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Division I
State of Washington

SUPREME COURT NO. 94294-3

NO. 73069-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Petitioner.

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

The Honorable Bruce E. Heller, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Thomasdinh Newsome Bowman, the appellate below, seeks review of the Court of Appeals decision in State v. Bowman, No. 73069-0-I, following the denial of his motion for reconsideration on February 15, 2017.

B. ISSUES PRESENTED FOR REVIEW

1. Were the prosecution's proffered race-neutral explanations for peremptorily striking the sole black woman on Bowman's jury implausible and pretextual, such that the peremptory strike violated Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)?

2. In light of this court's decision in State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013), which, although fractured, called for alternative approaches to the Batson standard, should the Court of Appeals have adopted (or at least considered) Bowman's proposed standard based on the greater protection provided in article I, section 21 of the Washington Constitution that would deny a peremptory challenge whenever there is a reasonable probability race was a factor in the exercise of the peremptory?

3. It is defense counsel's responsibility as a matter of trial strategy to decide whether to request lesser included offense instructions. Was defense counsel ineffective for not exercising his own judgment and leaving the decision to Bowman alone?

4. Does the pattern reasonable doubt instruction misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the defense to provide "a reason" for why reasonable doubt exists?

5. In prohibiting defense counsel from arguing that the State's evidence did not show premeditation, did the trial court deprive Bowman of his right to present a defense and right to effective counsel?

C. PRO SE ISSUES PRESENTED FOR REVIEW

6. Can the light most favorable to the State used in a sufficiency challenge be artificial?

7. Is a Filing Cabinet a reasonable analog for a Computer System connected to the Internet?

8. Does a slander campaign of false characterizations, misquotations, projected slogans, and personal opinions meet the threshold of prosecutorial misconduct that is incurable by jury instructions?

9. Is a person expected to pursue illegal and dangerous acts as methods of retreat when faced with grave personal threat?

10. Can the State argue that a defendant's silence before trial supports the State's theory of the defendant fabricating testimony?

11. If a person acts in justifiable self-defense, can a judgement of premeditated murder of a stranger be upheld?

D. STATEMENT OF THE CASE

1. Charges and factual background

The State charged Bowman with fist degree premeditated murder for the shooting death of Yancy Noll on August 31, 2012, and also alleged Bowman was armed with a firearm per RCW 9.94A.533(3). CP 1.

Witnesses near the shooting heard five gunshots in Seattle's Roosevelt neighborhood and described a silver BMW convertible quickly driving away. 12RP[1] 47, 52, 54, 72-73; 13RP 17-19, 21, 28, 30, 35-37, 100, 103-05, 129-30, 133-34. Police found Noll bleeding inside his red Subaru; he had four gunshots to the head. 13RP 79, 82; 18RP 69, 74, 78, 80.

A tip a couple weeks later turned the investigation to Bowman. 14RP 91. Police obtained a warrant and found a BMW with broken glass in the car and wheels had been freshly painted black. 14RP 92-95.

Bowman had taken the car to Portland to replace the glass and had bought new tires. 14RP 137, 141, 151, 158; 15RP 68-69, 75, 77.

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[1] Consistent with the briefing below, Bowman refers to the verbatim reports of proceedings as follows: 1RP—October 31, 2014; 2RP—November 3, 2014; 3RP—November 4, 2014; 4RP—November 5, 2014; 5RP—November 6, 2014; 6RP—November 10, 2014; 7RP—November 17, 2014; 8RP—November 17, 2014 (supplement containing voir dire); 9RP—November 18, 2014 (supplement containing voir dire); 10RP—November 18, 2014; 11RP—November 19, 2014 (supplement containing voir dire and opening statements); 12RP—November 19, 2014; 13RP—November 20, 2014; 14RP—November 24, 2014; 15RP—November 25, 2014; 16RP—December 1, 2014; 17RP—December 2, 2014; 18RP—December 3, 2014; 19RP—December 4, 2014; 20RP—December 8, 2014; 21RP—December 9, 2014; 22RP—January 2, 2015.

