101565-8

NO. ___
(COA NO. 83017-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

AHMED ELMESAI,

Petitioner.

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

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# PETITION FOR REVIEW

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## A. INTRODUCTION

This Court has made clear that a judgment won by appealing to racial bias cannot stand. Sadly, some courts still appear not to understand this rule.

Ahmed Elmesai's trial for rape and assault hinged on credibility—the alleged victim's testimony was the only evidence he committed a crime. Rather than trust the jury to weigh the legitimate evidence, however, the prosecutor appealed to the irrelevant fact of Mr. Elmesai's apparent Muslim ethnicity. The Court of Appeals nonetheless refused to reverse.

The trial violated Mr. Elmesai's rights in another respect. Before the trial, the prosecutor assured the alleged victim she would face no charges if she told "the entire story." The trial court prohibited Mr. Elmesai from exploring this motive to lie in closing argument. The Court of Appeals found this error harmless.

## B. IDENTITY OF PETITIONER

Petitioner Ahmed Elmesai asks for review of the decision affirming his convictions.

## C. COURT OF APPEALS DECISION

Mr. Elmesai seeks review of the unpublished opinion in *State v. Elmesai*, No 83017-1-I (Wash. Ct. App. Nov. 28, 2022).

## D. ISSUES PRESENTED FOR REVIEW

1. A prosecutor may not urge the jury to convict based on racial stereotypes. A conviction won through an appeal to racial bias must be reversed. Here, Mr. Elmesai's Muslim ethnicity—real or apparent—was irrelevant to the charges. Nonetheless, the prosecutor suggested Mr. Elmesai forced the complaining witness to take her shoes off because he is a Muslim. By affirming his convictions anyway, the Court of Appeals contravened this Court's precedent and violated Mr. Elmesai's right to an impartial jury.

2. The rights to present a defense and to assistance of counsel guarantee counsel's right to make an argument during closing that has support in the evidence. Based on testimony, Mr. Elmesai's counsel argued the complaining witness had a strong motive to assist the prosecution and her drug use may have affected how she perceived events. The trial court erroneously sustained the prosecution's objections to these arguments. By nonetheless affirming, the Court of Appeals acted contrary to precedent and violated Mr. Elmesai's constitutional rights.

E. STATEMENT OF THE CASE

Mr. Elmesai met Luz Rosales in fall 2019. RP 958–59, 962. Their relationship became romantic in December. RP 964–65, 966–67. Throughout that month and early January, they met at her apartment, his apartment, or a hotel to have sex and use

methamphetamine. RP 966–673, 976–78, 980–81; Ex. 19 at 3–7, 12–13, 17. Mr. Elmesai began to feel Ms. Rosales was "somebody special." RP 973–74.

Ms. Rosales's birthday is in early January. RP 789, 981. She and Mr. Elmesai celebrated at his apartment on January 10. RP 983–84. 988. Mr. Elmesai prepared to give Ms. Rosales "a queen's feast" for her birthday. RP 989.

After dinner, as the two sat on the couch to watch TV, Mr. Elmesai got up to refill his wine glass and noticed his bedroom door was open. RP 989. He looked inside and saw his watch was not where he left it. RP 990. It also "looked like some things" in the closet were "shuffled through." RP 990. Mr. Elmesai asked if Ms. Rosales went into his bedroom, and she "immediately" said, "I didn't steal anything from you." RP 991.

Upset at her for denying she took his watch, Mr. Elmesai lifted his glass and poured red wine on her head. RP 993–94, 1022–23. He grabbed Ms. Rosales's purse. RP 994. Ms. Rosales "lunge[d]" to grab it back. RP 995. In the struggle, Ms. Rosales's head struck his wine glass, which broke against her face. RP 995–96.

Ms. Rosales did not cry out or show distress, apart from protesting she did not steal anything. RP 996, 1000. Mr. Elmesai saw "scratch marks" on her face, but they were not bleeding. RP 999–1000.

The contents of Ms. Rosales's purse fell out onto the floor. RP 996, 997. Mr. Elmesai did not see his watch among them. RP 997. He admitted he was wrong about the watch and told her he felt "terrible." RP 998. He said he would understand if she wanted to leave, but asked her to stay so they could celebrate her birthday. RP 998. She decided to stay. RP 998.

Mr. Elmesai and Ms. Rosales returned to the couch. RP 1005. At about 12:30 am, they started to kiss. RP 1005–07. Mr. Elmesai suggested they go to his bedroom, and Ms. Rosales agreed. RP 1007.

Ms. Rosales said, "Keep going" and "Don't stop." RP 1007–08. She never said, "I'm in pain," and Mr. Elmesai saw no blood. RP 1008. He would have stopped if she said no or showed discomfort. RP 1008–09.

An hour later, Ms. Rosales's phone rang, and she said she had to go. RP 1009–10. Mr. Elmesai walked her to the lobby, and they kissed goodbye. RP 1010–11.

Mr. Elmesai's watch and "several other items were missing" the next day. RP 1011. At the trial, he testified methamphetamine dulls pain. RP 1000.

On January 12, Ms. Rosales went to the hospital for eye pain. RP 570, 573. An ophthalmologist found a cut one millimeter long on her left eye. RP 685–86.

A police detective interviewed Ms. Rosales in February 2021. RP 858. The prosecutor, Maggi Qerimi, participated in the interview. RP 858.

