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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

WENDELL M. CLARK,

Appellant.

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BRIEF OF APPELLANT,  
WENDELL M. CLARK

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY  
THE HONORABLE BERNARD F. VELJACIC, JUDGE

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## I. INTRODUCTION

Wendell M. Clark, a black man, was charged with raping a white woman. He was tried in Clark County, Washington, by a jury containing no black people. Mr. Clark was the only black person involved in this case, including all of the witnesses, the judge, the attorneys, and nearly 50 people in the jury venire.

The case against Mr. Clark rested almost entirely on testimony by the complaining witness. The physical evidence in this case was equivocal, and the parties agreed that the sexual encounter began as consensual. Mr. Clark testified at trial, but the jury did not believe him. He was convicted of second-degree rape and fourth-degree assault and sentenced to 114 months incarceration.

These proceedings violated Mr. Clark's constitutional rights, in two ways. First, he was denied effective assistance of counsel. Under the circumstances of this case, competent trial counsel would have moved to change venue to a county with at least a realistic chance of having black people in the jury venire. Second, prosecutorial misconduct denied Mr. Clark a fair trial. In closing argument, the prosecutor expressed her personal opinion about the case, vouched for the complaining witness, and implied that the jury had to find that the complaining witness was untruthful in order to acquit. This Court should reverse and remand for a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. Mr. Clark's trial counsel performed deficiently by failing to move to change venue.
2. The prosecutor committed misconduct by improperly vouching for the complaining witness, expressing her personal opinion about guilt, and implying that the jury had to find that the complaining witness lied in order to acquit Mr. Clark.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did counsel provide ineffective assistance, prejudicing Mr. Clark, by failing to move to change venue when the 40-plus jury venire contained no black people, Mr. Clark stood accused of raping a white woman, and the state's case rested almost entirely on credibility?
2. Did the prosecutor commit prejudicial misconduct by vouching for the complaining witness's credibility, expressing her personal opinion about guilt, and implying that the jury had to find that the complaining witness lied in order to acquit Mr. Clark?

## **IV. STATEMENT OF THE CASE**

Wendell Clark and Sabrina VonHorn started dating in about March 2018. RP at 531, 776. Mr. Clark is a black man and Ms. VonHorn is a white woman. RP at 57. By late April, they were dating exclusively and

had begun having a sexual relationship. RP at 532. Mr. Clark would come over to Ms. VonHorn's apartment and stay for the weekend. RP at 737. Ms. VonHorn lived in Clark County, Washington, with her daughter, K.V., who was 13 years old. RP at 533-34.

On April 21, 2018, Mr. Clark came over to Ms. VonHorn's apartment to spend the weekend. RP at 533. The events of April 21 and 22 are disputed. According to Mr. Clark, he and Ms. VonHorn had consensual intercourse that night, including oral, vaginal, and anal sex.<sup>1</sup> RP at 743, 745. According to Ms. VonHorn, she and Mr. Clark began having consensual vaginal sex. RP at 677. She testified that Mr. Clark then began having nonconsensual anal sex with her. *Id.* Ms. VonHorn said that she struggled, said "no" repeatedly, and told him that it hurt. *Id.*

Mr. Clark said that he believed Ms. VonHorn consented to anal sex. RP at 745. Mr. Clark said that he heard Ms. VonHorn say that it hurt at the beginning, and he immediately stopped. RP at 744-45. He asked if she was ok, Ms. VonHorn said that she was, and then they continued having anal sex. *Id.* Mr. Clark said that he never heard her say no. RP at 745.

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<sup>1</sup> Prior to this incident, Mr. Clark and Ms. VonHorn had discussed anal sex briefly. RP at 777-778. Mr. Clark asked Ms. VonHorn about it, and she responded in a joking manner. *Id.* According to Ms. VonHorn, she told him that she had never had anal sex before, and that was not something she was interested in trying. RP at 541. According to Mr. Clark, she said that she had tried anal sex previously but it was not one of her favorite positions. RP at 777-778.

That night, Ms. VonHorn texted a friend, Katie Davis, about the encounter. RP at 550. She said that it was not consensual but asked Ms. Davis not to call the police. RP at 550-51. Ms. Davis contacted K.V., who checked in with her mother. RP at 689-90. Ms. VonHorn told her daughter that everything was ok. RP at 558

The next morning, Mr. Clark cooked breakfast for Ms. VonHorn and K.V. RP at 752-53. According to Mr. Clark, he and Ms. VonHorn had sex again and then watched television. RP at 751, 753-54. At around 2:30PM, he went out to his car and noticed that his car was towed. RP at 754-55. Mr. Clark blamed Ms. VonHorn for this because she told him that he could park in the apartment complex lot. RP at 755-56. Mr. Clark requested money to pay for part of the towing cost. *Id.* Ms. VonHorn refused, and they got into an argument. RP at 756.