Police searched Bowman's workplace and found a Glock handgun; the State's firearm and tool mark said the cartridge cases found at the shooting scene matched the Glock slide. 15RP 135, 165-66. Police also found electronic materials on various devices, including a National Rifle Association video on vehicular defense, and PDFs pertaining to forensic topics including those titled "Arrest-Proof Yourself," "Murder, Inc.," and "Death Dealer's Manual." 17RP 68-71. State witnesses attempted to draw parallels between these materials and drawings and statements in Bowman's journal.[2] 18RP 112, 139-46. Police also found evidence Bowman looked at Noll's Facebook memorial page and the police blotter containing video of the suspect's car driving away from the shooting. 17RP 85-86, 96.

Bowman admitted to shooting Noll in self-defense. Bowman explained he had cut Noll off while driving on I-5 northbound, prompting Noll to become aggressive, shouting names and threats and throwing objects. 19RP 44-50. Bowman said Noll was chasing him quickly through surface streets south of the Lake City Way exit; Bowman was afraid and opened the bag where he kept his gun. 19RP 51, 54-58, 62. Bowman testified an object hit him and he crouched down, trying to duck inside the car. 18RP 63-64. Noll pulled alongside Bowman, leaning out and yelling "dick boy" and

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[2] The police found more than 12 terabytes of materials in all. 17RP 97. The State selected particular materials to support the State's premeditation theory, though witnesses acknowledged no human could read all the materials they found. 17RP 97; 18RP 149.

threatening to "fuck [Bowman] up." 19RP 64, 66. Noll turned away as though searching for something; Bowman though he was grabbing a gun. 19RP 66-68, 73. Bowman described entering a surreal state, opening his eyes, seeing his gun, the broken window, and glass inside his car. 19RP 68-69. Bowman said he did not remember the shooting and did not intend to kill him. 19RP 65, 67.

2. *Batson* challenge

At a sidebar during jury selection, the State indicated it would be peremptorily challenging the only black woman sitting in the jury box, Juror 5, and Bowman lodged a Batson objection. 11RP 65. The trial court demanded a race-neutral explanation from the prosecutor. 11RP 66.

The State proffered five purportedly race-neutral reasons: (1) her nephew was in prison for murder and, although Juror 5 stated she did not believe he was innocent, she said she would "like to believe" so, 19RP 112; 11RP 21, 66-67; (2) Juror 5 answered affirmatively to the prosecutor's question about whether it is difficult to "sit in judgment" of others, 11RP 66-67; (3) the State wasn't sure "about her ability to follow things," 11RP 66-67; (4) she referenced an Apple television commercial that "seemed to have nothing to do with anything," 11RP 66-67; (5) she wasn't "completely forthcoming about whatever her job is," 11RP 67.

The trial court denied the Batson challenge, relying primarily on Juror 5's agreement with the prosecutor that "she would have trouble sitting in judgment of somebody." 11RP 70-71. The trial court "wouldn't be as bothered by" Juror 5's statements about her nephew because "[s]he never said that she thought her nephew was innocent." 11RP 71. The trial court did not address the other proffered explanations.

3. Jury instructions

Defense counsel asserted repeatedly that it was Bowman's decision not to request lesser included offense instructions. 19RP 174; 20RP 168-69; 21RP 5. The State argued that counsel, not Bowman, was required to decide whether to request lesser included offense instructions per State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), as a matter of trial strategy. 20RP 168.

The jury was also instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 25.

4. Defense closing

To respond to the State's arguments that Bowman was a "student of murder because he possessed this manual, and this book," counsel argued, "he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car." 21RP 117. The State objected, "facts not in evidence," which was sustained. 21RP 117.

5. Verdict, judgment, sentence, and appeal

The jury found Bowman guilty as charged. CP 17-18.

The court imposed a standard range 290-month sentence and a 60-month firearm enhancement. CP 88. It also imposed $665 in discretionary court costs without inquiring into ability to pay. CP 87; 22RP 47.

Bowman appealed. CP 95. The Court of Appeals rejected all Bowman's Batson arguments and statement of additional grounds, refusing to even consider his proposed alternative to the Batson analysis based on article I, section 21. Appendix at 12-20. However, the Court of Appeals remanded for compliance with RCW 10.01.160(3) per State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), as to the court costs imposed by the trial court. Appendix at 20-21.

