No. 102682-0
COA No. 56832-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUAL MATAMUA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 21-1-00903-34

ANSWER TO PETITION FOR REVIEW

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1. Whether there is a basis under RAP 13.4(b) upon which this Court should accept review of the trial court's procedure for identifying jurors that the parties might lodge a GR 37 objection based on equal protection where the record demonstrates that no attempt was made to strike a white juror.

2. Whether there is a basis under RAP 13.4(b) to review the Court of Appeals' finding that non-constitutional harmless error applied to the denial of a peremptory challenged made by the defense under GR 37.

B. STATEMENT OF THE CASE

1. Procedural and Substantive History

The Appellant, Samual Matamua, was charged with robbery in the first degree after an assault that occurred in Heritage Park in Olympia. CP 18, RP 268. Hannah Mellske was a passenger in a vehicle that was passing the park when she noticed a person dressed in a vibrant

colored costume. RP 268. As she looked at the person, she observed another person walk up and "start attacking them." RP 268. Mellske called 911 and reported,

> I watched a man punch a woman in the face. He started beating her after that. She's wearing a super colorful, like, rainbow outfit, and he had no shirt on. He's in shorts. It looked like he has a little shaggy and brown hair, and he just walked up and just, like, drilled her in the face. It was very violent.

RP 273.

The person in the vibrant colored costume was Richard Johnson. RP 293. Johnson was in the park doing a "dance workout with ostrich fans" and was costumed "in character." RP 293. In addition to a wig, fangs, and rainbow boas, Johnson had a shoulder purse with a CD player and air buds. RP 293-294. The purse also contained a "driver's license and a few dollars." RP 294. As Johnson was dancing, a "tall, black, bare-chested man carrying a rolled-up mat," approached him. RP 296. Johnson testified,

> He stopped at the dumpster here, made a beeline for me, hit me on the left side of my face with the mat and then punched me to the ground. He then grabbed my purse, tore it off my neck and proceeded I guess this is west on Fifth.

RP 296.

With the assistance of another individual who stopped to provide aid, Johnson confronted the assailant who dropped the purse and "then continued on westbound on Fifth." RP 296-297. Johnson indicated he felt "very confused," and had "complete confusion over what was going on when he hit [Johnson] with the matt and then punched [Johnson] to the ground." RP 297. Johnson testified that the assailant grabbed their purse and tore it off of their neck. RP 298. Johnson indicated that they felt pain on the left side of their face that lasted a "couple weeks." RP 298. Johnson testified that a chain link on the purse had come apart and one of the air cushions that was

part of the air buds for the CD player was missing. RP 299. Johnson's fangs were also damaged. RP 300, 304.

Kaitlyn Dailey was driving to work with her mom on Fifth and turned onto Water Street. RP 277-278. She testified that she saw very bright colored clothing that caught her attention and "saw someone strike another person" and called 911. RP 278. Dailey said she saw what she thought was a lady in a "very, very rainbow-colored and bright-colored clothing," and saw someone with the person with "something that looked kind of like straw sticks," and testified "that someone punched her in the face." RP 279. Dailey described the assailant as a taller male. RP 279-280. Dailey called 911 and hopped out of her car. RP 280. In the 911 call, Dailey described the assailant as "black," approximately "35," and wearing no shirt, and indicated that he walked toward "the bridge and the homeless camp." RP 283-284.

After the incident ended, Johnson told the guy who was helping them that they were alright and walked eastbound on the sidewalk when Olympia Police Officers arrived. RP 299-300. Johnson described losing sight of the assailant as a "bundle of Olympia Police cars" headed that direction. RP 300. A video of the incident from the park was admitted as Exhibit 10 and played to the jury. RP 309-313.

Sergeant Matthew Renschler of the Olympia Police Department arrived on seen and observed Johnson who waved him down. RP 435, 443. Renschler could see a shirtless dark-skinned male wearing shorts near the area of Fifth and Simmons Street walking westbound "approximately one block away" from Johnson. RP 442-443. Renschler did not see any other shirtless dark-skinned males wearing shorts leaving the scene. RP 443-444. Renschler relayed his observations to other officers. RP 444.

Officer Bryan Henry was relayed the description of the suspect from Sgt. Renschler and observed a male matching the description near Fifth Avenue on Simmons Street. RP 326-327. The male was carrying what looked like a rolled-up straw mat. RP 327. Officer Henry did not see anybody else matching the description in the area. RP 331. With other officers, Officer Henry contacted the individual who initially did not stop for another officer and walked towards Henry with clenched fists and an aggressive stance. RP 332-333.