Mr. Clark was upset with Ms. VonHorn and did not handle it well. *Id.* He yelled at her and refused to leave her apartment. RP at 756-57. According to Ms. VonHorn, Mr. Clark scared her and raised his hand, but he did not hit her. RP at 563-65. Mr. Clark denied raising his hand. RP at 762. Ms. VonHorn sent K.V. to a neighbor's apartment, and K.V. and the neighbor called the police. RP at 562. When police arrived, Mr. Clark cooperated completely. RP at 325, 525, 733. He believed that police were here because of the dispute over the parking issue. RP at 759, 762-63. It

was not until later, during questioning, that he became aware of additional allegations. RP at 764.

Ms. VonHorn alleged to police that Mr. Clark raped her the night before. RP at 332. Police interviewed her briefly, then brought her to the hospital for a sexual assault assessment. RP at 358-59. At the hospital, Ms. VonHorn was crying and withdrawn. RP at 408, 481-82. She accused Mr. Clark of raping her and reported injuries. RP at 402, 409. She had minor bruising, as well as a broken nail. RP at 409-10. The state charged Mr. Clark with rape in the second degree, assault in the fourth degree, and tampering with a witness. CP 81-82. The state alleged that all three were domestic violence offenses. *Id.*

Trial began in May 2019. RP at 61. The jury venire consisted of over 40 people, none of whom were black. RP at 238. In fact, none of the people involved in the case—including the other witnesses, the attorneys, the police officers, and the judge—were black, except Mr. Clark. *Id.* Mr. Clark's trial counsel noted this and questioned the potential jurors about racial bias. RP at 238-44. However, he did not move to change venue to a different, more diverse county. *Id.*

At trial, Mr. Clark and Ms. VonHorn both testified. RP at 530, 736. Ms. VonHorn's testimony was not entirely consistent. She reported another incident of sexual coercion to the nurse at the hospital, but she did not report

this to the police or include it in her written statement. RP at 355, 422, 521, 524, 539, 621-22. She also reported to the nurse that Mr. Clark had a weapon in his bag, but she did not mention that to any other witness or to the police. RP at 352-53, 360, 390, 407, 519-20, 649. Mr. Clark testified that all of his sexual encounters with Ms. VonHorn were consensual. RP at 745.

In closing argument, the prosecutor argued, “This is forcible compulsion. This is rape.” RP at 848. She repeated, “It was a rape. The law is clear about that.” *Id.* The prosecutor argued that the jurors should convict if they believed Ms. VonHorn: “if you believe [Ms. VonHorn’s] testimony beyond a reasonable doubt then you have enough evidence to convict [Mr. Clark].” RP at 851. The prosecutor argued that the jury is “the sole judges of credibility but I would submit to you that [Ms. VonHorn’s] testimony yesterday was genuine.” *Id.* Mr. Clark objected, but the objection was overruled. *Id.* The prosecutor concluded by using repetition: “[Mr. Clark] is guilty of Rape in the Second Degree. He is guilty of Tampering with a Witness and he is guilty of Assault in the Fourth Degree.” RP at 861.

The jury believed Ms. VonHorn and convicted Mr. Clark of rape and assault. RP at 891. The jury acquitted him of witness tampering. *Id.* At sentencing, the judge found that Ms. VonHorn was especially vulnerable

due to her prior sexual abuse as a child, her daughter in the next room, and the fact that Mr. Clark refused to leave the next day. RP at 907-08. The judge also found that anal rape is especially painful. RP at 908. The court sentenced Mr. Clark to 114 months, the high end of the standard range. RP at 907-08. Mr. Clark appeals. CP 228-29.

## V. ARGUMENT

Mr. Clark, a black man, stood accused of raping a white woman. The case against him depended entirely on credibility—whether the jury believed him or the complaining witness. The jury venire, nearly 50 people, did not contain a single black person. Mr. Clark was denied effective assistance of counsel because, under these circumstances, competent trial counsel would have moved to change venue to a more diverse county. Mr. Clark was also denied a fair trial before an impartial jury due to prosecutorial misconduct during the state’s closing argument. This Court should reverse and remand for a new trial.

### A. **Mr. Clark was Denied Effective Assistance of Counsel because his Trial Counsel Should Have Moved to Change Venue.**

This Court must reverse because Mr. Clark was denied effective assistance of counsel. Reasonable trial counsel would have requested a change of venue, given the charges, the nature of the allegations, the makeup of the jury venire, and the potential for implicit and explicit bias. Counsel’s failure to request a change of venue prejudiced Mr. Clark by

denying him even the realistic possibility of having a black person on this jury.

