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Court of Appeals
Division I
State of Washington

NO. 73069-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was the State's peremptory challenge to Juror 5 based on race-neutral reasons and should the trial court's conclusion that the reasons were "not racially based and not a proxy for race" be affirmed?

2. Has Bowman failed to establish that defense trial counsel's decision to defer to Bowman's choice to decline to proffer a lesser included offense was ineffective assistance of counsel?

3. Should this Court follow Supreme Court precedent and hold that the Washington Pattern Instruction defining reasonable doubt that was used at trial was a correct statement of the law?

4. Did the trial court properly sustain an objection to a misleading statement of the law in the defense closing?

5. Did the trial court properly sustain an objection to an argument in the defense closing that referred to facts not in evidence?

6. Should the claim of cumulative error be rejected where no error has been established?

7. Should this court decline to consider Bowman's objection to the imposition of court costs, where there was no objection below

and the record supports that judge's conclusion that Bowman will have the ability to pay the $650 imposed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Thomasdinh Bowman, was charged with murder in the first degree, contrary to RCW 9A.32.030, for the August 31, 2012, killing of Yancy Noll. CP 1-9. The Honorable Bruce Heller presided over a jury trial that began on November 3, 2014. 2RP 1-2.[1] The jury found Bowman guilty as charged. CP 17, 18. The court imposed a sentence within the standard range. CP 96-100.

2. SUBSTANTIVE FACTS

On August 31, 2012, Yancy Noll left work at 7:10 p.m., driving his red Subaru Forester. 12RP 43. Fifteen minutes later, he was stopped at a traffic light in north Seattle, when Bowman, a

[1] The Report of Proceedings is in 22 volumes, referred to in this brief in the same manner as in the Appellant's Brief, as follows: 1RP – 10/31/14; 2RP – 11/3/14; 3RP – 11/4/14; 4RP – 11/5/14; 5RP – 11/6/14; 6RP – 11/10/14; 7RP – 11/17/14; 8RP – 11/17/14 (supplement containing voir dire); 9RP – 11/18/14 (supplement containing voir dire); 10RP – 11/18/14; 11RP – 11/19/14 (supplement containing voir dire); 12RP – 11/19/14; 13RP – 11/20/14; 14RP – 11/24/14; 15RP – 11/25/14; 16RP – 12/1/14; 17RP – 12/2/14; 18RP – 12/3/14; 19RP – 12/4/14; 20RP – 12/8/14; 21RP – 12/9/14; 22RP – 1/2/15.

stranger to Noll, shot Noll four times in the head. 12RP 45-47, 51-52, 57-59; 18RP 66-81; 19RP 67; 20RP 103-04, 133. Bowman was a skilled marksman. 16RP 33; 19RP 148-49. Noll's injuries were fatal. 16RP 67.

When he shot Noll, Bowman was in his BMW convertible, stopped next to Noll's Subaru, which was in the right lane. 13RP 185-87; 19RP 58, 62. After he shot Noll, Bowman pulled into the opposite lanes of travel to get around vehicles in front of him, ran the red light, swerving around traffic, and sped off. 12RP 47, 51-55; 13RP 17-21, 35-38. He turned down a residential street and drove fast enough to become airborne as he crested a hill. 13RP 60, 63-66.

When Bowman shot Noll, both cars were stopped southbound on 15th Avenue NE in Seattle, at the intersection of NE 75th Street. 12RP 47-53; 19RP 58, 62. Kevin Watts also was in a car at the light, in front of Bowman and Noll. 12RP 45-51. Watts heard five quick bangs behind him and heard a car's tires squealing, then saw a silver BMW flash past, run the red light, swerve around two cars and speed off. 12RP 47, 51-52, 57. Angjelo Rama was driving the car, and tried to pursue the BMW, but quickly lost it. 12RP 55; 13RP 123-25, 136-38.

Rama drove back to the intersection, and they saw a stationary red Subaru; the driver was not moving, so they parked to check on him. 12RP 57; 13RP 137-39. Watts walked over to the Subaru and saw that the driver was covered in blood, with multiple gunshot wounds. 12RP 57-58. The driver, Noll, was in a normal position in the driver's seat, with his hands on the steering wheel, entirely immobile. 12RP 59. It was obvious the wounds were lethal. 12RP 59.

Rama had another passenger, Ayumi Teraoka, who also heard five rapid shots. 13RP 97, 100-01. She saw the BMW come from behind them, run the red light, swerving through traffic, and speed off. 13RP 103-06. Teraoka and Watts both were able to see the driver of the BMW as it sped by, and together worked with a composite artist to produce a sketch of the man. 12RP 60-63; 13RP 105, 111-13; 14RP 44-50.

Ross Hoffman was in another car stopped at the light when the shooting occurred. 12RP 71-72. He heard five gunshots, then the silver convertible sped past on the left side and ran the red light. 12RP 72-74. Hoffman noticed that the red Subaru did not move when the light turned, so he drove around the block and parked behind it to investigate. 12RP 75-76. There was a passerby at the

driver's door, so Hoffman got into the passenger side to check on the driver. 12RP 77. The driver, Noll, was sitting in the driver's seat with both hands on the steering wheel, facing forward, unmoving. 12RP 77. The two good Samaritans leaned the driver's seat back and Noll's foot slipped off the brake, causing the Subaru, which was still running, to begin to move, so Hoffman shifted it into Park. 12RP 77-78. Given the amount of blood that gushed out, Hoffman concluded that Noll was dead. 12RP 78.

None of the three people in Rama's car heard anything unusual before the shots. 12RP 47; 13RP 100-02, 128-29. Hoffman also did not hear any yelling, any disturbance, or anything out of the ordinary before the shots were fired. 12RP 81. Drivers waiting at the light in the northbound lanes of 15th Avenue NE also did not see or hear any disturbance before the shots were fired. 13RP 27-28, 33-35.

One of the shots Bowman fired went into the home of Patricia and Carl Schulmeister, shattering the bay window in the living room and continuing through a lampshade and down a hallway. 13RP 158-63. The Schulmeisters were home but were in the kitchen and were not physically harmed. 13RP 157. The

Schulmeisters never replaced the lampshade and have not used the living room since. 13RP 165-66.

Nearby security video showed a car driving south immediately after the shooting. 13RP 169, 173; 14RP 89-91. Tinted glass was in the street on the driver's side of the Subaru; the Subaru windows were intact, so investigators surmised that the glass was from the shooter's car window. 13RP 192; 14RP 17.

The description of the BMW convertible, which had been identified as a BMW Z4, the video image of the car, and the sketch of the suspect driver of the BMW were released to the public. 14RP 88-90.

As a result of a tip, police began investigating Bowman and determined that Bowman owned a BMW Z4. 14RP 58, 91-92. Bowman's residence was less than 10 blocks from the scene of the shooting. 14RP 92. A picture of his residence available on the internet depicted a silver BMW in the driveway. 14RP 60-63.

On September 21, 2012, police saw Bowman leave his residence in a Mercedes, with his wife Jennifer driving, and stopped the car. 14RP 68-69. Bowman was told police were investigating a shooting that occurred nearby about three weeks earlier; he said he had not heard about the murder. 14RP 69-72. Bowman admitted

that he owned a BMW Roadster Z4. 14RP 73. When police interviewed Jennifer Bowman, she gave them her cell phone and receipts that were in her purse. 14RP 101-03.

Also on September 21, police executed a search warrant on Bowman's garage. 14RP 92-93. Inside, they found a BMW Roadster; there were glass shards on the floorboard of the passenger side. 14RP 93-94. Detective Duffy noticed that the passenger window was a non-BMW brand replacement. 14RP 93.

One of the receipts in Jennifer Bowman's purse was for dinner at Red Robin in Tacoma, the night of the shooting, at 9:17 or 9:27 p.m., charged to the credit card of D.N. Bowman. 14RP 107. At trial, Bowman admitted that after he killed Noll, Bowman went out to dinner with his wife, driving his wife's car. 19RP 76-78.

Bowman used a 9mm Glock 19 when he shot Noll. 15RP 151; 19RP 62, 85. He had purchased it in March of 2012. 15RP 195-98. After the shooting, he disassembled the pistol and cut up and disposed of the barrel because he thought it could be used to link the gun to the killing. 19RP 88-89. Bowman kept the slide of the gun, which he did not believe could be used to match ballistic evidence to the gun. 20RP 107-08. The gun's slide was discovered hidden at Bowman's business, Vague Industries. 15RP

135-38. Forensic analysis did establish that the shell casings left at the scene of the killing matched the slide. 15RP 165-66.

Police investigation established that on the night of the killing, Bowman turned off his own cell phone and quickly obtained another telephone (a TracFone, essentially a disposable cell phone) that he registered using a false identity, Peter Nguyen. 14RP 169-73. Using the name Peter Nguyen, Bowman called a BMW store and an auto glass company at about 9 a.m. on September 1, 2012, the day after Noll was killed, to ask about having a window replaced on his BMW. 14RP 121, 165-71. That day Bowman and his wife drove the BMW to Portland and had the front passenger window replaced. 14RP 114-16, 119-21. Bowman paid the $250 bill in cash. 14RP 145. Bowman was calm, acting normally, but his wife seemed distraught. 14RP 142-44, 153-54.

After the window was replaced, Bowman kept the BMW concealed in his garage. 20RP 70. Between September 12 and September 21, Bowman spray-painted the originally silver wheels of the BMW black. 14RP 94-95, 98, 109-10; 20RP 93. On September 20, Bowman bought four tires from Big O Tires in Lynnwood, Washington, paying $875 in cash. 14RP 110-11; 15RP 68-72. They were for his BMW, but Bowman did not bring the car

to the store, just the wheels. 15RP 68. The Big O sales manager was surprised that the tires were being replaced, because they were like new. 15RP 75. The new tires had a distinctly different type of tread. 15RP 75-76. Bowman took the old tires away with him. 15RP 79-80.