E. ARGUMENT IN SUPPORT OF REVIEW

1. THE STATE'S REASONS FOR PEREMPTORILY CHALLENGING JUROR 5 WERE PRETEXTUAL UNDER BATSON AND ITS PROGENY

The Fourteenth Amendment's equal protection clause requires trial "by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson v. Kentucky, 476 U.S. at 85-86. Batson establishes a three-part test to determine whether the State's peremptory challenge is

discriminatory,[3] but where the State purports to give a race-neutral explanation, the only pertinent question on appeal is whether the State's explanations were race-neutral. State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995); State v. Cook, 175 Wn. App. 36, 39, 312 P.3d 653 (2013). Here they were not.

a. The State's reliance on Juror 5's nephew's incarceration was pretextual

The State argued that Juror 5 "has a nephew who [is] in prison for murder. She would like to believe that he's innocent. In which case she believes she has an innocent nephew in prison." 11RP 66. But Juror 5, when asked directly whether she "believe[d] that there's a chance that your nephew is in prison unjustly," responded, "I don't believe that. I don't. I don't believe that." 11RP 21; see also Br. of Appellant at 13-14. The State's race-neutral explanation was not remotely supported by the record.[4] "The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." Snyder v. Louisiana, 552 U.S. 472, 485,

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[3] First, the defendant must establish a prima facie case of discrimination. Second, if the prima facie case is established, the State bears the burden to articulate a race-neutral reason for the challenge. Third, the trial court ponders the plausibility of the State's explanation and determines whether the challenge was discriminatory. Batson, 476 U.S. at 93-98.

[4] The prosecutor flailed to give confused reasons for the challenge: "She thinks he probably isn't [innocent], but she would like to believe that," and "And that means that she believes that there are innocent people in prison for murder in her family." 11RP 67. The prosecutor contradicted herself within a few sentences, demonstrating she was exercising the peremptory strike on the impermissible basis of race.

128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); see also Ali v. Hickman, 584 F.3d 1174, 1192 (9th Cir. 2009) (when proffered reasons are pretextual, it "raises an inference that this final rationale is also a make-weight"); Cook, 175 Wn. App. at 40 n.9 (unsupported explanations "alone can 'raise[] an inference' that the remaining reasons are pretextual").

The Court of Appeals excused the State's bogus explanation because "the trial court clearly recognized that Juror 5 had merely stated she wanted to believe her nephew was innocent." Appendix at 16. But when the State's explanation is not supported by the record, that belies the State's entire race-neutral purpose in striking the juror. Because the Court of Appeals missed this basic premise in federal and state case law rooted in the equal protection clause, review is warranted under RAP 13.4(b)(1), (2), and (3).

Juror 5 was not the only juror to have a relative in prison for murder whom she did not believe was innocent. Juror 2, who served on the jury, had a more recently convicted relative. 9RP 59-60. The prosecution cannot claim its peremptory strike of Juror 5 for having a murder convict as a relative was race-neutral when it did not seek to exclude Juror 2 for the same reason. Indeed, it shows purposeful discrimination when a "proffered race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve." Saintcalle, 178 Wn.2d at 43 (citing Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)). The Court of

Appeals claimed "it is not possible to conduct any comparability analysis" because "there is no meaningful record of the makeup of the jury panel." Appendix at 15. But defense counsel made the record that Juror 5 was the only black woman "even close to being seated in this case." 11RP 69. The Court of Appeals misreading of the record and refusal to conduct any comparability analysis places its decision in conflict with the constitutional decisions of this court, necessitating review. RAP 13.4(b)(1), (3).

And, as Bowman pointed out, it is more likely than not that a black woman has at least one relative in prison based on the alarming and disproportionately higher rates of contact black people have with our "justice" system. Br. of Appellant at 16-18. The Court of Appeals didn't bother addressing this issue of substantial public interest. RAP 13.4(b)(4).

b. Juror 5's concerns about sitting in judgment of others resulted from the State's fishing expedition to exclude her and were otherwise innocuous viewing the entirety of her statements

Juror 5, despite being questioned by the prosecutor far more than any other juror, repeatedly stated she would be fair, unbiased, and was open to the perspectives of both the State and the defense. Br. of Appellant at 23 (citing and quoting 9RP 60, 115; 11RP 21, 45). Yet the State, trial court, and Court of Appeals fault Juror 5's self-reflective and thoughtful reservations about her ability to sit as a juror, during which Juror 5 again explained her

ability to see both sides of a case, using her nephew's situation as an example. 2RP 21-22; Appendix at 15. Then the prosecutor asked whether it would be difficult to sit in judgment, Juror 5 said, "That's correct." 11RP 22.