> [Ms.] Qerimi ensured that [Ms.] Rosales understood that providing the [sic] accurate answers and the entire story will not result in charges and—will result in no charges towards [Ms.] Rosales. [Ms.] Rosales will not be getting in trouble with the prosecutor's office or the Seattle Police Department for activities around this event.

RP 762; *accord* RP 858.

At the trial, Ms. Rosales admitted messaging Mr. Elmesai but said she was only "trying to get some meth." RP 820. She denied the meetup on January 10 had anything to do with celebrating her birthday. RP 910. She denied having dinner with Mr. Elmesai and kissing him on the couch. RP 910.

Ms. Rosales claimed Mr. Elmesai "put the wine glass in [her] face." RP 826–27. She testified she did not give consent to have sexual intercourse. RP 843,

845–46. She insisted she never had sex with Mr. Elmesai before January 10. RP 846.

Ms. Rosales denied being alone with Mr. Elmesai before January 10, except one "brief" time. RP 869.

Mr. Elmesai's friend Cassandra Lewis, a hospital laboratory scientist, testified on his behalf. RP 941. Ms. Lewis said she visited Mr. Elmesai's apartment on December 16 and found him and Ms. Rosales alone together. RP 943–44, 974. Ms. Lewis said Ms. Rosales's "shoes were off" as if she were "lounging around" and "had been there for a while." RP 944.

The prosecution asked Ms. Lewis,

> Q: Do you know Mr. Elmesai's religion?
>
> A: No, I do not.
>
> Q: Do you know anything about Muslims and whether they allow shoes in their house?
>
> A: No, I do not.

RP 950.

No witness testified before or after this exchange that Mr. Elmesai is a Muslim or that any form of Islam requires guests to remove their shoes.

Mr. Elmesai's closing argument centered on Ms. Rosales's credibility. RP 1090, 1093. Counsel pointed out Ms. Rosales lied to medical staff about her drug use. RP 1091–92; *see* RP 586–87. Ms. Rosales also told medical staff and the jury she lived with her husband, when she told Mr. Elmesai she lived alone. RP 881, 965, 1091; Ex. 19 at 3. Counsel also noted Ms. Rosales's lie that she visited Mr. Elmesai to check out his new apartment, when her texts show she asked him for drugs. RP 825, 882–83, 982, 1095–96; Ex. 19 at 18–19.

Continuing on the theme of Ms. Rosales's lies about her drug use, counsel referred to her agreement with the prosecution:

> Even after the prosecutor told her repeatedly, even in front of you, "If you just tell us the truth, we're not going to prosecute you." There's no motive for her to lie.
>
> MS. QERIMI: Objection, Your Honor. Mischaracterization of the evidence.
>
> COURT: Sustained. *The jurors will disregard the statement of what [w]as said about deals with the prosecutor.*

RP 1096 (emphasis added).

Later, consistent with Mr. Elmesai's testimony that methamphetamine use dulls pain perception, counsel suggested,

> Here's a question. Is it possible that meth caused [Ms. Rosales's] pain to subside?
>
> MS. QERIMI: Objection. Speculation.
>
> COURT: Sustained.

RP 1105.

The jury found Mr. Elmesai guilty of third-degree rape and second-degree assault. CP 62–63.

F. WHY REVIEW SHOULD BE GRANTED

1. **Contrary to this Court's precedent, the Court of Appeals held the prosecutor's appeal to Mr. Elmesai's race did not require reversal.**

"[T]heories and arguments based upon racial, ethnic[,] and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011) (first alteration in original) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)). The prosecution "gravely violates" the right to an impartial jury when it "appeals to racial stereotypes or racial bias." *Id.* at 676.

Where an objective observer could see the prosecution's remark as an appeal to racial bias, reversal is required even without a showing of prejudice. *State v. Zamora*, 199 Wn.2d 698, 718–19, 721, 512 P.3d 512 (2022).

Invoking racial stereotypes is especially pernicious when credibility is at issue and race has "absolutely no relevance." *State v. Walker*, 182 Wn.2d 463, 488, 490–91, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring).[1] Where guilt turns on whose testimony to believe, an appeal to bias "could easily serve as the deciding factor" for the jury. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011), *aff'd after remand*, No. 39420-1-II, 2013 WL 703974 (Wash. Ct. App. Feb. 25, 2013) (unpub.).

In *Zamora*, the prosecutor asked questions about "border security" and "illegal immigration" during voir dire. 199 Wn.2d at 703. This Court noted immigration "was wholly irrelevant" to the issues and served only "to highlight the defendant's perceived ethnicity." *Id.* at

[1] The majority joined this portion of Justice Gordon McCloud's concurrence. *Walker*, 182 Wn.2d at 478 n.4.

719. The Court also observed our nation's past and recent history of discriminating against "Latinx-appearing persons." *Id.* at 719–20. These factors led the Court to conclude the prosecutor apparently intended to appeal to bias against Latin people. *Id.* at 720–21.

Likewise, a police witness's reference to a style of packing illegal drugs as a "Mexican ounce" required reversal where this race-based street term bore no relevance to the charged crime. *State v. Ibarra-Erives*, ___ Wn. App. 2d ___, 516 P.3d 1246, 1252–53 (2022).

Muslim people are as susceptible to racial bias as other racial groups.[2] *See State v. Tarrer*, No. 41347-7-

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[2] In the Court of Appeals, the prosecution did not dispute anti-Muslim bias occurs along racial lines. Br. of Resp. at 29–31; Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 Transnat'l L. & Contemp. Probs. 119, 144–45, 151–52 (2012); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259, 1278–79 (2004).