Police searched the computers at Bowman's business and discovered a collection of documents relating to investigation of shootings: "Forensic Gunshot Residue Analysis," "Chemical Analysis of Firearms, Ammunition and Gunshot Residue," "Gunshot Wounds – Practical Aspects of Firearms, Ballistics and Forensic Techniques," "Advances in Fingerprint Technology," "Automated Fingerprint Identification Systems," "Forensic Interpretation of Glass Evidence," and "Arrest-Proof Yourself." 17RP 68-70. Two more documents on the computer were guides to committing murder and getting away with it: Murder Inc. and The Death Dealer's Manual. 17RP 70-71; 18RP 139-43; 20RP 49, 70-73. Very limited portions of Murder Inc. and The Death Dealer's Manual were admitted at trial. Ex. 249, 250, 320, 321; 6RP 23-51; 18RP 139-43; 20RP 3-10, 49, 70-73.

Bowman testified that he cut Noll off in traffic and Noll became very angry, pursued Bowman's BMW, yelled a threat, and

threw a water bottle into Bowman's car as they drove on the freeway. 19RP 41-49. Bowman claimed that he tried to get away from Noll, but Noll pursued Bowman off the freeway and to the intersection where the shooting occurred. 19RP 53-58. Bowman claimed that Noll was still extremely angry, shouting and cursing, and threw a wine bottle into the BMW, which hit Bowman in the back of the head. 19RP 62-64. Bowman claimed that he saw Noll searching for something in the passenger seat. 19RP 66, 68. Bowman got his Glock out of his bag that was on the passenger seat and shot Noll. 19RP 62, 67. Bowman claimed to have no memory of firing the shots, although he admitted he fired them. 19RP 65, 67.

At sentencing, Bowman argued that the court should consider as mitigation that Bowman acted in self defense. 22RP 42. The court responded, "the jury rejected it as do I." 22RP 42. The court observed that Yancy Noll had his hands on the steering wheel when he was shot, and that Bowman's actions after the shooting were inconsistent with a person who had just narrowly escaped serious injury by an enraged motorist, citing Bowman going out to dinner and claiming that he threw away evidence that would support his version of events. 22RP 43.

C. ARGUMENT

1. THE STATE'S PEREMPTORY CHALLENGE TO JUROR 5 WAS PROPERLY MOTIVATED BY RACE-NEUTRAL REASONS.

Bowman argues that the State's peremptory challenge of Juror 5, an African-American woman, violated the Equal Protection Clause. To prove his claim, Bowman asserts that the State's race-neutral reasons were a pretext for discrimination based on race. This claim is meritless. A review of the record makes plain that the State challenged Juror 5 based on race-neutral reasons that were not present in any other potential juror: her professed inability to make a decision based on evidence presented and her belief that a nephew who had been in prison for 30 years on a murder conviction actually might be innocent. The trial court's finding that "the reasons that have been provided by the State for excluding this juror are not racially-based and they are not a pretext for race"[2] is not clearly erroneous.

The Equal Protection Clause guarantees a defendant the right to be tried by a jury selected free from racial discrimination. U.S. CONST. amend. 14; Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When reviewing a Batson

[2] 11RP 70.

challenge, the trial court undertakes a three-part inquiry to determine whether the challenged juror is being stricken based on purposeful discrimination.

First, a defendant opposing the State's peremptory challenge of a juror must establish a prima facie case of purposeful discrimination. Batson, 476 U.S. at 93-96. Second, if the defendant establishes a prima facie case, the burden shifts to the State to articulate a race-neutral explanation for challenging the juror. Id. at 97-98. Third, the trial court considers the State's explanation and determines whether the defendant has demonstrated purposeful discrimination. Id. at 98. Although the final step involves evaluating the persuasiveness of the State's explanation, the ultimate burden of persuasion that there has been purposeful discrimination rests with the defendant. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

Here, the trial court did not address the first Batson step, which requires the defendant establish a prima facie case of racial discrimination, because the State began by offering its reasons for the challenge. Once a prosecutor has offered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the

defendant has made a prima facie showing is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

The trial court's determination at the third step, as to the existence of purposeful discrimination, is accorded great deference by the appellate courts and will be upheld unless clearly erroneous. State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). The trial court "must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). Determinations of credibility and demeanor are "peculiarly within a trial judge's province" and must be deferred to on appeal absent exceptional circumstances. Id. (citations omitted); United States v. Kuhrt, 788 F.3d 403, 413 (5th Cir. 2015) (inquiry is "quintessentially a question of fact which turns heavily on demeanor and other issues not discernible from a cold record, such that deference to the trial court is highly warranted.").

a. Relevant Facts.

During preliminary questioning, the trial court asked potential jurors if they, or close friends or relatives, had been accused of a crime, rightly or wrongly. 9RP 58. Eighteen venire members responded that they had. 9RP 58-59.

Juror 5 said she had a nephew in California, about 50 years old, who had been serving time since he was a teenager for "a major crime." 9RP 60. The court asked what crime; Juror 5 said it was murder. 9RP 60. Asked if that would "impact your ability to judge this case on its merits," Juror 5 said no. 9RP 60.

During its first round of voir dire,[3] the State asked Juror 5 her reaction when she heard the charge. Juror 5 said that like the other jurors who had been asked that question, she did not have a strong reaction. 9RP 112. Then the following exchange occurred:

> MS. McCOY: Okay. And you mentioned that you had a family member who is serving time for I believe you said it was a murder.
>
> JUROR 5: Yes.
>
> MS. McCOY: Do you believe that person was rightfully or wrongly accused?
>
> JUROR 5: That's hard because I don't know. I don't know that I'll ever know for sure.

[3] The parties were each granted two 30 minute rounds of voir dire. 9RP 106.

MS. McCOY: Okay.

JUROR 5: I know what I'd like to believe, but I don't know for sure.

MS. McCOY: From knowledge of that situation, do you have an opinion about how the justice system works?

JUROR 5: Not really. Because we were here in the Northwest and it was – it was in California, so we didn't attend any of the trials, any of that. But hearing from relatives, of course you're going to get their side of it. But what it did for me was that at one time I thought everything was black and white, and then I see that there are gray areas, you know, because there has to be an assurance when you make a decision, you know, there has to be an assurance, so you have to look at it.

So for me, I'm not sure what kind of juror I'd make even because I want to see, you know, let me see, and then let me experience this and go through the process, because even coming in saying, yeah, that's even like saying -- you know, making a decision right there. But, yeah, I had that – that experience. I've talked to that family member and my love goes out to him, and, of course, he was quite young. So -- but I don't know.

9RP 112-13.

The defense did not talk to Juror 5 during its first round of voir dire. 9RP 133-58. Bowman's first round of voir dire concluded at the end of the day. 9RP 158. At that time, his lawyer addressed jurors who might be able to say only that they would try to be fair, telling them to think about it overnight and talk the next day about their feelings. 9RP 158.

The next day, during the State's second round of voir dire, the prosecutor asked Juror 5 about her job; Juror 5 said that she was independent, self-employed, doing administrative consulting. 11RP 18-19. Then the prosecutor asked about the juror's nephew who was in prison, as follows:

> MS. RICHARDSON: I got the impression, and tell me if this is correct, one of the things you said was "I know what I'd like to believe," which I assume you'd like to believe that he's innocent.
>
> JUROR 5: Exactly.
>
> MS. RICHARDSON: Okay. But you're not sure?
>
> JUROR 5: One thing, and maybe I should have responded also to your first question, in that one thing that impacted me quite a bit yesterday was to put it in my head about the defendant coming in innocent, not guilty, whichever way you want to phrase it, and in that the reason I raised my hand about process -- you know, being a prosecutor is the challenge of maintaining -- no, the defendant's attorney maintains his innocence. The onus is on you to provide evidence to – it's hard to put into words, but I understood the challenge.
>
> MS. RICHARDSON: Uh-huh.
>
> JUROR 5: And that is what I haven't seen in my nephew's case. I haven't seen enough, you know, putting aside Forensic Files that I watch or whatever.
>
> MS. RICHARDSON: Which I have to tell you has nothing to do with what happens in real life.
>
> JUROR 5: I understand that. I understand that.

MS. RICHARDSON: So...

JUROR 5: But that's what I mean, is that the challenge is to be sure.

MS. RICHARDSON: Uh-huh.

JUROR 5: And about life experience, this might seem a little asinine, but what comes to my mind is that old commercial, Apple commercial, where this person, this woman comes in with this ball of some sort and just breaks down whatever it is that's been held in, for example, my origin to that I should have an attitude about life, but then there's that -- that moment that comes where it breaks down all of those things. You know, breaks down even traditions sometimes.

So you have to be optimistic about life, be open to whatever it is that comes in front of you. And that's where you have to be unbiased.

MS. RICHARDSON: So do you believe that there's a chance that your nephew is in prison unjustly?

JUROR 5: I don't believe that. I don't. I don't believe that.

MS. RICHARDSON: Okay.

11RP 19-21 (quotation marks added).

Then the prosecutor asked Juror 5 what the juror meant when she said the previous day, "I'm not sure what kind of juror I'd make,"[4] as follows:

MS. RICHARDSON: Okay. Now, yesterday when Ms. McCoy was talking to you about case proof, you said "I'm not sure I'd make a good juror." And the reason was you said "I need to see." Can you expand on that a little bit more?