From Juror 5's statements, the State asserted Juror 5 "would find it difficult to sit in judgment, and in talking to her it was clear, it seemed clear to us that she would be probably unable to reach a verdict at all." 11RP 67. The record does not support this hyperbole. Juror 5 was just acknowledging the difficulties and gravitas of jury service, which is a positive, not negative, attribute. Several other jurors, likely white ones, expressed similar difficulties. 11RP 11, 62-63. The State's explanation is not supported by the record, which gives rise to an inference of discriminatory purpose. Under the case law discussed above, review is appropriate. RAP 13.4(b)(1)–(3).

And there is no good answer to the question, "would it be difficult for you to sit in judgment?" If the answer is yes, the prosecutor will assert he juror is too soft or sensitive to return a guilty verdict, which is exactly what the prosecutor argued here. 11RP 67. If the answer is no, the prosecutor could just as easily argue the juror did not take her duties seriously enough. Either way, by asking this question, the State will always have a legitimate sounding race-neutral explanation. Cf. Saintcalle, 178 Wn.2d at 93 (González, J., concurring) ("It would be naïve to think that

attorneys do not rely on readily available and plausible race-neutral reasons to circumvent Batson. Under our current framework, plausible race-neutral reasons remain readily available and regularly invoked."). The prosecutor's question about sitting in judgment was designed to circumvent Batson and does not qualify as a race-neutral explanation.

This conclusion is buttressed by the fact that the prosecutor got an answer to this question after focusing on Juror 5 far more than on any other juror. 9RP 107-32 (in 26 pages of transcript, State questions Juror 5 between pages 111 and 115, 15 to 20 percent of the State's allotted time); 11RP 5-30 (in 26 pages of transcript, State questions Juror 5 between pages 15 to 22, 20 to 25 percent of the State's allotted time). Such "disparate questioning of minority jurors can provide evidence of discriminatory purpose because it creates an appearance that an attorney is 'fishing' for a race-neutral reason to exercise a strike." Saintcalle, 178 Wn.2d at 43. Prosecutors may not "go fishing for race-neutral reasons and then hide behind the legitimate reasons they do find. This disproportionately affects minorities." Id. The Court of Appeals characterized the prosecutor's disparate amount of questioning as "merely asking follow up questions," again placing its decisions at odds with the record and the constitutional law of this court and the Court of Appeals. Review is warranted under RAP 13.4(b)(1), (2), and (3).

c. Juror 5's statements regarding her employment, an Apple television commercial, and the State's self-contradicting statements regarding Juror 5's ability to track did not provide race-neutral explanations for the strike

The Court of Appeals acknowledged that the State's concern that Juror 5 was not being forthcoming about her job is "perhaps strained" and also recognized that her statements about an Apple television commercial "ultimately led to a conclusion about the importance of not being biased," yet nonetheless concludes these issues showed the State was concerned about Juror 5's ability to communicate. Appendix at 16. As Bowman argued below, however, the State's concerns were just additional pretextual explanations for excluding the only black woman from Bowman's jury. Br. of Appellant at 25-29.

The Court of Appeals and trial court failed to analyze the prosecution's purported race-neutral explanations together. If any given reason appears pretextual, it "naturally gives rise to an inference of discriminatory intent, even where other, potentially valid explanations are offered." Snyder, 552 U.S. at 485; Miller-El, 545 U.S. at. 252. Under Snyder and Miller-El, even if a court accepts some of the State's explanations, it still "should step back and evaluate all of the reasons together. The proffer of various faulty reasons and only one or two otherwise adequate reasons[] may undermine the prosecutor's credibility to

such an extent that a court should sustain a Batson challenge." Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003). Indeed, "in considering a Batson objection, or in reviewing a ruling claimed to be a Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478 (citing Miller-El, 545 U.S. at 239). Because the Court of Appeals decision conflicts with this constitutional precedent, review warranted under RAP 13.4(b)(3).