II, 2013 WL 1337943, at *8–9 (Wash. Ct. App. Apr. 2, 2013) (unpub.); GR 14.1(a). In *Tarrer*, the defendant was a Muslim. *Id.* at *8. While discussing the reasonable doubt standard, the prosecution referred to the terrorist attacks on September 11, 2001. *Id.* This Court held the reference to 9/11 "play[ed] on unfair ethnic and religious stereotypes." *Id.* at *8–9.

As in *Zamora* and *Ibarra-Erives*, the prosecution appealed to Mr. Elmesai's apparent race in a manner likely to invoke anti-Muslim bias. Mr. Elmesai's friend Cassandra Lewis testified she visited his apartment weeks before the alleged incident, and found Ms. Rosales there, wearing no shoes. RP 943–44. Ms. Rosales's apparent comfort with Mr. Elmesai alone in his apartment contradicted her testimony that she had never been alone with Mr. Elmesai before January 10. RP 869, 876.

On cross-examination, the prosecution asked Ms. Lewis, "Do you know Mr. Elmesai's religion?" RP 950. Ms. Lewis said she did not. RP 950.

The prosecution then asked, "Do you know anything about Muslims and whether they allow shoes in their house?" RP 950. Ms. Lewis again said she did not know. RP 950.

Mr. Elmesai's race "was wholly irrelevant" to the charges against him. *Zamora*, 199 Wn.2d at 719. No witness before or after Ms. Lewis testified that Mr. Elmesai is a Muslim, and certainly not that he adheres to a tradition of requiring guests to remove their shoes.

The Court of Appeals erred in reasoning to the contrary. The reason Ms. Rosales was not wearing shoes is relevant, Slip op. at 10, but only marginally so. Even if she took her shoes off because Mr. Elmesai

asked her to, that she was alone with him in his apartment at all is directly contrary to her testimony.

Nor was an appeal to Mr. Elmesai's apparent race necessary to challenge Ms. Lewis's testimony. The prosecutor could simply have asked Ms. Lewis whether *Mr. Elmesai* has a custom of asking guests to remove their shoes. The prosecutor could also have asked Mr. Elmesai this question, but did not do so. RP 1016–38.

Contrary to the Court of Appeals, whether Mr. Elmesai is a Muslim "was somewhat relevant" only if Muslim people are more likely than others to expect guests to take off their shoes. Slip op. at 10.

Islam is not a monolith, but an "extremely diverse" family of religious traditions. Dr. Fatemah Albader, *Breaking the Perceptions of Islamic Monolithism*, 26 U. Miami Int'l & Comp. L. Rev. 337, 338 (2019). The prosecutor's question about "Muslims

and whether they allow shoes in their house," without any evidence about Mr. Elmesai's specific faith, was not even "somewhat relevant" to Ms. Rosales's reason for taking her shoes off. RAP 950; Slip op. at 10.

It does not matter the question did not directly "invoke a negative connotation of Muslim men." Slip op. at 10–11. Because Mr. Elmesai's race was irrelevant, the only conceivable reason for the question "was to highlight [Mr. Elmesai]'s perceived [Muslim] ethnicity." *Zamora*, 199 Wn.2d at 719. After that, the jurors were free to fill the blanks with any conscious or unconscious anti-Muslim bias they may harbor.

By holding the prosecutor's appeal to Mr. Elmesai's apparent race was not misconduct, the Court of Appeals acted contrary to both *Zamora* and *Ibarra-Erives*. RAP 13.4(b)(1), (2). As a result, the Court sanctioned a serious violation of Mr. Elmesai's right to

an impartial jury. *Monday*, 171 Wn.2d at 676; RAP 13.4(b)(3), (b)(4). This Court should grant review and make clear that prosecutors may not win convictions by injecting the irrelevant issue of race into a trial.

**2. The Court of Appeals violated Mr. Elmesai's rights to present a defense and to assistance of counsel by holding the improper limitations on closing argument did not require reversal.**

Mr. Elmesai has a constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Sixth Amendment right to assistance of counsel guarantees the accused "the opportunity to participate fully and fairly in the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Defense counsel's chance to argue her theory of the evidence to the jury in closing argument

is a critical component of this right. *State v. Frost*, 160 Wn.2d 765, 778–79, 161 P.3d 361 (2007).

Closing argument is the defense's only "clear chance" to appeal to the jury for a not-guilty verdict. *State v. Osman*, 192 Wn. App. 355, 368, 366 P.3d 956 (2016) (quoting *Herring*, 422 U.S. at 862). "[N]o aspect of [defense counsel's] advocacy could be more important than the opportunity finally to marshal the evidence" before asking for acquittal. *Herring*, 422 U.S. at 862.