[4] 9RP 113; 11RP 21.

JUROR 5: What did I say?

MS. RICHARDSON: ["]You need to see["] is what you said. And just I'm not saying specifically that sentence because in context it doesn't make a lot of sense, but were you concerned about your ability to sit? What do you think about having to see things?

JUROR 5: Well, maybe it is I have to believe. So that's why prosecution is so -- I mean, the role of a prosecutor is so important because it has to be enough evidence and collective input in order to make a good decision. And I'm not sure.

MS. RICHARDSON: About what?

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

MS. RICHARDSON: Uh-huh, please do.

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

MS. RICHARDSON: So it would be – it sounds what you're saying, I don't want to put words in your mouth, but that it would be difficult for you to sit in judgment?

JUROR 5: Thank you.

MS. RICHARDSON: To make that –

JUROR 5: That's correct.

11RP 21-22.

During the defense second round of voir dire, defense counsel addressed Juror 5 about her reluctance to sit in judgment:

> MR. BROWNE: ... Ms. Richardson asked you whether you'd feel uncomfortable judging a person, and you said after some thought yes, right?
>
> JUROR 5: Yes.
>
> MR. BROWNE: Yeah. There's no – I'm just remembering what you said. Right? Is it clear to you, and this is probably the most important question, from my perspective, of course, that you'll hear in this whole process, do you think you are here to judge Dinh Bowman, or do you think you're here to judge their case?
>
> Really think about this, and hopefully somebody else will have another response, but you've got the microphone so you've got the stage.
>
> JUROR 5: I think I'm here to judge to the best of my ability the evidence that's presented about the young man and -- and to determine whether I feel he did it or if there are extenuating cir -- I don't know. You'd have to put it altogether.

11RP 44-45.

After the defense second round, the State stated during a sidebar conference that it intended to exercise a peremptory challenge to Juror 5. 11RP 61, 65. Defense counsel responded that he needed to think about whether he would raise a challenge under Batson. 11RP 65. At a subsequent sidebar, defense counsel indicated he wanted to make a record as to a Batson challenge and the court excused the jurors. 11RP 65.

Without any prompting by the court, the State began by offering the reasons that it was challenging Juror 5. 11RP 66-68. One of the prosecutors explained:

> She has a nephew who [is] in prison for murder. She would like to believe that he's innocent. In which case she believes she has an innocent nephew in prison for murder.
>
> Her statement yesterday was "I'm not sure I would make a good juror." She said today that she wasn't sure about her ability to follow things and it will be difficult for her to sit in judgment.

11RP 66. The State then expressed concern about the juror's communication, noting the State's difficulty in tracking the juror at times, and the juror's possible inability to track. 11RP 66-67.

The State reiterated its reasons for the challenge:

> But the main two reasons, Your Honor, are the relationship to someone in her family who is in prison for murder, which is what this crime is, that she would like to believe that he's innocent. She thinks he probably isn't, but she would like to believe that. And that means that she believes that there are innocent people in prison for murder in her family.
>
> The second thing is that she would find it difficult to sit in judgment, and in talking to her it was clear, it seemed clear to us that she would be probably unable to reach a verdict at all.
>
> Certainly a verdict of guilty because that would be sitting in judgment. And it would be sitting in judgment on someone who is charged with the same thing her nephew is in prison for. I think that's far and away enough to validate the fact that we are not excusing her based on her race in any way, that's the bottom line question, and I would note there are numerous minorities on this panel.

> There are one or two in the box itself. There's several who are going to be coming up. This has nothing to do with Juror 5's race. I actually think she's a pleasant and intelligent woman, but given her perspective on the world and criminal justice system, we cannot keep her.

11RP 67-68.

Defense counsel noted that he remembered the commercial. Juror 5 had described as "basically about how your world changes when you learn things," and appeared to assert that he could not understand the State's reasoning related to Juror 5's nephew's murder conviction. 11RP 68-69.

Neither the defense lawyer nor the judge disputed the State's observation that there were other potential jurors who were minority members: one or two in the jury box already and several in position to join the panel when peremptory challenges were exercised on jurors already in the box. 11RP 68-72.

The trial court concluded that "the reasons that have been provided by the State for excluding this juror are not racially-based and they are not a pretext for race." 11RP 70. It viewed as most important the juror's assertion that she would have trouble sitting in judgment of someone, which would lead to the conclusion that the juror might have difficulty reaching a guilty verdict regardless of the evidence. 11RP 71.

b. The Trial Court Properly Concluded That The Reasons For The Challenge Were Race Neutral.

The trial court found that the State's reasons for challenging Juror 5 were not race-based and were not a pretext for race-based discrimination. 11RP 71. The reasons provided by the State for excusing Juror 5 were race neutral: her ambivalence about her nephew's 30-year imprisonment on a murder conviction; and her professed inability to make a decision and uncertainty that she had the ability to be a good juror.[5] 11RP 66-68. The trial court agreed that the juror's assertion that she would have trouble sitting in judgment indicated she might have difficulty reaching a guilty verdict regardless of the evidence. 11RP 71.

An explanation for a peremptory challenge is race neutral when it is based on something other than the race of the juror; it need not rise to the level of justifying a challenge for cause. Batson, 476 U.S. at 98. The reason need not be persuasive or related to the case, as long as it is not inherently discriminatory.

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[5] The State also noted that it was a little hard to track what the juror was saying at times, and that the juror talked about a commercial that seemed to have nothing to do with anything. 11RP 66-67. The State was concerned that the juror was not being completely forthcoming about her job, which was unclear. 11RP 67. These observations are supported by the record, which reveals ambiguous and sometimes confusing answers by the juror. These observations by the State also were race-neutral.

Rice, 546 U.S. at 338; Hernandez, 500 U.S. at 360. The persuasiveness of the justification becomes relevant only at the third step of the Batson analysis, determining whether the opponent of the strike has established purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); Murray v. Schirro, 745 F.3d 984, 1003 n.2 (9th Cir. 2014).

The criterion found to be race neutral by the United States Supreme Court in Hernandez was that the prosecutor believed that two Spanish-speaking jurors by their body language indicated that they were uncertain that they could listen only to the interpreter's version of Spanish spoken in the courtroom. 500 U.S. at 356-57. The reason was race neutral because it related to specific responses given by the juror, not assumptions based on stereotypes. Id. at 360-63. Because the State's reasons here were not based on race and no discriminatory intent was inherent in the reasons, they were race neutral.

In the course of his arguments that each reason was not race-neutral, Bowman argues that the reasons proffered by the State were pretextual. These arguments are properly considered at the third step of the Batson analysis, in determining whether the prosecutor's race-neutral reasons were persuasive. Rice v. Collins,

546 U.S. at 338 (the second step of the analysis does not demand an explanation that is persuasive, or even plausible, as long as it is not inherently discriminatory; the final step involves evaluating its persuasiveness). State v. Cook, upon which Bowman relies, refers to the question of whether the reasons given were race-neutral in its discussion of whether they were pretextual reasons, but the analysis makes it clear that the court is discussing the third step of the analysis, whether there was purposeful discrimination. 175 Wn. App. 36, 39-44, 312 P.3d 653 (2013). The quotation from Cook that is cited by Bowman regarding pretext is a quotation from a Ninth Circuit case in a discussion of the third step of a Batson analysis. App. Br. at 14, quoting Ali v. Hickman, 584 F.3d 1174, 1192 (9th Cir. 2009).[6] It is important to examine these questions at the third step in the analysis, because the party raising the Batson challenge has the burden of establishing purposeful discrimination at that stage. The State will respond to these allegations of pretext at the third step of its Batson analysis and will limit its analysis in this section to whether the reasons given were race neutral.

[6] The quotation Bowman cites from a third case also is from a discussion of the third step of a Batson analysis. Lewis v. Lewis, 321 F.3d 824, 830 (9th Cir. 2003).

One reason for the State's peremptory challenge was Juror 5's professed inability to make a decision: Juror 5 had asserted that she would find it difficult to sit in judgment, and it seemed clear to the State that she would probably be unable to reach a verdict at all, certainly a guilty verdict. 11RP 67. The trial court agreed that the juror's assertion that she would have trouble sitting in judgment indicated she might have difficulty reaching a guilty verdict regardless of the evidence. 11RP 71. Juror 5 had also twice explained that she was not sure she would make a good juror. 9RP 113; 11RP 21-22. This reason is race-neutral: there is no facial or inherent discrimination in a reason based on the juror's own statements that she would have difficulty making a decision and would find it difficult to sit in judgment.

The second reason for the State's peremptory challenge was that Juror 5 had stated that her nephew was in prison for murder, and Juror 5 said that she would like to believe that he was innocent. 11RP 66-67. The State drew an inference from these two statements: that Juror 5 believed that her nephew was in prison for murder although he was innocent. 11RP 66-67. The trial court agreed that Juror 5 had said she would like to believe her nephew was innocent, and concluded that reasonable people could differ

about what inferences to draw from that statement. 11RP 71. This reason also is race neutral: there is no facial or inherent discrimination in this justification, which was based on the juror's doubt that her nephew who had served 30 years in prison for murder was actually guilty. Because Bowman was also facing a murder charge, the State could reasonably conclude that this doubt would have an effect on Juror 5's ability to dispassionately weigh the evidence and reach a verdict.