2. THE COURT OF APPEALS SHOULD HAVE CONSIDERED BOWMAN'S PROPOSED BATSON ALTERNATIVE BASED ON AN INDEPENDENT INTERPRETATION OF ARTICLE I, SECTION 21 OF THE WASHINGTON CONSTITUTION

At this court's express invitation in Saintcalle, Bowman advocates for a new standard or framework: a peremptory challenge must be denied if there is a reasonable probability that race was a factor in the exercise of the peremptory challenge. Br. of Appellant at 33-46; Reply Br. at 6-7; Saintcalle, 178 Wn.2d at 51-55 (inviting ideas for a new, functional approach that departs from the Batson standard but declining to adopt new approach because "[n]either party has asked for a new standard or framework, nor have they briefed or argued what that framework might be or how it would apply in this case"); id. at 63 (Madsen, C.J., concurring) ("In my view, the analysis in this case should be limited to the issues raised by the parties.");

id. at 66 (Stephens, J., concurring) ("Because this issue is entirely unbriefed, we are not adequately informed on all sides of the question.").

To support the standard he proposes, Bowman completed a thorough analysis of article I, section 21 of the Washington Constitution pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Br. of Appellant at 36-39. Bowman's analysis was directly responsive to Saintcalle's statement that "there is constitutional value in having diverse juries, quite apart from the values enshrined in the Fourteenth Amendment. Article I, section 21 of our state constitution declares, 'The right of trial by jury shall remain inviolate.'" 178 Wn.2d at 49. The Saintcalle decision also suggested, "it might make sense to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory . . . ." 178 Wn.2d at 54.

The Court of Appeals refused to even consider this alternative, ironically relying on Saintcalle as a basis for this refusal. Appendix at 17. The Court of Appeals' failure to address this constitutional issue—an issue Saintcalle expressly invited based on the failure of Batson to address serious racial disparities and discrimination in jury selection—merits review under RAP 13.4(b)(1), (3), and (4).

3. DEFENSE COUNSEL MADE NO DECISION ON WHETHER TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS AND ERRONEOUSLY LEFT THE DECISION UP TO BOWMAN

a. Defense counsel failed to make the required strategic decision on whether to request lesser included first and second degree manslaughter instructions, resulting in deficient performance

In State v. Grier, 171 Wn.2d at 39, this court stated,

> A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but she also has more to gain if the strategy results in acquittal. Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision.

(Emphasis added.) "The decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel." Id. at 32 (emphasis added). Thus, a defendant's decision to "forgo lesser included offense instructions does not bar [an] ineffective assistance claim." Id.

The Court of Appeals decision conflicts with Grier because counsel did not make the decision on whether to request lesser included offense instructions but left that decision up to Bowman alone. This warrants review under RAP 13.4(b)(1) and (3).

The Court of Appeals did not meaningfully address defense counsel's various statements that make clear he did not exercise his own

judgment on lesser included instructions. See 19RP 174 ("And his -- it's ultimately his decision, not mine. So I need to look into that with him."); 20RP 169 ("No. It's not [my tactical decision]. It's my client's decision, and it's his decision ultimately to."); 21RP 174 ("And as my person opinion is that ultimately that decision is the defendant's."). Notwithstanding Grier and notwithstanding counsel's consultations with Bowman, Bowman made the decision on lesser included instructions; his lawyer did not. The Court of Appeals failed to acknowledge this clear record and failed to apply Grier's proviso that the attorney must believe "there is support for the decision."[5] 171 Wn.2d at 39.

Bowman's self-defense theory and evidence were most consistent with the lesser included offenses of first or second degree manslaughter—Bowman argued that the shooting was the culmination of a road rage incident gone awry. The evidence was also more consistent with second

[5] The Court of Appeals misleadingly quoted defense counsel to support its erroneous conclusion that defense counsel believed there was support for the decision. For instance, the Court of Appeals asserted defense counsel stated "I agree with it," referring to Bowman's decision, but this isn't what defense counsel said. Appendix at 18. Rather, he said, "One [decision] that [Bowman] has made that because he has made it, I agree with it." 21RP 5 (emphasis added). Likewise, the Court of Appeals relied on the fact that defense counsel "acknowledged the decision not to seek lesser included offenses 'could be characterized easily as a tactical decision.'" Appendix at 18 (emphasis added) (quoting 21RP 5). But defense counsel actually stated, "And as my person opinion is that ultimately that decision is the defendant's. So Mr. Bowman has made that decision. We all know that he is certainly capable intellectually of making decisions, and I think it could be characterized easily as a tactical decision." 21RP 5. Only by selectively omitting the context of defense counsel's statements was the Court of Appeals able to conclude that defense counsel believed there was support for the decision, given that the record is clear that the only reason defense counsel agreed with the lesser included offense decision was because Bowman made the decision.

degree intentional murder. Bowman testified Noll pursued him through city streets, threw objects at him, swore and yelled at him, and made violent, threatening gestures. 19RP 41-66, 138. Bowman also thought Noll was reaching for a gun and described being in fear for his life. 19RP 66. At the moment of the shooting, Bowman explained he experienced a surreal moment and faded in and out. 19RP 67-68. Noll was shot in the head four times. 13RP 82.