Officer Thomas testified that he arrived at the same time as Officer Henry and saw a “dark-skinned shirtless man” walking towards him carrying a rolled-up mat. RP 356. He also indicated that there were no other people that he saw who matched that description. RP 357. Officer Thomas testified that Matamua was verbally resistant and when told that he was under arrest, said that he was not

under arrest and continued walking with an aggressive posture. RP 360.

Detective Hutnick arrived and noted that Matamua had an aggressive posture with Officers Henry and Thomas. RP 380. Hutnik testified that when he arrived, Matamua was yelling and holding in a postured position with his hands clenched, but he took some time, and the officers were able to place Matamua in custody without force. RP 333-334, 335-336, 384. Sgt. Renschler testified that the man detained by Officers Thomas, Officer Henry and Detective Hutnik appeared to be the same man he spotted walking away from the costumed individual. RP 466.

Because the incident occurred in Heritage Park on the Capitol Campus, Trooper Joseph McClain of the Washington State Patrol also responded. RP 405, 407-408. Trooper McClain spoke with Matamua, who identified himself with his name and date of birth. RP 410-411.

Matamua told Trooper McClain that he was in Heritage Park relaxing on his mat and he had picked up his mat and walked through the park and was then arrested. RP 412. Before Trooper McClain explained what he was investigating, Matamua stated that "he wouldn't hit anybody or take anything." RP 413-414. At that point Trooper McClain informed Matamua about the information obtained from witnesses and Matamua spontaneously uttered the words "I'm sorry." RP 415.

Matamua decided to not testify during trial. RP 471-472. The jury found Matamua guilty of the crime of robbery in the first degree. RP 568-569. The trial court imposed a sentence of 151 months, ordered restitution in the amount of $158.50 and imposed the crime victim penalty assessment in the amount of $500. RP 586.

2. Jury Selection and GR 37

At the start of jury selection, the trial court asked counsel for both parties to take notes regarding the jury

panel to assist the court in properly applying GR 37. RP 89. The trial court acknowledged that it is an "uncomfortable process" but wanted to make sure that the rule was followed. RP 89-90. During jury selection, Juror 15 indicated that they had previously been the victim of a crime but indicated that would not affect their ability to be fair and impartial. RP 146.

During a break in questioning of jurors, the trial court asked, "I would like to know what the attorneys' understanding is at this time of the jurors in our pool to which GR 37 applies." RP 201. The prosecutor responded, "I recognize that the point of GR 37 is to identify what the parties' implicit bias might be so I believe it truly is my perception that's at play, not whether or not – the reality of whether these folks fall within potentially GR 37." RP 202. The prosecutor then identified Jurors 12, 15, 24 and potentially Juror 33 as jurors for whom an objection under GR 37 might be offered. RP 202. Defense counsel

noted “the same caveats that the State rose,” with regard to perceptions and concurred with the State’s assessment based on his perceptions. RP 202.

The trial court then indicated that a GR 37 analysis would be conducted if there were peremptory challenges against Jurors 12, 15, 24, and 33. RP 203. Neither party objected to the list or the procedure. RP 203-204. Prior to peremptory challenges, the trial court inquired of the parties regarding whether they intended to exercise a peremptory challenge on any of the previously identified jurors. RP 221. The trial court emphasized that the parties could raise an objection until all peremptories were exercised. RP 222. Defense counsel indicated an intent to exercise a peremptory challenge against Juror 12 and Juror 15. RP 222.

The trial court then conducted an inquiry regarding the basis for defense peremptory challenges for Jurors 12 and 15. RP 224. Defense counsel indicated that Juror 12

had raised his hand when asked if there was any person who did not want to be on the panel and indicated that he was getting pressure from his command to not be on the jury. RP 224. Defense counsel indicated that he was concerned that Juror 12 might have divided interests. RP 224. The prosecutor deferred to the trial court. RP 224. The trial court noted that a supervisor's concerns about a juror not being at work is "not unusual," and indicated that there were other potential jurors who presented potential issues with their employment who did not have the same follow up questions for Juror 12. RP 225. The trial court found "the court based upon the very high standard of GR 37 cannot say that an objective observer would not view race or ethnicity as a factor in the use of the peremptory challenge," and denied the use of a peremptory challenge for Juror 12. RP 226.

For juror 15, defense counsel indicated,

> When asked about the State's hypothetical and then when asked my hypothetical about what he was - - my questions regarding what he expected to see, he gave me answers that indicated to me that he had been expecting the defendant to testify and thought that that was going to be an expectation. Jury number 15, nine, eight and 14 also I believe when the state gave their hypotheticals would be in a similar situation, and that's the reason why I'm striking juror number 15, but it will also be the reasons why I'm intending to strike eight, nine and 14.