In its explanation of its peremptory challenge, in addition to the two main reasons the State identified, discussed above, the prosecutor mentioned that both prosecutors had a little trouble tracking Juror 5's answers (noting Juror 5 often stopped mid-sentence and had described a commercial that seemed irrelevant), that the juror had given an unclear explanation of her employment, and that the State was concerned about the juror's ability to track. 11RP 66-67. Bowman's argument that these reasons were not supported by the record is meritless. The best response to this argument is simply to cite the juror's answers, which are often unclear and rambling. 9RP 112-15; 11RP 18-22. Many of these answers already have been quoted in this brief and will not be repeated here.

Bowman offers an explanation of the relevance of the reference to the commercial, based on a description of the point of the commercial that defense trial counsel offered in argument to the judge. There is no way to know what that commercial was or why the juror thought it was relevant; the prosecutor's point was that its relevance was not apparent in the juror's response. The path of the juror's remarks that ended with the commercial illustrates the point: asked if she was sure her nephew was innocent, the juror referred to the presumption of innocence, and continued: "and in that the reason I raised my hand about process -- you know, being a prosecutor is the challenge of maintaining -- no, the defendant's attorney maintains his innocence. The onus is on you to provide evidence to – it's hard to put into words, but I understood the challenge." 11RP 19-20. Juror 5 indicated she had not seen enough to prove her nephew's guilt, putting aside the television show Forensic Files. 11RP 20. The prosecutor stated the show "has nothing to do with what happens in real life." 11RP 20. Juror 5 responded that she understood that, "But that's what I mean, is that the challenge is to be sure." She continued:

> And about life experience, this might seem a little asinine, but what comes to my mind is that old commercial, Apple commercial, where this person, this woman comes in

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

11RP 20-21. It is difficult to follow this spontaneous discussion about things being broken down, resulting in the conclusion that you have to be optimistic about life. That the statement ended with the words "you have to be unbiased" does not render the preceding remarks clear.

The lack of clarity in the juror's communication was a minor component in the State's decision to exercise a peremptory challenge, but it also was a race neutral reason that was supported by the record.

c. The Trial Court's Ultimate Rejection Of The Batson Challenge Was Not Clearly Erroneous.

Bowman failed to establish below that the State's challenge was purposeful race-based discrimination; trial defense counsel made no argument that there was purposeful discrimination based on race. Bowman has the burden of establishing that the trial

court's finding that there was no purposeful discrimination was clearly erroneous. Snyder, 552 U.S. at 477. He has not sustained that burden.

The trial court had the opportunity to observe the demeanor of the prosecutors and the juror, and concluded that the challenge was reasonable and in good faith. The best evidence relating to discriminatory intent often is the demeanor of the attorney exercising the challenge, which is peculiarly within the province of the trial judge who observes it. Snyder, 552 U.S. at 477.

The trial court heard the State's reasons for this challenge. It reviewed the two main reasons in detail and agreed that Juror 5's responses suggested she might not be able to reach a guilty verdict, regardless of the evidence. 11RP 71. The court concluded that reasonable minds could differ about the meaning of Juror 5's remarks about her nephew who had been convicted of murder. 11RP 71. The court concluded that both reasons were race neutral and were not a pretext for discrimination. 11RP 70.

Bowman claims that the court's conclusion was clearly erroneous because its analysis was insufficient, asserting the court did not conduct a "thorough, holistic analysis." This claim should be rejected. The claim is based on the suggestion that the court

should have conducted a comparative juror analysis sua sponte and that the court implicitly rejected the prosecutor's statement that the juror's communication was unclear. App. Br. at 32-33.

A comparative juror analysis is not required in analyzing a Batson challenge. Murray v. Schirro, 745 F.3d at 1004-05 ("Batson and the cases that follow it do not require trial courts to conduct a comparative juror analysis."). No Washington court has held that the trial court must conduct comparative juror analysis when confronted with a Batson challenge. See State v. Rhone, 168 Wn.2d 645, 657, 229 P.3d 752 (2010) (applying comparative juror analysis but not requiring it); State v. Wright, 78 Wn. App. 93, 97, 896 P.2d 713 (1995) (same). In the trial court, Bowman did not claim there was any comparable non-minority juror who was not stricken. 11RP 69. In any event, the comparative analyses proposed by Bowman in this appeal do not suggest purposeful discrimination in this case.[7]

The trial court did not implicitly reject the State's characterization of the State's difficulty understanding the juror's description of her employment or the juror's difficulty tracking. The court focused on the State's articulated "main reasons": Juror 5's

[7] The comparisons proposed on appeal are refuted in the sections below that address each reason.

ambivalence about her nephew's 30-year imprisonment on a murder conviction; and her assertion that she would have difficulty sitting in judgment of another person, and was uncertain that she had the ability to be a good juror. 11RP 67-72. Defense trial counsel did not suggest that the other reasons reflected purposeful discrimination, and the reasonableness of those observations is reflected in the record.

This Court should reject Bowman's argument that the presence of multiple additional minority jurors in the venire, and in the final jury panel, is irrelevant to the Batson analysis. While the presence of other minority jurors does not defeat a Batson claim, "it is a significant factor tending to prove the paucity of the claim." United States v. Edouard, 485 F.3d 1324, 1343 (11th Cir. 2007) (quoting United States v. Puentes, 50 F.3d 1567, 1578 (11th Cir. 1995)); see also Castellanos v. Small, 766 F.3d 1137, 1150 (9th Cir. 2014) (proper to consider minority jurors that were left on the panel in determining whether a strike was discriminatory); Harris v. Hardy, 680 F.3d 942, 952 (7th Cir. 2012) (same). In the context of this case, where only one of the State's peremptory challenges appears to have been to a minority juror, it is relevant to the State's lack of discriminatory intent.

Bowman faults the State for spending too much time talking with Juror 5 during voir dire, citing the number of transcript pages spent talking to various jurors.[8] A review of those pages reflects, however, that the time spent talking to Juror 5 was a product of her very lengthy answers to many questions, and the need for clarification of some equivocal or incomplete responses. For example, when asked to expand on her statement that she was not sure she would make a good juror, her response covered an entire page of transcript. (Question asked at 11RP 21, line 13; answer completed at 11RP 22, line 14.) When asked whether she was sure her nephew was innocent, her response covered about a page and a half. (Question asked at 11RP 19, line 16; answer completed at 11RP 21, line 3.)

Talking to a juror about matters relevant to the trial cannot be considered a pretext for racial discrimination. In fact, courts regularly consider it evidence of discrimination if the prosecutor does not question the juror about potential areas of concern.

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[8] Bowman asserts that Juror 5 was questioned from pages 111 to 115 of transcript 9RP. But the extent of questioning on page 111 was the last line on the page, comprising four words of the first question asked. 9RP 111. On 115, eight lines are examination of Juror 5. So, instead of five pages, it is 3.44 pages. Bowman asserts that the State questioned Juror 5 from pages 15 to 22 of transcript 11RP, but Juror 5 was not addressed until page 18, line 6, and continued to page 22. 11RP 18-22. So, this juror was examined for a total of 8.2 pages. The State's voir dire covered 56 pages. 9RP 107-32; 11RP 5-30, 61-64.

Hicks, 163 Wn.2d at 491-92. In Miller-El v. Dretke, the Supreme Court observed that the State's failure to engage in meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a pretext. 545 U.S. 231, 246, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). Contradicting his own claim that the prosecutors spent too much time talking to Juror 5, at a later point in his brief Bowman faults the State for not asking further questions about the Apple commercial described by Juror 5, although the prosecutor's perception was that the commercial did not appear to have any relevance. App. Br. at 27. The examination here was a fair attempt to determine the potential juror's ability to serve as a juror in this murder case, not a fishing expedition.

i. Juror 5's reluctance to sit in judgment and inability to make a decision.

As to the State's concern about Juror 5's reluctance to sit in judgment, her inability to reach a verdict, Bowman argues that the State's discriminatory intent was betrayed because the prosecutor asserted that the juror had said "I'm not sure I would make a good juror" and those were not the juror's words. App. Br. at 19.

However, the prosecutor's assertion was a fair statement of the juror's two comments on the subject. Juror 5 first offered her doubts about her ability to sit as a juror spontaneously, in her answer to a different question, saying:

> So for me, I'm not sure what kind of juror I'd make even because I want to see, you know, let me see, and then let me experience this and go through the process, because even coming in saying, yeah, that's even like saying -- you know, making a decision right there. But, yeah, I had that – that experience. I've talked to that family member and my love goes out to him, and, of course, he was quite young. So -- but I don't know.

9RP 112-13 (emphasis added). The next day the juror was asked what she meant by that statement:

> MS. RICHARDSON: ... [W]ere you concerned about your ability to sit? What do you think about having to see things?
>
> JUROR 5: Well, maybe it is I have to believe. So that's why prosecution is so -- I mean, the role of a prosecutor is so important because it has to be enough evidence and collective input in order to make a good decision. And I'm not sure.
>
> MS. RICHARDSON: About what?
>
> JUROR 5: About my ability. I think I better be honest.
>
> MS. RICHARDSON: Uh-huh, please do.
>
> JUROR 5: Okay. Because I did think about it last night. The defense attorney had mentioned that. And that is because -- I think my nephew is a good example of me not being able to say, well, for sure because there are times that I say he should be where he is if all of this is right, and then

> my heart says that's not what I would want for his life or anyone's life. ....

11RP 21-22 (emphasis added). The juror stated she was not sure what kind of juror she would make and was not sure about her ability to sit as a juror or to make a decision; these are equivalent to stating she was not sure she would be a good juror, as is apparent by the juror's own comment, "I think I better be honest." 11RP 22. That was not the statement of a person who was saying she sees things from both sides, but a person saying she was not sure she could make a decision. Juror 5 used her inability to decide about her nephew's guilt as an example of her inability to make a decision. 11RP 21-22.