In these factual circumstances, the trial court would have instructed the jury on the lesser included offenses of first and second degree manslaughter. See State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998) ("[A] defendant who reasonably believes he is in imminent danger and needs to act in self-defense, 'but recklessly or negligently used more force than was necessary to repel the attack,' is entitled to an instruction on manslaughter." (quoting State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)). The court would also have provided a second degree murder instruction, were it requested. See State v. Candon, 182 Wn.2d 307, 318-19 & n.4, 343 P.3d 357 (2015). Any reasonable attorney advancing a road rage theory would have requested the lesser offense instructions. In conflict with Grier, Bowman did not receive effective assistance of counsel, necessitating review under RAP 13.4(b)(1) and (3).

b. This court should reconsider *Grier*'s incorrect prejudice analysis

While the Court of Appeals decision is inconsistent with Grier on the deficient performance prong of the Strickland[6] analysis, this court should also take the opportunity to overrule Grier's incorrect Strickland prejudice analysis. Grier essentially foreclosed all ineffective assistance of counsel claims for failing to request lesser included offense instructions, which makes no sense.

The Ninth Circuit Court of Appeals recently recognized as much, noting that Strickland "does not require a court to presume . . . that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both." Crace v. Herzog, 798 F.3d 840, 847 (9th Cir. 2015). The problem with Grier is that it conflates the sufficiency of the evidence standard with Strickland's prejudice inquiry: under Grier, "a defendant can only show Strickland prejudice when the evidence is insufficient to support the jury's verdict . . . . And conversely, if the evidence is sufficient to support the verdict, there is *categorically* no Strickland error . . . ." Crace, 798 F.3d at 849.

Grier is also inconsistent with United States Supreme Court precedent. When an element of the offense is in doubt, but the accused

[6] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (2004).

appears guilty of some wrongdoing, the jury is likely to resolve its doubt in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). This is the primary rationale underpinning the common law rule that defendants are entitled to have the jury instructed on lesser included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 393 (1980). Providing the jury with the option of convicting on a lesser included offense "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." Id. at 634.

Grier conflicts with these principles by removing defense counsel's unreasonable and unsupportable decisions—and therefore clients' constitutional right to effective assistance of counsel—from judicial scrutiny. Because, in this respect, Grier is both incorrect and harmful, it should be overruled. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). This court should grant review of this issue pursuant to RAP 13.4(b)(3).

4. WASHINGTON'S PATTERN REASONABLE DOUBT INSTRUCTION IS CONSTITUTIONALLY INFIRM

In Washington, jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-37, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241,

148 P.3d 1112 (2006)). This court recently drew a distinction between defining reasonable doubt as "a doubt for which a reason can be given" and as "a doubt for which a reason exists," concluding that the former was constitutionally infirm but that the latter was constitutionally acceptable. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). But there is no difference between the two definitions. Average jurors would understand they must articulate a reason for having a reasonable doubt. This undermines the presumption of innocence and shifts the burden of proof to the accused in every criminal trial. Review is warranted under RAP 13.4(b)(3) and (4).

Kalebaugh conflicts with sensible precedent that readily acknowledged there is no difference between a reason that "exists" and a reason that "can be given." This court expressly relied on a Wisconsin case that stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." State v. Harsted, 66 Wash. 158, 164, 119 P. 24 (1911) (emphasis added) (citing Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899). More recently, this court determined the instruction, "A reasonable doubt is a doubt for which a sensible reason can be given," was "a correct statement of the law." State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968) (emphasis added). Kalebaugh's assertion that there is a substantive difference between the supposedly acceptable instruction

requiring reasonable doubt to merely exist and the concededly infirm instruction requiring reasonable doubt to be given makes no sense. To address the important constitutional consequences and to maintain the public's faith in the judiciary, this court should grant review per RAP 13.4(b)(3) and (4).