**1. Every defendant has the constitutional right to protection from racial discrimination, implicit or explicit.**

Every defendant has the constitutional right to a fair trial by an impartial jury. *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019). This right is a defendant’s “fundamental protection of life and liberty against race or color prejudice.” *Id.* at 658 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)). Whenever “explicit or implicit racial bias is a factor in a jury’s verdict, the defendant is deprived” of his or her constitutional rights. *Id.* at 657.

The Sixth and Fourteenth Amendments also provide criminal defendants with “the right to be tried by a jury that is representative of the community.” *State v. Barajas*, 143 Wn. App. 24, 34, 177 P.3d 106 (2007) (citing *State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977)). Historically, courts have held that the right to a fair trial does not guarantee the right to a jury that includes persons of his or her own race. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This protection only guarantees that jury members “are selected pursuant to non-discriminatory criteria.” *Id.* at 85-86.

The goal of impartial jury selection is not just to ensure the defendant is tried by an unbiased jury, but also to protect the legitimacy of the courts. *See Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364 (1991); *Aldridge v. United States*, 283 U.S. 308, 315, 51 S.Ct. 470 (1931) (public suspicion of racial bias among jurors harmful to the legitimacy of the courts). To allow racial bias in the jury system harms “both the fact and the perception” of the jury’s role as “a vital check against the wrongful exercise of power by the State.” *Powers*, 499 U.S. at 411.

Broadly speaking, racial bias takes two forms: implicit and explicit. Explicit biases are “openly expressed,” while implicit biases are “often not conscious, intentional, or maliciously-based,” but are “harbored nonetheless.” *United States v. Ray*, 803 F.3d 244, 259, n.8 (6th Cir. 2015) (quoting Melissa L. Breger, *The (in)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. Rev. L. & Soc. Change 555, 560 (2012)). Race-based discrimination is “not less real or pernicious” for “[p]erhaps . . . tak[ing] a form more subtle than before.” *Rose v. Mitchell*, 443 U.S. 545, 558-59, 99 S.Ct. 2993 (1979).

Social scientists have examined implicit bias extensively and have proven its pervasive and powerful impact on behavior and decision-making. *See Ray*, 803 F.3d at 260 (citing Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated*

*Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 152 (2010) (implicit biases are pervasive and powerful)); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 465 (2010); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 345 (2007). Researchers “have found that the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks, dark-skinned people, [and] other[ ] [groups].” *United States v. Robinson*, 872 F.3d 760, 782 (6th Cir. 2017) (Donald, J., dissenting in part) (quoting Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795, 802 (2012)). “As relates to the typical American juror, these biases can operate to distort a person’s interpretation of the evidence in a case, or the perception of a defendant’s guilt or innocence.” *Id.*; see also *Pena-Rodriguez v. Colorado*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017) (reversing and remanding due to racial animus which was a significant factor in juror’s decision regarding guilt or innocence and creating exception to “no-impeachment rule”).

Racial bias among jurors is “uniquely difficult to identify.” *Berhe*, 193 Wn.2d at 661. Many people who “harbor explicit biases will not admit to doing so,” and all jurors, to some extent, “harbor[] implicit biases that are

difficult to recognize.” *Id.* (citing *Peña-Rodriguez*, 137 S. Ct. at 869; *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017)). *Batson* was not designed to root out unconscious, unintentional, or implicit biases. *State v. Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467 (2018). Implicit biases threaten the very foundation of our criminal justice system—the right to a fair trial, to a trial by a jury of one’s peers, and to be assumed innocent until proven guilty. *See id.* at 249-50; *Berhe*, 193 Wn.2d at 661; *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018).

Implicit bias can be particularly impactful in rape cases, especially interracial rape cases with a black male defendant and a white female alleged victim. “Interracial rape” is “a classic catalyst of racial prejudice” in American society. *Dukes v. Waitkevitch*, 536 F.2d 469, 471 (1st Cir. 1976). In a study to “identify societal conceptions of criminals for certain crimes, participants overwhelmingly selected black perpetrators as being associated with the crime of rape.” Smith & Levinson, *supra* at 809 (citing Jeanine L. Skorinko & Barbara A. Spellman, *Speech at the 1st Annual Conference on Empirical Legal Studies: Stereotypic Crimes: How Group-Crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing* 19 (Oct. 27, 2006)). Research also shows that “black males have

been characterized traditionally as hypersexual, ‘lascivious, sexual monsters who preyed upon white women.’” Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. Ill. U. L.J. 243, 251 (2007).

Examining implicit bias and prosecutorial discretion in rape cases, Smith and Levinson, *supra*, gave the following example:

Consider a case in which the prosecutor must decide whether to charge a suspect with forcible rape. According to the suspect, after a romantic dinner and a movie, the complaining witness invited him back to her house. They entered her bedroom. The complaining witness grabbed his crotch area and started kissing him. He directed her onto the bed and began taking off her (and then his) clothes and began having intercourse. After roughly one minute, she slapped his face. Taking this as a sign of sexual play, he slapped her back. After roughly another minute, he saw tears rolling down her face, immediately stopped having intercourse and asked her, “What’s wrong?”