Limiting counsel's closing on the erroneous ground it misstates the evidence or law violates the accused's constitutional rights. *Frost*, 160 Wn.2d at 778–79; *Osman*, 192 Wn. App. at 377. Reversal is required unless the prosecution shows "beyond a reasonable doubt that the jury verdict would have been the same." *Osman*, 192 Wn. App. at 378 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 89 (2002); *State*

*v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013); *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

A constitutional error is harmless beyond a reasonable doubt only if the unaffected evidence "is so overwhelming that it necessarily leads to a finding of guilt." *Frost*, 160 Wn.2d at 782 (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

The Court of Appeals correctly held that the trial court improperly limited Mr. Elmesai's closing argument. Slip op. at 5–6. In an interview before the trial, the prosecutor assured Ms. Rosales she would not face liability for her drug use if she told "the entire story."[3] RP 762. When defense counsel referred to this

[3] When this interview took place on February 1, 2021, methamphetamine possession was still a felony. RP 858; Laws of 2017, ch. 317, § 15; former RCW 69.50.4013(1), (2); *see State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (decided Feb. 25, 2021). Ms. Rosales may also have worried the police suspected her of stealing from Mr. Elmesai. RP 1011.

statement during closing, however, the trial court ruled that counsel misstated the evidence and instructed the jury to "disregard the statement of what [w]as said about deals with the prosecutor." RP 1096.

In holding the error harmless, however, the Court of Appeals contravened precedent. Appellate courts hold an erroneous limitation on argument caused no prejudice when independent evidence supports the guilty finding. *See State v. Orn*, 197 Wn.2d 343, 360, 482 P.3d 913 (2021) (confession); *Frost*, 160 Wn.2d at 782–83 ("three taped confessions"); *Osman*, 192 Wn. App. at 378–79 (third-party eyewitness testimony). Mr. Elmesai's trial, on the other hand, boiled down to a credibility contest between him and Ms. Rosales.

"[T]he more essential the witness is to the prosecution's case," the more critical it is to explore her "motive to cooperate with the State . . . to avoid

prosecution." *Orn*, 197 Wn.2d at 354 (quoting *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)).

Ms. Rosales's testimony was the sole evidence Mr. Elmesai committed a crime. There was no dispute Ms. Rosales and Mr. Elmesai had sexual intercourse or that his wine glass injured her eye. RP 826–27, 838, 844–45, 995–96, 1009, 1090, 1093. The only evidence the intercourse lacked consent or the injury was intentional was Ms. Rosales's testimony.

By preventing Mr. Elmesai from raising Ms. Rosales's motive to fabricate evidence against him to avoid liability for her own conduct, the Court of Appeals hamstrung his ability to confront the only evidence the jury could rely on to find him guilty.

The Court of Appeals may have believed Mr. Elmesai's account of the night in question was "not believable," but this determination belongs to the jury.

Slip op. at 6. Had the trial court not interfered with Mr. Elmesai's right to present a defense, his trial counsel may well have convinced the jury that Ms. Rosales's incentive to avoid liability drove her to provide false testimony against him.

Besides, the Court of Appeals's reasoning Ms. Rosales "had no apparent motivation" to undergo a sexual assault examination and trial is contrary to the evidence. Slip op. at 6. One obvious motive was to avoid facing charges of her own. RP 762. Another was that she was married during her affair with Mr. Elmesai—a fact she concealed from him. RP 764–65, 881.

The trial court violated Mr. Elmesai's right to present a defense in one other respect: it rejected as "[s]peculation" counsel's argument that Ms. Rosales's methamphetamine use may have dulled her pain perception. RP 1105. This erroneous ruling thwarted

counsel's ability to explain why Ms. Rosales would remain at the apartment after a painful eye injury, as well as argue her perception was unreliable.

Contrary to the trial court and the Court of Appeals, this argument was not "speculative." Slip op. at 7. Mr. Elmesai testified that methamphetamine dulls pain. RP 1000. Ms. Rosales asked Mr. Elmesai whether he had "smoke" on January 10, and he confirmed that he did. Ex. 19 at 19. This evidence, in addition to evidence the couple used the drug every other time they were together, was more than enough of an "evidentiary basis" to permit counsel to make the argument. *Frost*, Wn.2d at 778–79.

In holding that one erroneous limitation on Mr. Elmesai's closing argument was harmless and the other was not an error, the Court of Appeals acted contrary to precedent. RAP 13.4(b)(1), (b)(2). In

hamstringing Mr. Elmesai's attack against the only evidence of his guilt, the Court also violated his right to present a defense and to the assistance of counsel. *Frost*, 160 Wn.2d at 778–79; RAP 13.4(b)(3), (b)(4). This Court should grant review.

G. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 3,551 words.

DATED this 22nd day of December, 2022.

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# Appendix

FILED
11/28/2022
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|
| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>AHMED MOHAMED ELMESAI,<br>Appellant. | No. 83017-1-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

MANN, J. — Ahmed Elmesai appeals his convictions for rape in the third degree and assault in the second degree. Elmesai argues that (1) the trial court erred in limiting defense counsel's closing argument, (2) the prosecutor committed misconduct, (3) the trial court erred in dismissing two jurors for cause, and (4) the trial court abused its discretion in failing to dismiss sua sponte two allegedly biased jurors. We affirm.

## FACTS

Elmesai and L.R. met through a mutual friend in 2019. The parties dispute the nature of their relationship. But they do not dispute that L.R. obtained methamphetamine from Elmesai many times and that they did drugs together.

On January 10, 2020, L.R. went to see Elmesai's new apartment in Seattle. Elmesai was not home when L.R. arrived but had left the door unlocked for her. Elmesai asked L.R. to do his dishes and not to go in his bedroom. When Elmesai returned home, they watched T.V. and drank some alcohol.