RP 229. The prosecutor noted that Juror 15's answers to hypothetical questions indicated "he understood that the defendant didn't have to testify, just that he sort of started out with the idea that the defendant might." RP 230.

The trial court considered the justification provided and noted,

> in the court's view it is not unusual for jurors to state their expectations perhaps inconsistent with how it might go. In followup questions, however, it is common for jurors to indicate that they would follow the law and they would base their decision on the evidence. I don't have a recollection, nor do I have notes of any followup questions and answers regarding juror 15's statement of his expectations.

RP 231-232.

The trial court then stated that it was "not making any determination" that Matamua or defense counsel were "intending to exercise a peremptory challenge based on race." RP 232. The trial court then noted that the standard for GR 37 is "very, very high" and found that the justification given for striking Juror 15 was inadequate because "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." RP 232-233.

Defense counsel exercised peremptory challenges on Jurors 8, 9, 14, and 22. CP 74-75. Jurors 12 and 15 were seated as Jurors 3 and 5 for trial. CP 74, RP 237-238. The trial court swore in the panel by asking, "Do you solemnly swear or affirm under the law that you will well and truly try the issues in this case according to the evidence and the instructions of the court?" RP 238-239.

3. Decision of the Court of Appeals

In a published opinion, the Court of Appeals affirmed Matamua's conviction. State v. Matamua, No. 56832-2-II.[1] The Court of Appeals found that Matamua had not preserved his objection to the trial court's GR 37 process for appeal. Id. at 12. The Court of Appeals then found that the trial court erred in concluding that an objective observer could view race as a factor but found that the error was harmless. Id. at 12, 16.

C. ARGUMENT

1. Matamua has not shown that review is appropriate under RAP 13.4 where the trial court correctly found that issue with the process of GR 37 was not properly preserved and even if preserved, Matamua made no attempt at striking a white juror in this case.

The trial court appropriately asking the attorneys to be mindful of implicit biases and make a record, where

[1] The slip opinion of the published opinion is attached to the petition for review; therefore, the citations herein will be to the page numbers in the slip opinion. The opinion is reported at ___Wn.App.2d___, 539 P.3d 28 (2023).

appropriate, when they believed that an objective observer could view the use of a peremptory challenge to strike a particular juror as motivated by racial or ethnic bias. When the trial court again addressed GR 37, the trial court asked, "I would like to know what the attorneys' understanding is at this time of the jurors in our pool to which GR 37 applies." RP 201. The question essentially asked the attorneys, based on their knowledge of the venire and understanding of bias, which jurors they believed an objective observer might find a peremptory challenge for to be racially or ethnically motivated.

In response, the prosecutor discussed the uncomfortable process of GR 37, stating, "I recognize the point of GR 37 is to identify what the parties' implicit bias might be so I believe it truly is my perception that's at play, not whether or not – the reality of whether these folks fall within potentially GR 37." RP 202. The prosecutor then identified Jurors 12, 15, 24 and potentially Juror 33 as

jurors for whom an objection under GR 37 might be offered. RP 202. Defense counsel noted "the same caveats that the State rose," with regard to perceptions and concurred with the State's assessment based on his perceptions. RP 202.

The trial court then indicated that a GR 37 analysis would be conducted if there were peremptory challenges against Jurors 12, 15, 24, and 33. RP 203. Neither party objected to the list or the procedure. RP 203-204. This process did not infuse racial discrimination into the jury process. If either attorney had indicated a belief that an objective observer might view a peremptory challenge of a white juror as racially or ethnically motivated, the Court would have addressed that concern. Neither attorney identified a potential for an improper peremptory challenge on those jurors in this case.

An objective observer is one who "is aware that implicit, institutional, and unconscious biases, in addition to

purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f). Here, the record suggests that the parties were aware of the standard when identifying jurors who they believed an objective observer might find race or ethnicity as a factor in a peremptory challenge. The fact that they did not list a white juror did not inject racial discrimination into the jury selection process. The Court of Appeals correctly noted that the record was not sufficiently developed for review of the issue raised.

This case is not similar to cases where this Court or the Court of Appeals have found that racial discrimination was injected into the proceeding. In State v. Zamora, 199 Wn.2d 698, 721, 512 P.3d 512 (2022), this Court applied structural error analysis when a prosecutor flagrantly or apparently intentionally appealed to racial or ethnic bias. This case did not involve flagrant or intentional appeals to racial or ethnic bias. The Court of Appeals was correct in

noting that there was no manifest error that should be reviewed for the first time on appeal.