5. THE TRIAL COURT DEPRIVED BOWMAN OF COUNSEL'S PROPER ARGUMENTS ATTACKING THE STATE'S PREMEDITATION EVIDENCE

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."' State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The defendant, "through counsel, ha[s] a right to be heard in summation of the evidence from the point of view most favorable to him." Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); accord State v. Woolfolk, 95 Wn. App. 541, 549-50, 977 P.2d 1 (1999).

Defense counsel challenged the State's evidence of premeditation during closing argument:

> If Dinh Bowman was a student of murder because he possessed this manual, and this book, he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car.

21RP 117. The prosecutor objected, "This is facts not in evidence," and the trial court sustained the objection. 21RP 117.

The trial court erred by depriving counsel the opportunity to dispute the State's theory in summation. The State's premeditation evidence was exclusively based on materials it selected out of a reference library on a computer to which Bowman had access, which contained information about forensic investigations, how to overcome police investigations, and how to avoid detection of criminal activity. 17RP 61-71; Exs. 249-50. The State attempted to draw parallels between these materials and the contents of one of Bowman's journals. 20RP 73-95. Bowman said he had not read several of the materials offering advice on how to kill people. 20RP 57, 75, 86-87.

Bowman used his credit card, contrary to advice in the materials not to "leave a paper trail. And don't use a check or credit when in transit." 20RP 88-90; Ex. 249, ch. 10. He also testified he used a semiautomatic weapon rather than a revolver (which he had) to shoot Noll, contrary to the advice contained in the materials: "if I had thought about something like that and said I didn't want to leave evidence, I think you would be a fool to choose anything but a revolver." 21RP 41-42. Defense counsel's closing argument attempted to bolster this line of defense, arguing that Bowman did not follow the general advice in the materials to avoid detection to support the claim that Bowman never read the materials and was not a "student of

murder" like the State claimed. Defense counsel advanced the arguments about not doing anything in broad daylight, in heavy traffic, or in a flashy car because doing so could lead to detection, contrary to the advice contained in the various materials. See Ex. 249, ch. 10 ("As a general rule you must always plan to avoid looking out of place, strange, or unexpected. As far as is possible, try to look normal."). Defense counsel's arguments were fair and legitimate to dispute the State's student of murder theory. The arguments were based on reasonable inferences drawn from the State's premeditation evidence.

The Court of Appeals cursory statement that defense counsel relied on information outside the record contravenes the constitutional role of counsel as established by the precedent of this court and the Court of Appeals. The Court of Appeals erroneous decision merits review. RAP 13.4(b)(1)-(3).

F. PRO SE ARGUMENTS IN SUPPORT OF REVIEW

6. LIGHT MOST FAVROABLE TO THE STATE

Is the State allowed to use any proffered theory as an artificial light to support evidence that is otherwise irrelevant to the case at hand? The judgement of the credibility of the evidence is not solely with the trier of fact, as the act of admission of the evidence is a comment on its relevance. In this case, the State created the theory that Mr. Bowman was a "Student

of Murder" with a motive of a "Thrill Kill" as an artificial light to justify the introduction of unfairly prejudicial and unrelated material.

The admissibility of evidence should only be viewed in lights made from fact and reason. The allowance otherwise was an abuse of discretion and not the legislative intent. The Court of Appeals ignored that "the light most favorable to the State" was based on untenable grounds. This is also an issue of the constitutional right to a fair trial. By allowing the State to create artificial sufficiency, the public is not protected from false accusations with supposed evidence painted by the State.

For these reasons, this case merits review under RAP 13.4(b)(3) and 13.4(b)(4).

7. NO DUTY TO RETREAT

The State repeatedly suggested that if Mr. Bowman felt in fear of his life, he should have intentionally crashed into other vehicles, driven over 100 mph on the shoulder of the road, or headed into on-coming lanes of traffic to escape [Statement of Additional Grounds for Review (SAG) p.36]. The Court of Appeals improperly accepted these comments as having been cured by the jury instruction WPIC 16.08. The jury was repeatedly told that Mr. Bowman could have gotten away if he tried. The mere instruction at the end of the trial, that Bowman had no duty to retreat, did not cure the damage.

For this reason, this case merits review under RAP 13.4(b)(1) and RAP 13.4(b)(2).