Later in the evening, a friend of Elmesai's stopped by, L.R. became uncomfortable and wanted to go home. Elmesai noticed that his bedroom door was open and believed his watch was missing. Elmesai then accused L.R. of stealing, yelled at her, grabbed her purse, and dumped the contents out. Elmesai's friend was told to leave. L.R. testified that Elmesai then hit her in the face with his wine glass, breaking the glass. Elmesai alleged at trial that he dumped the wine in his glass on L.R. and grabbed her purse. He testified that L.R. then lunged for her purse and her "face brushe[d] against the wine flute" and the glass immediately crumpled. In any case, a piece of glass lacerated L.R.'s cornea and she had abrasions on her cheek.

L.R. described feeling terrified. L.R. went into the bathroom and tried to rinse the glass out of her eye. She described the pain as excruciating and her vision was impaired. L.R. tried to calm Elmesai down because she was scared that he would kill her. L.R. alleged that Elmesai then raped her. L.R. testified that she never gave consent.

L.R. went to the hospital about 36 hours later, reported the sexual assault, and complained of eye pain. She was treated for a corneal laceration and underwent a sexual assault examination.

Soon after, Elmesai was arrested and charged with rape in the second degree. The charges were later amended to rape in the third degree and assault in the second degree.

Prospective jurors were sent questionnaires to respond to before voir dire.[1] During voir dire, the prosecutor and defense counsel had a chance to question prospective jurors. After questioning, the State moved to remove two prospective jurors for cause. The defense moved to dismiss four prospective jurors for cause. Jurors 3 and 4 were selected randomly as alternates. Neither party objected. The parties then alternated exercising peremptory challenges. The State used five of its six peremptory challenges and then accepted the panel. The defense used all six of its peremptory challenges.

The alternates, jurors 3 and 4, were dismissed before deliberations. The jury found Elmesai guilty of rape in the third degree and assault in the second degree. Elmesai was sentenced to 57 months confinement.

Elmesai appeals.

## ANALYSIS

### A. Closing Argument

Elmesai argues that the trial court placed two improper limits on defense counsel's closing argument. First, by instructing the jury to ignore evidence that L.R. cooperated with the prosecution in exchange for a promise to overlook her methamphetamine use. And second, by sustaining an objection to defense counsel's

[1] The answers to the questionnaire were sealed in the trial court and filed under seal with this court.

argument that drug use may have dulled L.R.'s pain. The State argues that neither ruling was improper but, regardless, any error was harmless. We agree that the first ruling was error but find that it was harmless and the second ruling was not error.

The Sixth Amendment right to counsel includes the right to make closing argument. State v. Osman, 192 Wn. App. 355, 368, 366 P. 3d 956 (2016); U.S. CONST. amend. VI. A defendant's due process rights may also be infringed when a trial court improperly limits the scope of counsel's closing argument. Osman, 192 Wn. App. at 369. But trial courts possess broad discretionary powers over the scope of closing arguments. State v. Perez-Cervantes, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000). The trial court should restrict the argument of counsel to the facts in evidence. Perez-Cervantes, 141 Wn.2d at 475.

We review a trial court's decision to limit the scope of closing argument for an abuse of discretion. Perez-Cervantes, 141 Wn.2d at 475. A trial court abuses its discretion "'only if no reasonable person would take the view adopted by the trial court.'" Perez-Cervantes, 141 Wn.2d at 475 (quoting State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

Elmesai first argues that the trial court erred when it sustained the State's objection to his discussion of the prosecution's statements to L.R. that if she tells the truth, the State would not prosecute her. Elmesai asserts that State v. Frost supports his position. 160 Wn.2d 765, 161 P.3d 361 (2007). In Frost, by preventing counsel from arguing that the State failed to meet its burden, the trial court lessened the State's burden to some degree, thus infringing on Frost's due process rights. 160 Wn.2d at

777-78. Despite finding that the trial court abused its discretion, our Supreme Court held that any error was harmless. Frost, 160 Wn.2d at 779.

Here, during closing argument, defense counsel discussed L.R.'s credibility and argued, "[s]he couldn't even tell you guys the truth. Even after the prosecutor told her repeatedly, even in front of you, 'If you just tell us the truth, we're not going to prosecute you.' There's no motive for her to lie." The trial court sustained the State's objection to these comments. The court then instructed the jury to disregard "the statement about what [was] said about deals with the prosecutor."

The evidence presented showed that the State made several attempts to assure L.R. that it was ok to tell the truth about her drug use. In a follow up interview with the prosecutor, lead detective, and a victim advocate, the prosecutor assured L.R. that providing the accurate answers and the entire story would not result in charges and that L.R. would not get in trouble with the prosecutor's office or Seattle Police Department for activities surrounding this event. The lead detective testified that L.R. downplayed her addiction, and the intent of this later interview of L.R. was to let her know that discussing her drug addiction would not result in prosecution as it related to this case. He explained that it is extremely common in cases like these for a victim to have difficulty understanding that just because you are doing drugs does not give someone else the right to do whatever they want.

Thus, defense counsel's statement that "if you just tell the truth, we're not going to prosecute you" was an accurate statement of the evidence. Moreover, contrary to the trial court's instruction, defense counsel did not argue that a deal was made with the

prosecutor. The trial court erred in sustaining the objection and instructing the jury to disregard the statement.