"Manifest means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992). Courts have struggled with application of GR 37. In State v. Orozco, 19 Wn.App.2d 367, 375-376, 496 P.3d 1215 (2021), Division III of the Court of Appeals discussed the State's argument about the difficulty of identifying race or ethnicity on the record, noting, "GR 37 is not about self-identification; it is evaluated from the viewpoint of an objective observer." "GR 37 teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution." State v. Lahman, 17 Wn. App. 2d 925, 938, 488 P.3d 881 (2021).

In this case, the attorneys noted which jurors they felt an objection based on GR 37 would be appropriate for. As Matamua acknowledges, 36 out of 40 of the jurors were objectively white.[2] RP 202-203, CP 74-75. The fact that the attorneys did not note any protentional GR 37 objections based on white jurors did not contaminate the jury selection process with racial discrimination. There was no manifest error.

The State agrees that more guidance is necessary with the proper application of GR 37, this is not the record for which such review is appropriate. A case with a properly preserved equal protection claim, such as the recent Division I decision in State v. Walton, __ Wn.App.2d ___, ___P.3d ___ (No. 83538-6-I, Feb. 12, 2024), where the State argued that GR 37 did not apply to white jurors,

[2] Objectively is used here to acknowledge the inherent difficulty of identifying any persons race or ethnicity based on appearances alone.

would be a far more appropriate record for review of the equal protection implications of GR 37. No such record exists in this case. There is no basis upon which review should be granted under RAP 13.4(b)(3).

2. Substantial public interest favors the harmless error analysis utilized by the Court of Appeals. There is no basis upon which review should be granted.

By its plain language, GR 37 is designed to limit the exercise of a peremptory challenge where such a challenge "could" be viewed as based on race or ethnicity. The express purpose of GR 37 is to eliminate the unfair exclusion of potential jurors based on race or ethnicity. State v. Booth, 22 Wn. App. 565, 583-584, 510 P.3d 1025 (2022). "To facilitate this goal, the parties must feel free to bring GR 37 motions to challenge peremptory strikes and courts must feel free to grant those motions." Id. at 584. "Peremptory strikes are not part of the constitutional structure of the juridical process and automatic reversal is

appropriate only when an error is constitutionally infirm. Id. at 583, *citing* Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L.Ed.2d 320 (2009); In re Pers. Restraint of Meredith, 191 Wn.2d 300, 422 P.3d 458 (2018).

As such, non-constitutional harmless error properly applies to erroneous denial of a peremptory challenge. Booth, 22 Wn.App.2d at 584. "Strong policy reasons support the use of harmless error analysis. 'A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.' State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question." State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

Under the nonconstitutional harmless error standard, an error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the

trial would have been materially affected.'" State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (*quoting,* State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

"A juror who was not subject to a for-cause challenge is necessarily competent and unbiased." State v. Hillman, 24 Wn.App.2d 185, 195, 519 P.3d 593 (2022), *citing,* Booth, 22 Wn. App. at 584-585. Erroneous denial of a peremptory challenge "is not the type of error that undermines the validity of the final verdict or that warrants reversal of the final judgment." Id.; State v. Lupastean, 200 Wn.2d 26, 48, 513 P.3d 781 (2022) (peremptory challenges are not a necessary component of a fair jury trial).

GR 37 could not satisfy the goals for which it was enacted if trial court's faced reversal for denying a peremptory challenge. The emphasis on the "could" standard necessarily leads to more peremptory challenges

being denied. The Court of Appeals properly applied a non-constitutional harmless error standard in this case.

There is no likelihood that denial of the use of a peremptory challenge on Juror 15 materially affected the outcome of the trial. Significantly, Juror 15 stated that whether the defendant testified or not was a strategic decision of the defense that would not affect how he considered the case. RP 207. Additionally, sworn jurors are presumed to be fair and impartial. State v. Munzanreder, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017) (*quoting,* State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). Juries are also presumed to follow the trial court's instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013).

The jury was instructed regarding the burden of proof and that the defendant is not required to testify and the fact that he did not, could not be used to infer guilt or prejudice him in any way. CP 145, 147. If any error occurred in the

denial of the peremptory challenge of Juror 15, such error had no likelihood of materially affecting the verdict in light of all of the evidence and the trial court's instructions to the jury. The Court of Appeals correctly determined that any error was harmless. There is no basis upon which this Court should accept review under RAP 13.4(b)(4).

D. CONCLUSION

For the reasons stated herein, the State respectfully requests that this Court deny review.

I certify that this document contains 3,807 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 19th day of March 2024.

Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 19th day of March 2024.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

March 19, 2024 - 11:24 AM

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