The witness tells a different story. She contends that the suspect closed the door after they entered the bedroom. He approached her quickly as though he was going to shove her against the door. She put up her hand in a defensive posture and struck him in the crotch area. He began kissing her. At first she tried to pull away, but then she “just sort of stopped resisting.” He shoved her onto the bed and began taking off her (and then his) clothes. She said it “all happened so quickly” that she didn’t know what was happening and felt like she was in “shock.” She slapped his face as hard as she could muster. He then slapped her across the face with such force that she thought “my jaw had shattered.” She began to sob. After a pause, he asked her, “What is wrong?” and then rolled off from on top of her. She began to sob very loudly. How does the prosecutor evaluate whether to charge this

crime as a rape or consider the conduct to represent a reasonable mistake?

Smith & Levinson, *supra* at 808-09. In this scenario, prosecutorial discretion can be affected by implicit biases about both the suspect and the victim. *Id.* at 809-10. “It is not that the prosecutors consciously think about the black suspect and purposefully decide that black males are rapists.” *Id.* at 809. Instead, “the associations are automatic.” *Id.* The prosecutor might “‘sense’ aggression in the interaction or might have an instinctual reaction that the suspect is an incorrigible offender, but those thoughts are not necessarily consciously linked to race.” *Id.* at 809-10. The race of the complaining witness matters as well. *Id.* at 810. “White women historically have been portrayed as pure and sexually modest.” *Id.*

Jurors, like prosecutors, are human beings influenced by implicit biases. *See Berhe*, 193 Wn.2d at 661. Ensuring a fair and impartial jury must necessarily consider implicit biases surrounding interracial accusations of rape.

## **2. Washington has reexamined implicit racial bias, increasing protections for criminal defendants.**

Recently, Washington courts have grappled with implicit racial bias in the criminal justice system. The Washington Supreme Court has issued several decisions in recent years that increase protections against race-based discrimination for defendants. In *Gregory*, the Court took judicial notice of

“implicit and overt racial bias against black defendants in this state.” 192 Wn.2d at 22. The Court held that “Washington’s death penalty is administered in an arbitrary and racially biased manner” and struck it down as unconstitutional. *Id.* at 18-19.

The Court has also examined bias in juries and the limits of *Batson*. In *Erickson*, the Court wrote that *Batson* “guarantees a jury selection process free from racial animus. Yet, we have noted that our *Batson* protections are not robust enough to effectively combat racial discrimination during jury selection.” 188 Wn.2d at 723. Abrogating prior decisions, the *Erickson* Court held that trial courts “must recognize a prima facie case of discriminatory purpose” under *Batson* whenever “the sole member of a racially cognizable group has been struck from the jury.” *Id.* at 734.

The Washington Supreme Court continued to examine racial bias in juries in subsequent cases. In *Jefferson*, the Court again strengthened protections for criminal defendants. 192 Wn.2d 225. The Court noted that *Batson* failed to address “peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination.” *Id.* at 242 (citing *Saintcalle*, 178 Wn.2d at 54). To correct this deficiency, the Court held that the relevant inquiry was not “whether the proponent of the peremptory strike is acting out of purposeful discrimination.” *Id.* at 249. Instead, the

question is whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.” *Id.* This objective test is “based on the average reasonable person” defined as “a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways.” *Id.* at 249-50.

The Court next applied this objective test to jury verdicts. In *Berhe*, the Court evaluated a motion for a new trial based on allegations that racial bias tainted the jury’s deliberations. 193 Wn.2d at 649. The Court held that this inquiry turns on “whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict.” *Id.* 665. If the defendant makes this showing, the trial court must hold an evidentiary hearing. *Id.*

The *Berhe* Court emphasized the insidious nature of implicit bias in this analysis. “[W]hen determining whether there has been a prima facie showing of implicit racial bias, courts cannot base their decisions on whether there are equally plausible, race-neutral explanations.” *Id.* at 666. The Court cautioned that “[t]here will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates.” *Id.* At the prima facie stage, courts must conduct further

inquiries when the evidence is “unclear or equivocal, as it will often be in cases of alleged implicit racial bias.” *Id.*

Most recently, the Court addressed racial bias in jury selection in *State v. Pierce*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2020 WL 103341 (Jan. 9 2020). In that case, the Court abrogated its decision in *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). *Pierce*, 2020 WL 103341 at 7. *Townsend* prohibited informing potential jurors about sentencing consequences in voir dire, specifically whether the state sought the death penalty. 142 Wn.2d at 846-47. However, this rule had unintended consequences—it disproportionately excluded people of color from juries. *Pierce*, 2020 WL 103341 at 6. The *Pierce* Court reiterated that “[j]ury selection must be done in a fair way that does not exclude qualified jurors on inappropriate grounds, including race.” *Id.* at 1 (citing *Erickson*, 188 Wn.2d at 723). The Court held that “[h]ewing to a rule that has a disproportional effect of eliminating people of color undermines our commitment to fostering juries that reflect our society.” *Id.* at 6.