But where a trial court improperly limits counsel's argument, reversal is not required if, beyond a reasonable doubt, the jury verdict would have been the same without the limitation. Osman, 192 Wn. App. at 378. We look to the untainted evidence to determine whether the evidence is so overwhelming that it necessarily leads to a finding of guilt. Frost, 160 Wn.2d at 782. Here, the limitation on argument did not affect the evidence presented.

Elmesai's story was not believable. He claimed that L.R. received a serious cornea laceration from "brushing her face" against a "delicate" wine glass. Although Elmesai's defense was that L.R. was lying, L.R. had no apparent motivation to endure an invasive sexual assault examination and a criminal trial. Furthermore, when the police came to Elmesai's apartment, he knew why they were there, tried to run, gave them a false name, and ultimately made up a story that was inconsistent with his later trial testimony, telling the police that "one chick" had "broke into" his apartment.

Moreover, the limitation on argument did not prevent defense counsel from arguing that L.R. was not credible. After the court sustained the State's objection, defense counsel told the jury—consistent with the court's instructions—that "everything I say is an argument. If there's evidence that speaks to something different, please rely on your evidence." Counsel then argued:

> But we heard "Tell the truth." "Tell the truth." Detective Belgard met her in February. "Just tell the truth. That's all you've got to do. Just tell the truth. We just want to know the truth." And when she got in here and we asked her to tell you the truth and we asked her about her [drug use], she still lied to you. You guys saw it and you heard it with your own ears.

> Please see it with your own eyes that on January 10th, on that day, she contacted him. "Got any smoke? Can I come through?" She was using on January 10th.

The trial court's error in limiting argument was harmless.

Second, Elmesai argues that the trial court erred when it sustained the State's objection to his discussion of whether use of methamphetamine could have affected L.R.'s pain tolerance. We disagree.

Defense counsel asked, "[h]ere's a question. Is it possible that meth caused her pain to subside?" The trial court sustained the State's objection to this question. But immediately following this objection, defense counsel resumed this train of thought, asserting "[L.R.] used meth that evening . . . what impact did that have on her pain when she was spending eight hours in the apartment?" And again, "Why the delay? What impact does meth have on pain?" Finally, "if there's meth in her system and if she's not complaining of any pain, if there's no blood everywhere, doesn't it make sense that he believes that she's giving consent?"

While there was evidence that L.R. intended to smoke methamphetamine that night, neither party testified that they used methamphetamine that night. L.R. testified that the eye injury caused her excruciating pain. Testimony by her treating ophthalmologist supported her testimony. Elmesai was the only witness who testified that using meth dulls his pain. The argument that methamphetamine use affected L.R.'s pain tolerance was properly limited as speculative. In any event, defense counsel was not further limited in making this inference. The trial court did not abuse its discretion.

B. Prosecutorial Misconduct

Elmesai argues that the prosecutor invoked a harmful stereotype that Muslim men are violent and strive to dominate women during questioning of a defense witness and that this was race-based misconduct. We disagree.

Elmesai did not object to the prosecutor's alleged misconduct below. Thus, to prevail on a claim of prosecutorial misconduct raised for the first time on appeal, a defendant must generally show improper conduct and prejudice as well as show that the prosecutor's actions were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

But when the allegation is race-based misconduct, this court applies a separate analysis. State v. Zamora, 199 Wn.2d 698, 709, 512 P.3d 512 (2022). This court looks to see whether the prosecutor "'flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence.'" Zamora, 199 Wn.2d at 709 (quoting State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011)). This is determined by asking whether an objective observer could view the prosecutor's comments as an appeal to the jury's potential prejudice, bias, or stereotypes. See Zamora, 199 Wn.2d at 718. "The objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination." Zamora, 199 Wn.2d at 718. We assess the conduct within the context of trial. Zamora, 199 Wn.2d at 718. In doing so, we consider the broader context, such as the frequency of improper comments, their intended purpose, the subject, and the

type of case. State v. Loughbom, 196 Wn.2d 64, 75, 470 P.3d 499 (2020). When a prosecutor flagrantly or apparently intentionally appeals to a juror's potential racial or ethnic prejudice, bias, or stereotypes, the resulting prejudice is incurable and requires reversal. Zamora, 199 Wn.2d at 721 (modifying the constitutional harmless error standard announced in Monday).

This court recently reversed a criminal conviction based on prosecutorial misconduct for two race-based comments. See State v. Ibarra-Erives, 23 Wn. App. 2d ___, 516 P.3d 1246 (2022). The case involved allegations of constructive possession of methamphetamine and heroin and whether the defendant intended to sell the drugs. Ibarra-Erives, 516 P.3d at 1252. During his direct testimony, the lead detective, told the jury that when dealing with heroin, "25 grams is considered an ounce" and that "the term on the street is it's a Mexican ounce." Ibarra-Erives, 516 P.3d at 1249. The prosecutor then repeated the term twice during closing argument. Ibarra-Erives, 516 P.3d at 1252. The court found use of the street term attributing that practice to a particular racial or ethnic group not relevant and "when the defendant appears to be a member of that same racial or ethnic group, such comments improperly suggest that he is more likely to have packaged or possessed the drugs." Ibarra-Erives, 516 P.3d at 1252. As a result, the court held that an objective observer could view the prosecutor's use of the term as an apparently intentional appeal to jurors' potential bias. Ibarra-Erives, 516 P.3d at 1252.