Bowman argues that the juror's statements do not undermine her impartiality, but that was not the State's reason: it was the juror's concern, which she volunteered, that she was not sure she would be a good juror and might be unable to reach a verdict. Bowman also argues that this proffered justification is not race neutral because the State could have challenged Juror 5 if she had said she would have no difficulty sitting in judgment. That speculation is irrelevant to the reality, acknowledged by the trial judge, that this juror was saying she might be unable to reach a

guilty verdict, regardless of the evidence. 11RP 71. The inability to reach a verdict is not an inherently discriminatory reason to remove a juror; it is race neutral.

Bowman's reliance on a comparative juror analysis is meritless. Comparative juror analysis can be probative of whether a challenge was racially motivated, although it is more probative if the reason for the challenge is an objective characteristic, like age or profession. Caldwell v. Maloney, 159 F.3d 639, 653 (1st Cir. 1998). Comparative juror analysis requires "side-by-side comparisons" of "black venire panelists who were struck and white panelists allowed to serve." Miller-El, 545 U.S.at 241; see also Rhone, 168 Wn.2d at 657 (comparing the similarity between an African-American juror who was struck and a non-African-American juror who served on the jury). The defense at trial did not assert that there was any comparable non-minority juror that was not stricken. 11RP 69.

On appeal, Bowman cites three jurors who he claims also expressed reservations about the difficulties in performing jury service: Jurors 52, 63, and 64.[9] App. Br. at 23-24. However, none of these jurors was seated, so they could not have been

[9] In the excerpts quoted by Bowman, none of these jurors expressed any doubt about the ability to reach a verdict. App. Br. at 23-24.

challenged. 11RP 77. For that reason, they cannot be part of a comparability analysis. Miller-El, 545 U.S. at 241 (Comparative juror analysis requires "side-by-side comparisons" of minority venire panelists who were struck and non-minority panelists allowed to serve).

ii. Juror 5's doubts about her nephew's conviction and incarceration for murder.

Bowman argues that the State's concern about Juror 5's doubts about her nephew's conviction and incarceration was pretextual because it was unsupported by the record, suggesting that because the prosecutor's conclusion was an inference, it was a pretext for racial discrimination. Bowman concedes that when asked whether her nephew was rightly or wrongly accused, Juror 5 said, "I know what I'd like to believe, but I don't know for sure." 9RP 112. Bowman does not acknowledge the juror's answer to the question "I assume you'd like to believe that he's innocent" – the juror's answer, "Exactly." 11RP 19. When the prosecutor asked, "[B]ut you're not sure?", Juror 5 responded at length, indicating that she had not seen enough evidence to convince her that her nephew was guilty. 11RP 19-20. The prosecutor stated she was

drawing an inference from the juror's answers; the inference was a reasonable one.

The trial court agreed that the inference was one that reasonable minds could draw. 11RP 71. The trial court indicated that while it would not be too bothered by these statements, the question is not whether the judge would exercise a peremptory challenge for the reason given – the question is whether the reason was discriminatory. 11RP 70; Jamerson v. Runnels, 713 F.3d 1218, 1224 (9th Cir. 2013). In examining remarks of a juror, this Court recently held that the statement "I would like to think he's guilty" reflected actual bias as to the defendant's guilt. State v. Irby, 187 Wn. App. 183, 196-97, 347 P.3d 1103 (2015). This reinforces the State's inference that Juror 5's statement that she would like to believe her nephew is innocent meant that she was inclined to believe that he was innocent, although he had been in prison for many years.

Bowman's reliance on a comparative juror analysis as to this reason for the challenge also is meritless. On appeal, Bowman cites Juror 2 as comparable, because he or she has a maternal relative who had been convicted of murder. App. Br. at 15. Comparability analysis cannot be used as to Juror 2 because there

is no information in the record as to Juror 2's minority status. Juror 2 may have been a minority juror. Comparative juror analysis requires comparisons of minority panelists who were struck and non-minority panelists allowed to serve. Miller-El, 545 U.S. at 241. The defense at trial did not assert that there was any comparable non-minority juror that was not stricken. 11RP 69.

In any event, the two potential jurors' opinions were markedly different. Juror 2's responses present a stark contrast to the uncertainty of Juror 5. Juror 2 informed the court that "my mother's relative" was convicted of murder about 12 years earlier, but the juror would not have a problem being impartial. 9RP 59. Just as the prosecutor did with Juror 5, the prosecutor asked Juror 2 about that conviction. 9RP 107-09. Juror 2 was asked multiple questions about his or her ability and willingness to serve. Asked whether the juror thought the relative was "wrongly or rightly convicted," Juror 2 responded, "Oh, no, that person was rightfully convicted." 9RP 109. Asked if the juror thought he or she would be a good juror, Juror 2 responded, "I think I would" and explained why. 9RP 109.

In contrast, when Juror 5 was asked whether she believed her nephew was "rightfully or wrongly accused," she said, "That's

hard because I don't know. I don't know that I'll ever know for sure." She continued, "I know what I'd like to believe, but I don't know for sure." 9RP 112-13. The next day when Juror 5 was asked what she would "like to believe" about her nephew's murder conviction, as the juror had said earlier, this exchange occurred:

> MS. RICHARDSON: I got the impression, and tell me if this is correct, one of the things you said was "I know what I'd like to believe," which I assume you'd like to believe that he's innocent.
>
> JUROR 5: Exactly.
>
> MS. RICHARDSON: Okay. But you're not sure?
>
> JUROR 5: One thing, and maybe I should have responded also to your first question, in that one thing that impacted me quite a bit yesterday was to put it in my head about the defendant coming in innocent, not guilty, whichever way you want to phrase it, and in that the reason I raised my hand about process -- you know, being a prosecutor is the challenge of maintaining -- no, the defendant's attorney maintains his innocence. The onus is on you to provide evidence to – it's hard to put into words, but I understood the challenge.
>
> MS. RICHARDSON: Uh-huh.
>
> JUROR 5: And that is what I haven't seen in my nephew's case. I haven't seen enough, you know, putting aside Forensic Files that I watch or whatever.

11RP 19-20. Juror 5 appeared to be saying that she presumed that her nephew, who had been in prison for murder for 30 years, was innocent, and that she had not seen enough evidence herself to be

confident of his guilt. These opinions are not similar to Juror 2's clear, definite statement about her relative, "Oh, no, that person was rightly convicted." 9RP 109.

When asked whether her nephew was in prison "unjustly," Juror 5 said no. 11RP 21. What she meant is not clear, and may have been just that he had had a fair trial. That answer does not eliminate the significance of her other answers – it may be an illustration of her ongoing inability to make a decision about that case, as the answer appeared inconsistent with her other comments about it.

Bowman also claims that the State should not be permitted to strike any African-American juror because he or she has a relative in prison, because a disproportionate number of African-Americans are incarcerated. But Juror 5 was not stricken because she has a relative in prison for murder – it was because of her uncertainty about whether her nephew was guilty, her uncertainty that she would make a good juror, and her discomfort with sitting in judgment. Batson does not prohibit reliance on a reason solely because it might have a disparate impact on minority jurors. Hernandez, 500 U.S. at 356-57; Caldwell, 159 F.3d at 654; United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993).

Bowman's reliance on Justice Sotomayor's comments during a recent oral argument also is unwarranted.[10] According to Bowman, Justice Sotomayor mentioned that she had cousins (who she did not know) who had been arrested, although she knew nothing about the circumstances, commenting that the government in that case likely would have excluded her. The peremptory challenge here was not based on such attenuated facts that might apply to many jurors but have little relevance, it was based on Juror 5's own remarks professing her difficulty making a decision or sitting in judgment. The Washington Supreme Court has noted that Batson did not transform "a shield against discrimination into a sword cutting against the purpose of a peremptory challenge." Rhone, 168 Wn.2d at 654.

iii. Juror 5's confusing answers.

The prosecutor's friendly remarks to the juror about needing help organizing a desk do not establish that the prosecutor's later statements about the vagueness of the juror's description of the juror's work were a pretext for discrimination. There is no requirement that a prosecutor confront a juror with the prosecutor's

[10] App. Br. at 18 n.5.

concerns, and it would certainly be imprudent to do so when the prosecutor does not know if the juror will be seated on the panel. The prosecutor tried several times to clarify the nature of the juror's work before moving to another topic. 11RP 18.

The prosecutor's statement that the juror was pleasant and intelligent also does not establish that the concerns about tracking the juror's remarks and the juror tracking were a pretext for discrimination. A person may be intelligent and yet not communicate in a linear, logical fashion.

The State's questions about Juror 5's ability to logically communicate were a minor part of its reasons for exercising a challenge to this juror. These reasons find support in the record and were not a pretext for discrimination.

In evaluating the persuasiveness of the State's explanation for a peremptory challenge, the ultimate burden of persuasion that there has been purposeful discrimination rests with the defendant. Rice v. Collins, 546 U.S. at 338. The trial judge, who observed the prosecutors and the juror interact, and observed the demeanor of the prosecutor as the challenge was explained, concluded that Bowman did not sustain that burden. Based on this record, the deferential standard of review, and the trial court's distinct

advantage in assessing demeanor and credibility, Bowman cannot show that the trial court clearly erred in denying the Batson challenge.

d. There Is No Constitutional Basis For Bowman's Proposed New Standard And It Should Be Rejected.