In *Erickson*, *Gregory*, *Jefferson*, *Berhe*, and *Pierce*, the Washington Supreme Court recognized the harmful impact of implicit racial bias in our criminal justice system. These decisions also demonstrate the Court’s commitment to combating implicit bias. Competent defense counsel would

aware of these decisions. Competent counsel would also move to change venue under the circumstances of this case.

**3. Mr. Clark received ineffective assistance of counsel.**

Mr. Clark's attorney knew or should have known that implicit racial bias could affect this case. Mr. Clark is a black man in an overwhelmingly white county and stood accused of raping a white woman. The physical evidence was equivocal, and the parties agreed that the sexual encounter started out consensual. Thus, the case hinged on credibility—whether the jury found Mr. Clark or Ms. VonHorn more credible. The jury venire included nearly 50 individuals, but no black people.

Under these circumstances, reasonable trial counsel would have moved to change venue. Reasonable counsel would have requested to move to a venue that has the realistic chance of having black people in the jury venire. Counsel's failure to bring this motion denied Mr. Clark effective assistance. It also resulted in prejudice by undermining the legitimacy of the judicial proceedings in this case. This Court must reverse and remand for a new trial.

**a. Mr. Clark's attorney performed deficiently by failing to move to change venue.**

Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563

(1996). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77.

Here, Mr. Clark's trial counsel performed deficiently by failing to move to change venue. Trial counsel noted that race was a potential issue during voir dire:

There's fifty-five people in this room right now and the only African American in this room is Wendell Clark, okay?

And as a matter of fact once this trial proceeds and goes from start to finish he will remain the only African-American person involved in this case. Okay?

RP at 238. Counsel went on to ask the jurors if they would "make sure that Mr. Clark gets a fair trial." RP at 239.

None of the jurors endorsed explicitly racist views. RP at 239-44. A couple of the jurors talked openly about race. One discussed unconscious bias, and another bluntly stated, "[a]s a Defendant I wouldn't be thrilled with the demographic of Vancouver, Washington." RP at 239-40. At the end of this discussion, defense counsel summarized by stating, "it sounds like everybody is – agreed that they're going to be very careful about reviewing evidence in this case and making sure that racial bias doesn't

enter into it – do I have everybody’s word on that? Okay. Thank you.” RP at 243.

Defense counsel was correct to bring up race during voir dire in this case. However, counsel erred by failing to move to change venue. The charge at issue—alleged rape of a white woman by a black man—is “a classic catalyst of racial prejudice.” *Dukes*, 536 F.2d at 471. The jurors denied explicit bias, and a few acknowledged the reality of implicit bias as well. RP at 239-44. This was not sufficient to safeguard a fair trial. Implicit bias operates such that “people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.” *Saintcalle*, 178 Wn.2d at 49. Moreover, people will “act on unconscious bias far more often if reasons exist giving plausible deniability (e.g., an opportunity to present a race-neutral reason).” *Id.*

The venire in this case included over 40 potential jurors and no black people. RP at 238. This was not a surprising result given the demographics of Clark County. In 2019, the United States Census Bureau estimated that the population of Clark County, Washington was 86.4% white and only 2.3% black or African American. Appendix at 1. By contrast, the estimated population of Pierce County, Washington in 2019 was 7.6% black or African American and 74.8% white. Appendix at 3.

Considering the racially charged accusations in this case, reasonable trial counsel would have moved to change venue to Pierce County. Under CrR 5.2, a defendant can file a motion to change venue if “he believes he cannot receive a fair trial in the county where the action is pending.” CrR 5.2(b)(2). Counsel should have moved to change venue to a county with at least the realistic possibility of having black people in the jury venire.

**b. Trial counsel’s failings prejudiced Mr. Clark.**

Counsel’s actions also prejudiced Mr. Clark, violating his constitutional rights to effective assistance and to a fair trial. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Mr. Clark was prejudiced in two ways. First, there is a reasonable probability that the outcome of his case would have been different with a more diverse jury venire. Second, the makeup of juries impacts the legitimacy of our entire criminal justice system. Under the circumstances

of this case, failure to file a motion to change venue undermined that legitimacy.