Here, during the trial, L.R. testified that the day of the sexual assault was her first time at Elmesai's apartment and before that they were only alone together for a brief moment one time. Elmesai disputed this account and offered testimony from his friend

Cassandra Lewis that she was introduced to L.R. in December, one month before the sexual assault, at Elmesai's apartment. Lewis stated that L.R.'s "shoes were off, and it looked like she was just lounging around like she had been there for a while." On cross-examination, the following interaction occurred:

> [Prosecutor]: Do you know Mr. Elmesai's religion?
> [Lewis]: No, I do not.
> [Prosecutor]: Do you know anything about Muslims and whether they allow shoes in their house?
> [Lewis]: No, I do not.

The only other time religion was raised was during voir dire when counsel for Elmesai asked whether anyone felt uncomfortable handling a case involving a Muslim, or if the name "Ahmed Mohamed Elmesai" would conjure up any bias.

The State argues the prosecutor's line of questioning was meant to provide a reason, other than intimacy, for why L.R.'s shoes might have been off inside Elmesai's apartment. Elmesai argues the prosecutor was invoking a stereotype of Muslim men as controlling and domineering.

"[N]ot all express mentions of race will carry the danger of appealing to jurors' potential racial bias." Zamora, 199 Wn.2d at 715. Here, we conclude that the prosecutor did not flagrantly or apparently intentionally appeal to bias. First, the reference to Elmesai's religion was somewhat relevant. While the question by the prosecutor may have been inartful, it was relevant to ask if there may have been another reason for L.R. to have her shoes off in Elmesai's home when there was a dispute about the nature of their relationship. Second, the question did not invoke a negative connotation of Muslim men. In Ibarra-Erives, the term "Mexican ounce" improperly suggested that the defendant was more likely to have packaged and

possessed drugs. 516 P.3d at 1252. In Zamora, the prosecutor referenced border security and illegal immigration at least 10 times, questioning that was completely irrelevant to the subject matter of the case and invoking harmful stereotypes highlighting the defendant's perceived ethnicity. 199 Wn.2d at 719. Here, it is a stretch to argue that referencing that removing shoes in the home plays into a harmful stereotype. This is a wide spread practice in many cultures and does not alone carry any negative connotation. Finally, the comments were only made once.

Thus, an objective observer, aware of this country's history of race and ethnic discrimination and aware of implicit, institutional, and unconscious biases, would not view the prosecutor's questions as an appeal to the jury's potential prejudice, bias, or stereotypes. Zamora, 199 Wn.2d at 718. We conclude that Elmesai has not established prosecutorial misconduct.

C. Jurors Dismissed for Cause

Elmesai argues the trial court erred in dismissing prospective jurors 17 and 34 for cause. Elmesai argues that the trial court relied on pretexts in dismissing the jurors. The State argues that Elmesai's claim is barred by RAP 2.5(a) because he cannot show manifest error. We agree with the State.

During voir dire, the defendant's constitutional rights to an impartial jury are not automatically violated when the trial court erroneously dismisses a potential juror. State v. Van Elsloo, 191 Wn.2d 798, 816, 425 P.3d 807 (2018). Parties do not have vested rights to have a particular member of the panel sit on the jury until the juror has been accepted and sworn. Van Elsloo, 191 Wn.2d at 816. Further, erroneously dismissing a potential juror does not cause a biased juror to be impaneled and it is presumed that the

juror chosen in the place of a rejected juror is an impartial juror. Van Elsloo, 191 Wn.2d at 816. If a juror is dismissed before being impaneled, the defendant is not entitled to a new trial even if the juror was rejected by the court on insufficient grounds. Van Elsloo, 191 Wn.2d at 817.

Here, both prospective jurors 17 and 34 were dismissed for cause before being impaneled. Elmesai has not argued or presented evidence that a biased juror sat on his jury. Thus, Elmesai cannot establish that his rights to an impartial jury were violated by the dismissals of these jurors.

Further, Elmesai cannot establish that these jurors were rejected on insufficient grounds. Because the trial court is in the position to observe a potential juror's demeanor and otherwise make judgments about their ability to be impartial, on appeal we review a trial court's decision for abuse of discretion. State v. Noltie, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991). Here, we find that the trial court did not abuse its discretion.

Prospective juror 17's responses were not equivocal. On his questionnaire he answered that he had concerns about his ability to be fair and impartial. He answered yes to the question "[d]o you have strong feelings, either positive or negative, about law enforcement officers?" During questioning, he explained that his work with a professional organization for public defenders exposed him to police and prosecutorial misconduct and "skewed" his perspective on the system. When asked whether he could be fair and impartial in this case, he stated: "Who knows? I would honestly really try to be." But he also said that his exposure to these issues, self-study, and personal experience "give me a lot of pause as to trusting particularly law enforcement." He also

explained that he has "some misgivings" about his ability to be fair and while he would "try to be a balanced person . . . [he has] been very exposed to this and heard a lot of horror stories." He admitted that he would "systemically" be leaning towards the defense.

Thus, the State moved for cause to dismiss prospective juror 17. Defense counsel asked whether he could make decisions based strictly off the evidence presented to him. He replied:

> I would definitely try to. But again, I'm just trying to—I can't predict what I would do depending on the evidence or the circumstances and how the evidence was collected, but I mean, I think that's something that I'm not necessarily trustful of that. I just did a whole training on the toxicology lab and methamphetamines and how ridiculously that was handled. Yeah, I would have, I would have trouble trusting that . . . I would do my best, absolutely. But that is just part of my life.