Bowman argues that the right to a jury trial under the Washington Constitution warrants adoption of an entirely new limitation on peremptory challenges exercised by the State, to be applied retroactively to this trial. That argument should be rejected, because there is no basis to believe that the drafters of the state constitutional right to a jury trial meant to constitutionally limit the bases upon which the State could exercise its peremptories. The constitutional jury trial guarantee was satisfied here. Restriction of peremptory challenges should originate with the rule-making or legislative process.

This Court must consider the Gunwall[11] factors to determine whether the Washington Constitution provides greater protection of a right than does the federal constitution. The six Gunwall factors are (1) the text of the state provision, (2) differences between the

[11] State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

federal and state texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences between the federal and state constitutions, and (6) matters of particular state or local concern. 106 Wn.2d at 61-62. If these factors point to greater protection under the state constitution, the court then must determine the extent of that protection. State v. Smith, 150 Wn.2d 135, 149, 75 P.3d 934 (2003).

(1) Text of the State Provision. Bowman relies on the right to a jury trial provided in Article I, Section 21, in relevant part: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record...." WA. CONST. art. I, § 21. The purpose of article I, section 21 was "to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution." Smith, 150 Wn.2d at 150-51. This factor is neutral when there is nothing in the language addressing the question presented. State v. Brown, 132 Wn.2d 529, 595, 940 P. 2d 546 (1997). There is no reference to the exercise of peremptory challenges, so this factor is neutral here.

(2) Differences Between the State and Federal Texts. The provision in Article I, Section 21, that the right of trial by jury shall remain "inviolate" has no federal counterpart. "Inviolate" means

there should be no incursion on the right as it existed in 1889. Smith, 150 Wn.2d at 157. The scope of the right must be determined from the law and practice in Washington in 1889. Id. at 151.

(3) Constitutional and Common Law History. That in some instances the jury trial right under the state constitution is greater than the federal constitution does not establish that it will be greater in every instance. Brown, 132 Wn.2d at 596. The Supreme Court has concluded that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." Id. at 596 & n.180. "[T]he third Gunwall factor does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right." State v. Meggysey, 90 Wn. App. 693, 702, 958 P.2d 319 (1998), overruled on other grounds, State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

(4) Preexisting State Law. Bowman has cited no authority for the proposition that the right to a jury trial as enacted in 1889 was intended to include limitations on the bases upon which peremptory challenges could be exercised.

Bowman concedes that peremptory challenges existed at the time the Constitution was adopted. App. Br. at 38 (citing Code of 1881, ch. 87, §1079, at 202). He does not suggest that the bases upon which peremptories could be exercised was limited in any way at that time. The 1881 Code upon which Bowman relies indicates that the exercise of peremptory challenges was not limited, except as to number. It provided that a peremptory challenge is "an objection to a juror for which no reason need be given, but upon which the court shall exclude him." Code of 1881, ch. 15, §208, at 68.[12]

Justice Stephens observed in State v. Saintcalle[13] that courts have consistently recognized that peremptory challenges are integral to assuring the selection of a qualified and unbiased jury. 178 Wn.2d at 67 (Stephens, J., concurring). Justice Stephens concluded that it may be as valid an argument to say that the state jury trial right enshrines peremptory challenges as to say it restricts them. Id.

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[12] This provision appears in a chapter relating to civil actions. The code provides that the law relating to drawing, retaining, and selecting jurors in civil cases shall apply to criminal cases. Code of 1881, ch. 87, §1078, at 202.

[13] 178 Wn.2d 34, 309 P.3d 326 (2013).

Bowman argues that the fewer number of peremptories allowed to the State under the Code of 1881 is persuasive authority that the constitutional drafters intended that the defendant be favored in the exercise of peremptories. App. Br. at 38. That difference in the number of challenges allowed does not indicate that the drafters intended that the bases upon which challenges could be exercised be constitutionally limited, when section 208 of the code specifically provides that no reason need be given when a peremptory is exercised.

(5) Differences in Structure. This factor always favors an independent analysis because the federal constitution is a grant of limited power from the states, while state constitutions limit the power of the state. Smith, 150 Wn.2d at 152. However, the difference in structure does not address the scope of the right that is guaranteed. Id.

(6) Particular State Interest or Local Concern. The State does not dispute that providing jury trials is a matter of particular local concern. Id.

There is no reason to believe that the drafters of the state constitution, by guaranteeing the right to a jury trial in criminal cases, intended to limit the bases upon which peremptory

challenges could be exercised. Bowman concedes as much. App. Br. at 41. His discussion of the many opinions in Saintcalle, supra, establishes only that the court would like to do as much as possible to prevent racial bias in jury selection, not that there is a constitutional basis for the rule Bowman proposes. 178 Wn.2d 34-119 (five separate opinions).

Further, Bowman has not preserved the argument that the state constitution requires a trial court to bar a peremptory challenge by the State if the court believes there is a reasonable chance that race was a factor in the decision. Bowman did not make the argument below and the record is insufficient for an appellate court to determine whether a violation of that proposed new constitutional rule occurred. Thus, review should be denied pursuant to RAP 2.5(a). Id.

The rule proposed by Bowman would require the trial court to determine the motivation for the challenge, just as the Batson rule does. As with Batson, the appellate courts would undoubtedly give great deference to the trial court, which alone would have the opportunity to observe the nonverbal behavior and demeanor of all of the jurors, and to determine the credibility of the attorney's

explanation for the challenge.[14] See Snyder v. Louisiana, 552 U.S. at 477. In this case, the trial court was not given the chance to apply the proposed standard, so the record is insufficient for review.

Finally, the record that is available does not support a conclusion that it is reasonably probable that race was a factor in the exercise of this challenge. The reasons proffered by the State have been discussed in section C.1.b., supra. Those reasons are not related to race, or a proxy for race. There is no reason to believe that the challenge was motivated in any part by race.

[14] The limited number of appellate reversals in Washington does not establish that the Batson rule has had no effect. Instances in which the trial court refuses to permit a peremptory challenge by the State are effectively not appealable (the State would have no remedy), so successful Batson claims by the defense do not appear in appellate cases. The limited number of reversals in the Washington appellate courts as likely represents a positive state of affairs, not a failure of the standard. Reversals in the federal courts are not rare. A partial list of reversals within the last five years includes: Foster v. Chatman, No. 14-8349, 2016 WL 2945233 (U.S. May 23, 2016); Shirley v. Yates, 807 F.3d 1090 (9th Cir. 2015), as amended (Mar. 21, 2016); Crittenden v. Chappell, 804 F.3d 998 (9th Cir. 2015); Williams v. Pliler, 616 Fed. Appx. 864 (9th Cir. 2015); Castellanos v. Small, 766 F.3d 1137 (9th Cir. 2014); Lark v. Sec'y Pennsylvania Dep't of Corr., 566 Fed. Appx. 161 (3d Cir. 2014); Drain v. Woods, 595 Fed. Appx. 558 (6th Cir. 2014); Adkins v. Warden, Holman CF, 710 F.3d 1241 (11th Cir. 2013); United States v. Quesada, 540 Fed. Appx. 636 (Mem) (9th Cir. 2013); Harris v. Hardy, 680 F.3d 942 (7th Cir. 2012); Rice v. White, 660 F.3d 242 (6th Cir. 2011).

2. DEFENSE TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE IN HIS DECISION TO DEFER TO BOWMAN'S CHOICE TO DECLINE TO PROFFER A LESSER INCLUDED OFFENSE.

Bowman contends that his trial counsel, John Henry Browne, provided constitutionally ineffective assistance of counsel by deferring to Bowman's strategic choice not to offer the jury any lesser included offense instructions. That claim must be rejected because Bowman has not established either deficient performance or resulting prejudice, as is his burden. Bowman has not established that deference to the defendant's choice constituted deficient performance in this case, when an all-or-nothing strategy was legitimate, presenting high risk but a high reward (acquittal) if it had been successful. Even if it was deficient performance, Bowman has not established resulting prejudice: either that defense counsel would have made a different decision if he had given less weight to Bowman's opinion, or that the result of the trial would have changed.

To establish ineffective assistance of counsel, a defendant must show both that the representation was deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that the deficient

representation prejudiced the defendant. Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Courts begin with a strong presumption that the representation was effective. Id.; Hutchinson, 147 Wn.2d at 206. That includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The Strickland standard must be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90). Counsel's representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 562 U.S. at 105. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In addition to showing deficient performance, the defendant must affirmatively show prejudice. Id. at 693. That showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112. Speculation that a different result might have followed is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, an ineffectiveness claim fails, even if the representation was deficient. In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

The Washington Supreme Court recently considered an ineffective assistance claim in the context of the decision to request lesser-included offense instructions, in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). The court held that the decision whether to offer lesser included offense instructions is a "tactical decision for which defense attorneys require significant latitude." Id. at 39. The court observed that appellate courts are not in a position to determine what risks are acceptable, because whether or not to pursue an all or nothing approach is a subjective decision. Id. The

court stated, "it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision." Id. The court held that reliance on an all-or-nothing strategy in that murder case was not deficient performance, although that strategy ultimately proved unsuccessful. Id. at 43.

a. Deference To A Defendant's Choice To Pursue Outright Acquittal Is Not Deficient Performance.

Bowman argues that because defense trial counsel told the trial court that it was his belief that his client should make the final decision as to whether to pursue lesser offenses, Bowman was deprived of counsel on that issue. App. Br. at 48. This invitation to second-guess the tactical decision-making process of defense counsel should be rejected. Bowman's argument illustrates the wisdom of the court's observation in Grier: "the complex interplay between the attorney and the client in this arena leaves little room for judicial intervention." Id. at 40.