As explained above, this case involves accusations that tap into the heart of racial animus in this country. *See* Stewart Chang, *Our National Psychosis: Guns, Terror, and Hegemonic Masculinity*, 53 Harv. C.R.-C.L. L. REV. 495, 507 (2018) (discussing the “apprehension over interracial rape,” which “exemplified white anxieties regarding threats to the existing racial hierarchy”). Often, these biases are unconscious and automatic. *See* Smith & Levinson, *supra* at 809. This case also hinged on credibility.<sup>2</sup> The Washington Supreme Court has recognized that people will “act on unconscious bias far more often if reasons exist giving plausible deniability” for their actions. *Saintcalle*, 178 Wn.2d at 49.

Credibility can provide that plausible deniability. Implicit biases affect credibility determinations in “subtle, subconscious ways.” Mikah K. Thompson, *Bias on Trial: Towards an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1261 (2018). For example, jurors tend to be “more suspicious of witnesses who do not share their identity.” *Id.* at 1262. Jurors also tend to believe “stereotype-

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<sup>2</sup> There was physical evidence in this case, but it was equivocal. Ms. VanHorn had some injuries, including small bruises and a broken nail. RP at 409-10. These injuries could have resulted from either consensual or nonconsensual sexual activity.

consistent information” and “ignore information that is inconsistent with their expectations.” *Id.* at 1262-63. Especially concerning, “stereotypes concerning violence or sexual behavior are particularly corroborative of a witness’s testimony. Thus, a racial stereotype regarding the sexual proclivities or super-sexuality of Black men might work to corroborate the testimony of a White woman who says a Black man raped her.” *Id.* at 1263 (citing Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 41 (2000)).

Here, the jury found Ms. VonHorn credible and did not believe Mr. Clark. There are race-neutral explanations for this credibility assessment. But “[t]here will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates.” *Berhe*, 193 Wn.2d at 666. Under *Batson*, Mr. Clark had no right to have black people on his jury. 476 U.S. at 85. However, facing these charges, he at least had the right to have this be a realistic possibility. A different jury makeup could result in different credibility assessments, which could have changed the outcome of this trial.

A change of venue would also help preserve the legitimacy of our criminal justice system. Racial discrimination “casts doubt on the integrity of the judicial process” and “places the fairness of a criminal proceeding in doubt.” *Powers*, 499 U.S. at 411 (quoting *Mitchell*, 443 U.S. at 556). Here,

Mr. Clark was the only black person involved in these proceedings, including the entire jury venire. RP at 238. When coupled with the allegations at issue, that dynamic casts into doubt the integrity of these proceedings. Competent trial counsel would have moved to change venue to Pierce County in this case. This Court should reverse because Mr. Clark received ineffective assistance.

**B. The Prosecutor Committed Misconduct During Closing Argument, Depriving Mr. Clark of a Fair Trial.**

This Court should also reverse due to misconduct by the prosecuting attorney. The prosecutor acted improperly during closing arguments, in three ways. First, she improperly vouched for the complaining witness, Ms. VonHorn. Second, she expressed her personal opinion about Mr. Clark's guilt. Third, she improperly implied that in order to acquit Mr. Clark, the jury needed to find that Ms. VonHorn lied or was not truthful. Taken together, this misconduct was flagrant and prejudiced Mr. Clark.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213

(1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

**1. The prosecutor committed prejudicial misconduct by vouching for Ms. VonHorn's credibility.**

The prosecutor in this case committed misconduct by expressing her personal belief about Ms. VonHorn's credibility. Specifically, in closing the prosecutor told the jury, "[n]ow you are the sole judges of credibility but *I would submit* to you that Sabrina's testimony yesterday was genuine." RP at 851. Defense counsel objected, and this objection was overruled. *Id.* This Court reviews claims of prosecutorial misconduct for abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Every criminal defendant is entitled to a fair trial. *Finch*, 137 Wn.2d at 843. Improper vouching undermines that right. Vouching occurs when a "prosecutor expresses his or her personal belief as to the veracity of the witness." *Ish*, 170 Wn.2d at 196. For example, a prosecutor commits misconduct by stating that he or she personally believes a witness. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985).

In *Sargent*, the state charged the defendant with murder and arson based largely on statements from his cellmate, Jerry Lee Brown. *Id.* at 345.

In closing, the prosecutor stated, “I believe Jerry Lee Brown.” *Id.* at 343. The defendant failed to object at trial. *Id.* at 345. The Court of Appeals reversed, holding that the prosecutor’s statements improperly “bolstered the credibility of the only witness directly linking Sargent to the crime. All of the other evidence against Sargent is circumstantial.” *Id.* The Court concluded that these remarks “could not have been cured with an appropriate instruction” and were “so prejudicial as to deprive Sargent of a fair trial.” *Id.*

Here, like in *Sargent*, the prosecutor’s statements bolstered the state’s key witness, in a case that otherwise was not very strong. Absent Ms. VonHorn’s testimony, the remaining evidence could result from a consensual sexual encounter. The prosecutor’s statement that “I would submit” Ms. VonHorn’s testimony was “genuine” improperly bolstered her credibility, prejudicing Mr. Clark.

