App. 272, 277, 325 P.3d 250 (2014)). The resistance that forcible compulsion overcomes need not be physical resistance, but it must be reasonable resistance under the circumstances. Id. Whether the evidence establishes the element of resistance is a fact-sensitive determination based on the totality of the circumstances, including the victim's words and conduct. McKnight, 54 Wn. App. at 526.

A threat for purposes of forcible compulsion cannot be based solely on the victim's subjective reaction to particular conduct. State v. Weisberg, 65 Wn. App. 721, 725, 829 P.2d 252 (1992). "Threat" means to communicate, directly or indirectly the intent to "cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(28)(a). "[T]here must be some evidence from which the jury could infer that not only did [the victim] perceive a threat, but also that [the defendant] in some way communicated his intention to inflict physical injury in order to coerce compliance." Weisberg, 65 Wn. App. at 726.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences from the evidence, there is sufficient evidence in the record to prove forcible compulsion. B.C.'s testimony that the assailant grabbed her shirt, brought her towards him, and pushed B.C. to the ground, even "lightly," permits a jury to find force directed at overcoming the victim's resistance. Gene, 20 Wn. App. 2d at 224. B.C.'s testimony supports the inference that she resisted because the man "pushed" her to the ground. Further, before the man forced B.C. to perform oral sex on him, he grabbed Marco by the collar and punched him in the face, and, when he grabbed B.C. by her shirt and brought her close to his face he told her he "would fuck [her] in the parking lot, right there in the parking lot," and at some point took B.C.'s phone away to prevent her from contacting the police. And when B.C. paused while performing oral sex on the man, he told B.C. to "suck it like [you] mean it." A jury may conclude the man made a "threat" within the meaning of the statute because he "communicated his intention to inflict physical injury in order to coerce compliance" through his violent and coercive actions leading up to and during the rape. Weisberg, 65 Wn. App. at 726. The evidence was sufficient to support a second degree rape conviction.

III

In light of our disposition, we do not reach Bell's claims of error in his brief of appellant and his statement of additional grounds concerning a lesser degree instruction on third degree rape, seizure of his phone, ineffective assistance of counsel, DNA collection, alleged violation of Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), alleged violation of Brady v.

Maryland, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), alleged appeals to racial bias in closing argument in violation of State v. Monday, 171 Wn.2d 667, 678, 257 P.3d 551 (2011), and sentencing error.

Reversed and remanded.

Birk, J.

WE CONCUR:

Chung, J.

Dwyer, J.

FILED
4/15/2024
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN LAMAR BELL,

Appellant.

No. 85684-7-I

ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

The respondent, State of Washington, has filed a motion for reconsideration of the opinion filed on February 5, 2024. The appellant, Shawn Bell, has filed an answer to the motion. The court has considered the motion and answer, and a majority of the panel has determined that the motion should be denied but the opinion should be withdrawn and a substitute opinion filed; now, therefore, it is

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on February 5, 2024 is withdrawn; and it is further

ORDERED that a substitute unpublished opinion shall be filed.

Birk, J.

Chung, J.

Dwyer, J.

PIERCE COUNTY PROSECUTING ATTORNEY

May 15, 2024 - 1:40 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Shawn Lamar Bell, Appellant
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