There is no question that Browne (trial counsel) advised Bowman that the defense could offer the jury lesser included offense options. Browne explained:

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

21RP 5. Defense counsel specifically stated that he agreed with the decision. 21RP 5. Thus, Bowman's claim that Browne did not make the decision is unsupported by the record.

What Bowman objects to is the manner in which defense counsel made that decision. In making a decision whether to pursue lesser included offenses, the defense weighs the risks: If lessers are given, the defendant may be convicted (here, convicted of intentional murder, for example) when the jury has concluded that the State did not prove the charged crime and would otherwise have acquitted the defendant. If lessers are not given, the jury cannot convict on a lesser crime -- outright acquittal results if the State does not prove the charged crime. The suggestion that Brown was constitutionally ineffective because he deferred to his client's choice as to which strategy to pursue is contrary to common sense.

The unanimous opinion in Grier endorses the approach taken by Browne, holding "it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision." Grier, 171 Wn.2d at 39 (emphasis added). There is no suggestion in the record that defense trial counsel believed that the decision Bowman made was unreasonable in this case, although others might make a different choice.[15] In evaluating an ineffective assistance claim on appeal, the court is limited to facts in the record. Grier, 171 Wn.2d at 29. As a result, in reviewing this claim, the court must assume that Browne believed the decision was a reasonable one. Id. at 30.

There is no dispute that at least some lesser included offense instructions would have been given by the court if requested by Bowman. That does not render the decision to forego those instructions deficient performance.

Bowman chose an all-or-nothing strategy. The crime charged was premeditated murder. CP 1, 32. On appeal he argues that he should have requested manslaughter instructions,

[15] Defense counsel's comments at sentencing indicate that he believed the choice made sense. 22RP 24, 27-28.

based on State v. Schaffer,[16] so if the jury concluded he acted in self defense but he recklessly or negligently used excessive force, he would be convicted of only manslaughter. But Bowman shot Noll four times in the head and testified that he intentionally shot Noll, so there is no doubt he intentionally used lethal force, which was either justified by Bowman's perception of danger, or not. The court in Grier advised, "courts should be loath to second-guess the defendant's approach, risky or not." Grier, 171 Wn.2d at 40.

Grier recognized that an all-or-nothing strategy, foregoing available instructions on lesser crimes, is the defendant's choice "even where the risk is enormous and the chance of acquittal is minimal." 171 Wn.2d at 39. Many other cases recognize that it is a legitimate strategy to pursue complete acquittal. Id. at 44-45 (listing cases); see also State v. Breitung, 173 Wn.2d 393, 398-400, 267 P.3d 1012 (2011); State v. Hoffman, 116 Wn.2d 51, 111-13, 804 P.2d 577 (1991) (as to aggravated first degree murder); State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009) (citing cases from other jurisdictions in n.5).

Perhaps not every attorney would defer to a client's decision, but Bowman has not established that no reasonable, competent

[16] 135 Wn.2d 355, 957 P.2d 214 (1998).

attorney would defer to the decision of an intelligent person well aware of the risks. While Grier held that the ultimate decision rests with defense counsel, it did not limit the manner in which that decision would be made, and it endorsed the approach taken by defense counsel here.

b. Bowman Has Not Established Prejudice Resulting From The Alleged Deficiency.

Bowman also has not sustained his burden of persuasion as to the second prong of the Strickland ineffective assistance analysis: he has not established resulting prejudice from the alleged deficient performance. He has not established that if defense counsel had given less weight to Bowman's opinion, counsel would have requested instructions as to any lesser offense. The claimed deficiency is excessive deference to Bowman's choice, so the result at issue is whether counsel's decision would have changed. Because Bowman has not established that the decision would have changed, he has not shown that there would have been any effect at all on the trial.

Bowman's argument as to prejudice is based on the premise that the decision to request instructions on lessers would have

changed, but there is no evidence of that. In making this decision, the Washington Supreme Court has advised that "it is the defendant's prerogative to take this gamble, provided her [or his] attorney believes there is support for the decision." Grier, 171 Wn.2d at 39. There is no evidence in the record that defense trial counsel did not believe there was support for the decision. Counsel's reference to Bowman's intellectual ability to make the decision suggests that counsel believed that the decision had logical support. If so, counsel would have made the same decision, respecting the defendant's choice not to request instructions on the lessers. Thus, no prejudice has been established.

Bowman argues that it is reasonably probable that there would have been a different result because the lesser offense instructions would have been given and the evidence supported conviction on second degree murder, or first or second degree manslaughter. App. Br. at 60. This simplistic analysis ignores the specific alleged deficiency in this case (the basis of counsel's decision), as argued supra; it also completely nullifies the second prong of the Strickland analysis, as it asserts no more than that the lesser included instructions would have been given.

The Supreme Court in Grier held that defendant had not established prejudice under the second prong of the Strickland analysis, because it must assume the jury would not have convicted the defendant of the charged crime (second degree murder) unless the State met its burden of proof,[17] so the availability of lesser offenses (manslaughter) would not have changed the outcome. Grier, 171 Wn.2d at 43-44 (citing Autrey v. State, 700 N.E.2d 1140 (Ind. 1998)). For the same reason, Bowman has not established prejudice in this case: the jury found Bowman guilty of premeditated murder and must be presumed to have followed their instructions, so the availability of lesser offenses would not have changed the outcome.

Bowman asks this court to overrule Grier's holding regarding prejudice, citing a Ninth Circuit case that rejects that holding. App. Br. at 57-58 (citing Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015)). This Court does not have the authority to overrule Supreme Court precedent, however. State v. Witherspoon, 171 Wn. App. 271, 317, 286 P.3d 996 (2012), aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014). This is certainly not a case that calls for such action, as Grier was a unanimous decision of the Supreme Court only five years ago. In

[17] 171 Wn.2d at 44 (citing Strickland, 466 U.S. at 694 (holding that a reviewing court should presume the judge or jury acted according to law)).

contrast, Washington courts are not bound by Ninth Circuit precedent. Feis v. King County Sheriff's Dept., 165 Wn. App. 525, 547-49, 267 P.3d 1022 (2011). It is worth noting that the dissent in Crace recognizes that the holding of Grier is not an unreasonable application of the Strickland standard, under which the defendant has the burden of proving that there is a reasonable probability that there would have been a different result. Crace, 798 F.3d at 853-63 (Callahan, J., dissenting).

3. THE REASONABLE DOUBT INSTRUCTION WAS CORRECT.

Bowman claims that the trial court erred by submitting a jury instruction on reasonable doubt drawn from the Washington Pattern Instructions. This argument should be rejected. As this court recently recognized, the Washington Supreme Court has held that WPIC 4.01 properly states the burden of proof.

> Lizarraga challenges the jury instruction defining "reasonable doubt" in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008) (WPIC). Specifically, the language that states, "A reasonable doubt is one for which a reason exists." Lizarraga claims the language undermines the presumption of innocence and the burden of proof. But in State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court expressly approves the WPIC as a correct statement of the law and directs courts to use WPIC 4.01 to instruct on the burden of

> proof and the definition of reasonable doubt. See also State v. Pirtle, 127 Wn.2d 628, 656–58, 904 P.2d 245 (1995) (concluding WPIC 4.01 adequately permits both the government and the accused to argue their theories of the case).

State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), as amended (Dec. 9, 2015), review denied, 369 P.3d 501 (2016).

Bowman asserts that the language of WPIC 4.01 defining "reasonable doubt" as "one for which a reason exists," is a misstatement of the law and therefore his conviction must be reversed. This claim should be rejected, as challenges to similar language have been rejected repeatedly by Washington courts. In State v. Bennett, supra, the Washington Supreme Court stated:

> We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. . . Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 317-18 (emphasis added).

As far back as 1901, the Supreme Court approved very similar instructional language, which defined reasonable doubt as "a doubt for which a good reason exists, - a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901). In upholding the instruction, the court stated that "[t]his instruction is according to the great weight of authority, and is not error." Id.

In State v. Tanzymore, the court addressed a reasonable doubt instruction that said, "[t]he jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists." 54 Wn.2d 290, 291 n.1, 340 P.2d 178 (1959). In rejecting a claim that the trial court should have given a different reasonable doubt instruction, the court noted that the trial court gave the standard instruction on reasonable doubt, holding: "This instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit." Id. at 291; accord, State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973).

In State v. Thompson, the defendant challenged this same language "argu[ing] rather strenuously that this phrase (1) infringes

upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt in order to acquit." 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975). Rejecting the challenge, the Court of Appeals stated:

> Although we recognize that this instruction has its detractors, it was specifically approved in State v. Tanzymore, [...] and also in State v. Nabors, [...]. We are, therefore, constrained to uphold it. We would comment only that it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.
>
> Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. (emphasis added).

The doctrine of stare decisis requires a "clear showing that an established rule is incorrect and harmful" before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). Bowman's arguments are similar to arguments rejected in past cases, and

they do not establish that those precedents are clearly incorrect and harmful.

4. THE TRIAL COURT PROPERLY SUSTAINED TWO OBJECTIONS TO THE DEFENSE CLOSING ARGUMENT.

Bowman contends that the trial court erred in sustaining the State's objections to two arguments made by his trial counsel in closing argument. These claims are without merit. The trial court properly sustained the State's objection to a misleading statement of the law in one instance, and to reference to facts not in evidence in the second. If the court erred in sustaining either objection, the error was harmless.