**2. The prosecutor committed misconduct by expressing her personal opinion about Mr. Clark’s guilt.**

The prosecutor also committed misconduct by expressing her personal belief about Mr. Clark’s guilt. In closing argument, the prosecutor argued that, “This is forcible compulsion. This is rape.” RP at 848. She repeated, “It was a rape. The law is clear about that.” *Id.* Finally, she concluded her closing statement by repeating: “[Mr. Clark] is *guilty* of Rape

in the Second Degree. He is *guilty* of Tampering with a Witness and he is *guilty* of Assault in the Fourth Degree.” RP at 861 (emphasis added).

The right to a fair trial “certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). Mr. Clark did not object to these statements at trial. Thus, he must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). A prosecutor may not express an individual opinion of the defendant’s guilt, independent of the evidence actually in the case. *Id.* Such an opinion is “likely to have significant persuasive force with the jury” due to the “prestige” of the office and the “fact-finding facilities presumably available” to prosecutors. *Id.* (internal quotations omitted).

Many Washington cases warn of the danger of a prosecutor expressing a personal opinion of guilt. *See, e.g., State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecutor to express his individual opinion that the accused is guilty, independent of the testimony in the case); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a defendant’s guilt or innocence); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a prosecutor’s comment in closing argument that the appellant “was just coming back and he was dealing [drugs] again” impermissible opinion “testimony”); *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he “knew” the defendant committed the crime).

The Washington Supreme Court examined this issue in *Monday*, 171 Wn.2d 667. In that case, the prosecutor made a “variety of improper comments during opening statements and closing argument,” including expressing his personal belief about the strength of the state’s case. *Id.* at 676-77. The Court reversed, holding that the prosecutor committed misconduct by improperly commenting on “the guilt and veracity of the accused.” *Id.* at 677.

Here, like in *Monday*, the prosecutor improperly expressed her personal opinion of Mr. Clark's guilt in her closing argument. Stating "This is forcible compulsion. This is rape." amounts to an opinion that Mr. Clark is guilty. RP at 848. Repeating "It was a rape. ***The law is clear about that.***" has the added effect of throwing the prestige of the state, and the prosecutor as an attorney, behind that conclusion. *Id.* (emphasis added).

The prosecutor's misconduct also prejudiced Mr. Clark. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *Ish*, 170 Wn.2d at 195. The Washington Supreme Court examined prejudicial prosecutorial misconduct in *Glasmann*, 175 Wn.2d 696. In that case, the prosecutor improperly expressed his personal belief that Mr. Glasmann was guilty. *Glasmann*, 175 Wn.2d at 699. The prosecutor used PowerPoint slides during closing argument, showing pictures superimposed with the prosecutor's own commentary. *Id.* at 701. Several slides depicted pictures of Mr. Glasmann with "GUILTY" superimposed over them. Defense counsel did not object. *Id.* at 702.

The Washington Supreme Court reversed, holding that the prosecutor committed misconduct by expressing his personal opinion of Mr. Glasmann's guilt. *Id.* at 707. The Court held that "[a] prosecutor could never shout in closing argument that 'Glasmann is guilty, guilty, guilty!' and it would be highly prejudicial to do so." *Id.* at 708.

Here, like in *Glasmann*, the prosecutor used repetition to drive home her personal belief about Mr. Clark’s guilt. She concluded her closing argument by repeating: “[Mr. Clark] is **guilty** of Rape in the Second Degree. He is **guilty** of Tampering with a Witness and he is **guilty** of Assault in the Fourth Degree.” RP at 861 (emphasis added). These comments prejudiced Mr. Clark by improperly influencing the jury’s assessment of the facts of this case, requiring reversal.

**3. The prosecutor committed prejudicial misconduct by implying that the jury must find that Ms. VonHorn lied or was mistaken in order to acquit.**

Finally, the prosecutor told the jury in closing, “if you believe Sabrina’s testimony beyond a reasonable doubt then you have enough evidence to convict the Defendant.” RP at 851. This statement improperly implied that the jury had to find that Ms. VonHorn lied or was mistaken in order to acquit Mr. Clark.

The Court of Appeals examined a similar scenario in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). In *Fleming*, the defendants were accused of rape. 83 Wn. App. at 210. In closing, the prosecutor argued that for the jury to find the defendants not guilty, “you would have to find either that [the alleged victim] has lied about what occurred in that bedroom or that she was confused.” *Id.* at 213. The Court held that this statement was flagrant and ill-intentioned because it

contradicted established caselaw. *Id.* at 213-14 (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991)). The Court also held that it misstated the law and had the potential to reverse the burden of proof by requiring the defendants to prove that the alleged victim was not truthful. *Id.* at 214.