The State reemphasized its for cause challenge based on prospective juror 17's leanings and the court dismissed him.

While Elmesai argues that prospective juror 17 was dismissed based on distrust of law enforcement, a historically racist reason, prospective juror 17 made unequivocal statements that based on his job he held a bias towards the defense. Because courts presume actual bias where there is a statement of partiality without a subsequent assurance of impartiality, the trial court did not abuse its discretion by dismissing prospective juror 17 for cause. State v. Guevera Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020) (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)).

As for prospective juror 34, he also indicated in his questionnaire that he had concerns about his ability to be fair and impartial. During questioning, he was asked a few questions about the type of evidence he would expect to see in a case like this and

whether a victim's word alone is enough, he answered that he would need something more but he wasn't really sure what.

When asked about his concerns about his ability to be fair and impartial, he responded "[m]aybe like the lack of evidence maybe" but then said he didn't really remember what his concerns were when filling out the questionnaire. When the State circled back, prospective juror 34 said his concerns were "[m]aybe just the difficulty of making the decision." The State asked if he was uncomfortable discussing this case and he responded "sort of . . . yes." After asking if he wanted to be excused, he said yes, and the State moved to excuse him. Defense objected and the court agreed with defense counsel. The State resumed questioning prospective juror 34:

> [Prosecutor]: When you say that you are uncomfortable sitting in a case like this, are you uncomfortable discussing topics of sexual assault or something else?
> [Juror 34]: Topics.
> [Prosecutor]: The topics. And do you think that it would be difficult for you to deliberate and discuss topics of sexual assault if you were seated as a juror?
> [Juror 34]: Yes.
> [Prosecutor]: Do you think that you would be unable to or unwilling to discuss certain things about sexual assault because you might feel uncomfortable?
> [Juror 34]: Yes.

The State renewed its motion and the court asked what was making him uncomfortable, he replied "[j]ust nervousness" about the topic in general. The court dismissed prospective juror 34.

Later in the proceedings, the State asked to make the record a little clearer on prospective juror 34. The State explained:

> he had a very tough time saying more than just a word or two or just a couple of words at a time . . . he didn't want to really participate, actively

> participate in the voir dire process. At one point, he had noted in his questionnaire that he had concerns about being able to be fair and impartial. And when I asked him to expand on that, he clearly had difficulty shedding any more light about what he meant, which caused the State a lot of concern. And then I asked him whether he'd be able to deliberate actively with other jurors, and he clearly had a lot of discomfort as to that and, again, was not really giving us fully formed substantive answers about his discomfort or things that were clearly causing him trouble sitting in court. So the State had a lot of concerns about him being able to participate in voir dire but also about him being able to participate in deliberations should he have been picked.

The court responded, "He was mostly inarticulate . . . Not in a condescending way. I don't mean it that way. Just really almost nonresponsive."

While Elmesai argues that prospective juror 34 was dismissed for pretextual reasons, prospective juror 34 gave a statement of partiality without a subsequent assurance of impartiality. Questioning did not soften or rebut his statement of partiality. And while prospective juror 34 had trouble articulating why he felt he could not be fair and impartial, he clearly stated that he could not be fair and impartial. Thus, the trial court did not abuse its discretion by dismissing him.

Because there was evidence that both prospective jurors were biased, we find that the trial court did not abuse its discretion in dismissing them for cause.

D. Alternate Jurors

Finally, Elmesai argues that the trial court violated his constitutional right to a fair and impartial jury by failing sua sponte to dismiss jurors 3 and 4. We disagree.

The State relies on State v. Schierman to argue that there is no violation of the right to an impartial jury when the challenged juror ultimately does not deliberate. 192 Wn.2d 577, 632, 438 P.3d 1063 (2018). In Schierman, the defendant moved to dismiss a juror for cause but was denied. 192 Wn.2d at 625. But the juror was excused before

deliberations. Schierman, 192 Wn.2d at 631. The court held that because the defendant did not allege that this error indirectly resulted in the seating of a biased juror, he was not entitled to relief. Schierman, 192 Wn.2d at 632. In support of its position, the Schierman court cited cases in which the trial court refused to dismiss a prospective juror for cause and the defendant used a peremptory challenge to remove the allegedly biased juror. See United States v. Martinez-Salazar, 528 U.S. 304, 307, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); State v. Fire, 145 Wn.2d 152, 154, 34 P.3d 1218 (2018).

Washington courts have held that errors related to alternate jurors are harmless where the alternate jurors do not deliberate. For instance, in State v. Rivera, the trial court gave the parties fewer than the required number of peremptory challenges for alternate jurors. 108 Wn. App. 645, 657, 32 P.3d 292 (2001), abrogated on other grounds by State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). The court found the error was harmless because it did not prevent the defendant from having a fair trial before a fair and impartial jury. Rivera, 108 Wn. App. at 651-52.

Here, jurors 3 and 4 were randomly selected as the alternates and were dismissed before deliberations. While this case differs from Schierman because neither juror 3 nor juror 4 were challenged for cause during voir dire, ultimately jurors 3 and 4 were excused before deliberations. As in Schierman, Elmesai has not alleged that this error resulted in the seating of a biased juror.

Thus, we find that because neither of the alternates deliberated, and Elmesai has not shown that the panel was not impartial, the trial court did not err.

Affirmed.

Mann, J.

WE CONCUR:

Díaz, J.

Chung, J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83017-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 22, 2022

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