A trial court has the authority to restrict closing argument, including argument by the defense. State v. Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Argument "must be restricted to facts in evidence and the applicable law, lest the jury be confused or misled." Id. The judge has broad discretion to ensure argument does not impede the fair and orderly conduct of trial. Id. at 475. The trial court will be found to have abused its discretion only if no reasonable person would have made that decision. Id. The trial court does not err when it precludes an argument that is

not supported by the evidence. Id. at 480. Even if the trial court errs in precluding the argument, the error is reversible only if there is a reasonable probability that it affected the verdict. State v. Frazier, 55 Wn. App. 204, 212, 777 P.2d 27 (1989).

a. Defense Counsel Argued That The Standard For Evaluating Self Defense Is Entirely Subjective; That Is Inaccurate.

The jury was properly instructed as to the defense of justifiable homicide, which includes both an objective and a subjective component. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The subjective portion requires the jury to consider all the facts and circumstances known to the defendant; the objective portion requires the jury to use this information to determine what a reasonably prudent person would have done. Id. In his closing, defense counsel incorrectly stated that the standard was entirely subjective. 21RP 104. The State's objection to that misstatement was properly sustained. 21RP 105.

The jury was instructed as to definition of justifiable homicide, in relevant part:

> Homicide is justifiable in the lawful defense of the slayer when:

(1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

CP 33 (Instruction 11). Bowman does not dispute that this was an accurate statement of the law. In its closing, the State accurately explained the standard. 21RP 84.

The defense attorney began his discussion of the defense of justifiable homicide with an accurate statement of the law, reading from Instruction 11:

> The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to him at the time[,] taking into consideration all the facts and circumstances as they appear to him, at the time of and prior to the incident.

21RP 104. There was no objection.

Having explained the standard, defense counsel emphasized that the State had the burden to disprove self defense, but he inserted an incorrect statement of the substance of the justifiable homicide definition:

> What makes our state unusual in so many ways is the following paragraph of jury instruction number eleven. Still read it. The State has the burden of proving beyond a

> reasonable doubt that the homicide was not justifiable. If you find, and keep in mind this is all subjective, because you have to view things from Mr. Bowman's standpoint."

21RP 104 (emphasis added). The State objected that this was "a misstatement" and that objection was valid: the justifiable homicide standard is not all subjective. 21RP 105. The court sustained the objection, without further comment. 21RP 105. That ruling was proper because defense counsel's statement was misleading. Statements by counsel to the jury concerning the law must be confined to the law set out in the court's instructions. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

Even if the trial court erred in sustaining the objection, the error was harmless. That ruling did not prevent defense counsel from arguing his theory of the case, including the significance of Bowman's perception of events. Defense counsel later repeated his statement that jurors should put themselves in Bowman's shoes in evaluating the issue of self defense. 21RP 115. There was no objection to that argument. Defense counsel also directed the jury's attention to instruction 13, which provides that a person is entitled to act on appearances in defending himself, if the person "believes in good faith and on reasonable grounds that he is in actual danger." CP 35. Counsel also mentioned Instruction 15,

which provides that it is lawful for a person who "has reasonable grounds for believing that he is being attacked to stand his ground" and defend himself using lawful force. CP 37.

The jury was instructed as to the correct legal definition of justifiable homicide. CP 33. The two other instructions cited by defense counsel also indicated that the jury was to view the circumstances as they appeared to Bowman. CP 35. A jury is presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). The jury was not led to believe that there was no subjective component of the self defense standard, it was just informed that the statement that the standard is entirely subjective is incorrect. This was consistent with the law given in the court's instructions.

There is no reason that sustaining the State's objection would have resulted in any confusion about the standard or suggested that the jury should not follow the instructions. The court's ruling also did not limit the defense argument as to the defendant's subjective perception of the events. The ruling was correct, but even if it was not, it was harmless.

b. Defense Counsel Improperly Referred to Facts That Were Not In Evidence.

Bowman claims the trial court erred in sustaining an objection that an argument in defense counsel's closing misstated the facts in evidence. The argument at issue follows:

> And then he's going to go on, and I'm repeating myself, go on, and do what the State believes he did as a student of murder. The thrill kill concept makes no sense in light of the facts. And I don't mean to be condescending because I'm not at all. I have the most respect for juries. You wouldn't believe how much I do. But if we can -- if you can focus on the facts. The thrill kill thing makes no sense at all.
>
> If Dinh Bowman was a student of murder because he possessed this manual, and this book, he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car.
>
> MS. RICHARDSON: Your Honor, I'm going to object. This is facts not in evidence.
>
> THE COURT: Sustained.
>
> MR. BROWNE: The book is in evidence. You can read what's in there. I will continue talking about the factors that do not apply to Mr. Bowman. Semiautomatics leave shell casings. Using -- committing a crime, and having your cellphone on will, we now know from the experts, record your area where you are.

21RP 117 (emphasis added).

Only a very few excerpts from each of the two books, The Death Dealer's Manual and Murder Inc., were admitted at trial.

Ex. 249, 250, 320, 321; 6RP 23-51; 18RP 139-43; 20RP 3-10, 49, 70-73. None of these excerpts include what counsel represented were the lessons prescribed.

Bowman concedes that the lessons defense counsel listed did not appear in those books. App. Br. at 81-82. He does not argue that the portions of The Death Dealer's Manual that were admitted included anything that reflected defense counsel's list of lessons. He concedes that Murder Inc. did not say anything about daylight, heavy traffic, or a flashy car, but argues those conclusions could be inferred from the actual advice given in Murder Inc. Id.

The trial court should always restrict the argument of counsel to the facts that are in evidence. Perez-Cervantes, 141 Wn.2d at 475. Otherwise a jury may be confused or misled. Id. at 474. Because Bowman concedes that the rules counsel listed were not "prescribed in those books," he has conceded that the State's objection on that basis was valid. Bowman suggests that he should have been permitted to argue that his behavior was inconsistent with the general advice in Murder Inc., but he was not making that argument when he drew the objection – he stated specific rules were in Murder Inc. that were not in that book.

Bowman asserts that the judge precluded a defense argument that the State had not proven he was a student of murder. That claim is entirely unsupported by the record, as much of the defense closing addressed that issue. 21RP 107-13, 116-18.

After this objection, defense counsel continued to characterize Bowman's behavior as inconsistent with the general advice given in Murder Inc., without further objection. 21RP 117-18. Bowman concedes as much, arguing only that the court's ruling undermined those arguments. App. Br. at 82. That may be a risk that defense counsel took by inaccurately characterizing the evidence in the case but it does not render the court's ruling error.

Even if the court's ruling was error, it was harmless. The jury was properly instructed that its role was to determine the case based on the testimony and exhibits at trial. CP 20-22. It had the opportunity to review the portions of Murder Inc. and The Death Dealer's Manual that were admitted. If it agreed that defense counsel's statements were justifiable as an inference from the actual advice given in those books, the jury would not be influenced by the objection or ruling of the court. Counsel was permitted to continue to refute the State's theory that Bowman was a student of

murder, although counsel did not re-cast the general advice as specific lessons again.

5. BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn.2d 772 (discovery violations, three kinds of bad acts improperly admitted, hypnotized witnesses, improper cross-examination of defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for victim's credibility). No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

6. THE COURT PROPERLY IMPOSED COURT COSTS.

Bowman contends that the trial court abused its discretion in imposing court costs of $665 because the court did not conduct an inquiry into Bowman's ability to pay pursuant to RCW 10.01.160(3).

This Court should decline to consider this issue, because the issue was not preserved and this case does not present compelling reasons to review it. As to the merits of the claim, the record supports the judge's conclusion that Bowman would have the ability to pay $665 at some time in the future.

At sentencing, there was no discussion of the imposition of financial obligations. The only discretionary financial obligation that was imposed was court costs of $665. CP 87. In the Judgment and Sentence, the court made this finding: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 87.

Because Bowman alleges only a statutory violation, he is not entitled to review for the first time on appeal. State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). While the Supreme Court in Blazina exercised its discretion to address the findings necessary to impose discretionary legal financial obligations, that was in the context of establishing a framework that would avoid over-burdening indigent defendants with such obligations. In this case, it is clear that Bowman will not be burdened by this $665 obligation.

This sentencing occurred in January 2015, after the lower court opinion in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), which held that a defendant must object to imposition of costs in the trial court to obtain review, but before the Supreme Court's decision. Trial counsel chose not to object, most likely because he believed that an objection was not warranted. He now argues that the court's finding is contradicted by the finding that Bowman would be permitted to proceed in forma pauperis on appeal, but the motion to proceed in forma pauperis was not made until three weeks after the sentencing hearing – at sentencing defense counsel was not even certain that Bowman would request that status. 22RP 47; Supp. CP __ (Sub no. 98, Motion to Proceed In Forma Pauperis, 1/27/2015). This is not a case that cries out for review. The dedication of resources to a remand on this issue is unwarranted where Bowman did not object, as required under the case law at that time, and there is substantial evidence in support of the court's finding.

Even if this court considers the merits of this claim, it should conclude that based on the information before it, the trial court properly concluded that Bowman had either the present or future ability to pay the court costs of $665. Bowman is an intelligent man

with sophisticated skills in technology. 16RP 27-28, 40-43. He testified that his wife is a dentist. 19RP 78. At sentencing, his attorney stated that Bowman's wife continued to stand behind him. 22RP 38-39. Bowman did not present information that he was indigent at sentencing, indicating that he "probably" would do that later. 22RP 47. Unlike most persons, Bowman had a continuing source of income while in custody – the community income of his wife. RCW 26.16.030. The finding was supported by the record.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Bowman's conviction and sentence.

DATED this 6TH day of June, 2016.

Respectfully submitted,

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Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kevin A. March, containing a copy of the Brief Of Respondent in State v. Thomasdinh Bowman, Cause No. 73069-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

06-06-16
Date

Done in Seattle, Washington