Here, like in *Fleming*, the prosecutor implied that the jury needed to disbelieve Ms. VonHorn in order to acquit Mr. Clark. RP at 851. This had the potential to confuse the jury about the burden of proof. It also could lead jurors to conclude “that an acquittal would reflect adversely upon the honesty and good faith” of the complaining witness. *Casteneda-Perez*, 61 Wn. App. at 361 (discussed in the context of police witnesses). This Court should reverse and remand for a new trial because the prosecutor’s statements deprived Mr. Clark of a fair trial.

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## VI. CONCLUSION

Mr. Clark did not receive a fair trial before an impartial jury. His case involved racially charged allegations, in an overwhelmingly white county, with a jury venire containing no black people. Under these circumstances, competent defense counsel would have moved to change venue. Mr. Clark also did not receive a fair trial because the prosecuting attorney made prejudicial and inappropriate statements during closing argument. Mr. Clark respectfully requests that this Court reverse the superior court and remand for a new trial.

RESPECTFULLY SUBMITTED this 13th day of January, 2020.



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STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Wendell M. Clark

**VII. APPENDIX**

United States Census Bureau, *QuickFacts Clark County, Washington, Population Estimates July 1, 2019*  
(accessed January 9, 2020) .....1-2

United States Census Bureau, *QuickFacts Pierce County, Washington, Population Estimates July 1, 2019*  
(accessed January 9, 2020) .....3-4

**QuickFacts**

**Clark County, Washington**

QuickFacts provides statistics for all states and counties, and for cities and towns with a *population of 5,000 or more*.

**Table**

Race and Hispanic Origin		Clark County, Washington
Population estimates, July 1, 2019, (V2019)		NA
 <b>PEOPLE</b>		
<b>Race and Hispanic Origin</b>		
White alone, percent		▲ 86.4%
Black or African American alone, percent (a)		▲ 2.3%
American Indian and Alaska Native alone, percent (a)		▲ 1.2%
Asian alone, percent (a)		▲ 4.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)		▲ 0.9%
Two or More Races, percent		▲ 4.3%
Hispanic or Latino, percent (b)		▲ 10.0%
White alone, not Hispanic or Latino, percent		▲ 78.0%

About datasets used in this table

**Value Notes**

 Estimates are not comparable to other geographic levels due to methodology differences that may exist between different data sources.

Some estimates presented here come from sample data, and thus have sampling errors that may render some apparent differences between geographies statistically indistinguishable. Click the Quick Info  icon to the row in TABLE view to learn about sampling error.

The vintage year (e.g., V2019) refers to the final year of the series (2010 thru 2019). *Different vintage years of estimates are not comparable.*

**Fact Notes**

- (a) Includes persons reporting only one race
- (b) Hispanics may be of any race, so also are included in applicable race categories
- (c) Economic Census - Puerto Rico data are not comparable to U.S. Economic Census data

**Value Flags**

- Either no or too few sample observations were available to compute an estimate, or a ratio of medians cannot be calculated because one or both of the median estimates falls in the lowest or upper in open ended distribution.
- D Suppressed to avoid disclosure of confidential information
- F Fewer than 25 firms
- FN Footnote on this item in place of data
- N Data for this geographic area cannot be displayed because the number of sample cases is too small.
- NA Not available
- S Suppressed; does not meet publication standards
- X Not applicable
- Z Value greater than zero but less than half unit of measure shown

QuickFacts data are derived from: Population Estimates, American Community Survey, Census of Population and Housing, Current Population Survey, Small Area Health Insurance Estimates, Small Area Income and F Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits.

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**QuickFacts**

**Pierce County, Washington**

QuickFacts provides statistics for all states and counties, and for cities and towns with a *population of 5,000 or more*.

**Table**

Race and Hispanic Origin		Pierce County, Washington
Population estimates, July 1, 2019, (V2019)		NA
 <b>PEOPLE</b>		
<b>Race and Hispanic Origin</b>		
White alone, percent		▲ 74.8%
Black or African American alone, percent (a)		▲ 7.6%
American Indian and Alaska Native alone, percent (a)		▲ 1.8%
Asian alone, percent (a)		▲ 6.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)		▲ 1.7%
Two or More Races, percent		▲ 7.3%
Hispanic or Latino, percent (b)		▲ 11.1%
White alone, not Hispanic or Latino, percent		▲ 66.3%

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No. 53771-1-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On January 13, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Wendell M. Clark, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document, including the appendix, as indicated below:

Rachael Rogers ( X ) via email to:  
Clark County Prosecuting Attorney's rachael.rogers@clark.wa.gov  
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Wendell M. Clark ( X ) via U.S. mail  
DOC # 416403  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

SIGNED in Port Orchard, Washington, this 13th day of January,  
2020.

  
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**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53771-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Wendell Maurice Clark, Appellant  
**Superior Court Case Number:** 18-1-01142-6

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