8. RIGHT TO REMAIN SILENT BEFORE TRIAL

The State argued that Mr. Bowman's silence before trial further corroborated the State's opinion that Bowman strategically fabricated testimony. This is a generic argument that flames the prejudice that all defendants are guilty. In this case there were no contradictions to infer false statements. The State effectively argued that because Mr. Bowman's testimony matched all of the evidence, he must be lying because he is guilty.

Mr. Bowman had a constitutional right to remain silent. When he truthfully testified, the State announced "So you have brought forward your self-defense claim because you have no defense to identification at this point" [RP:12/8:19.12]. The State emphasized that Bowman's testimony was fabricated in closing with "How does he know he intended to shoot him but not to kill him? Because that's what will get him acquitted. That's how he knows. That's why he says it." [RP:12/9:89.23].

The Court of Appeals improperly accepted that such generic arguments were cured by jury instructions. The courts have ruled that "when a generic argument is offered on summation it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants ettually and therefore does not help answer the question that is the essence of a trial's

search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence" [State v. Martin, 171 Wn.2d 521, 252 P.3d 873 (2011)].

For these reasons, this case merits review under RAP 13.4(b)(2) and 13.4(b)(3).

9. PREMEDITATION DISPROVES SELF-DEFENSE

The State declared that "premeditation disproves self-defense" [RP:12/9:122.16]. What this case shows is that if the State offers the theory that the defendant is a psychopathic "Student of Murder" interested in a "Thrill Kill11 , a truthful and innocent explanation of the events could not unbias a jury from falsely convicting Mr. Bowman of premeditated murder one.

The Court of Appeals ignored the fact that the State did not and could not disprove self-defense. The courts have ruled that the State must bear the burden of proving absence of self-defense beyond a reasonable doubt. [State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983)] and that inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation" [State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)].

The State shifted the burden of disproving self-defense to a biased credibility determination of a presumably guilty defendant. This is also an

issue of the constitutional rights to a fair trial and the public's interest in false imprisonment.

For these reasons, this case merits review under RAP 13.4(b)(1), 13.4(b)(2), 13.4(b)(3), and 13.4(b)(4).

10. FILING CABINET ANALOGY

The Trial Court used the analogy "Let's assume that all of the material on State's Exhibit 1 were found in a file cabinet in Mr. Bowman's office instead of on a computer" [RP:11/10:4.16]. The term computer was used to describe multiple computing and data storage devices connected to the Internet at Mr. Bowman's place of business {a technology company with multiple servers around the world). The SAG outlines the untenable grounds that this analogy used [SAG p5-8]. The Trial Court's improper analysis should not be considered within reason of the sound discretion of the court.

The Court effectively accepted the argument that a person's access and entrance to a Library is sufficient foundation for introducing any constitutionally protected reading material at the Library if it aligns with the State's theory of the case. In this case, entrance was shown through operating system file MetaDate that was indistinguishable from automatic activity or other users.

The jury was improperly expected to determine credibility by being shown single documents without a tangible concept of the enormous size of

the Library which the documents were cherry-picked from. A needle paraded in front of a jury carries significantly more weight than a needle found in an excavation that even the State's detective stated "I don't think anybody could" do [RP:12/3:149.10]. See SAG p6 -Scale for the calculation of how it would have required 175,000 hours of continuous reading to infer probable knowledge.

Proof of knowledge was supposedly confirmed by alignment of such common sense phrases as "Well-made handguns of suitable caliber are undoubtedly the best short-range tools of killing known to man" [SAG p15] with the fact that Mr. Bowman carried and used a Glock 9mm handgun which he purchased for self-defense. The use of a single SAT word ("Garrotte" written in a journal describing movie props) was deemed sufficient for similarity in subject to show that Bowman read two books in question. The issue of credibility for the jurors was handicapped by redacting the context and visual depictions which were completely different [id].

With the annual increases in computing power, storage capacity, and cloud computing, this is a significant issue for future cases involving constitutionally protected digital information and is of significant public interest.

For these reasons, this case merits review under RAP 13.4(b)(3) and 13.4(b)(4).

11. SLANDER CAMPAIGN

In general, the courts have agreed that there is a limit to the level of prosecutorial misconduct allowed before it becomes incurable by jury instructions. This case represents a systematic and calculated campaign of tactics designed for a conviction without respect to facts or justice. The SAG outlines numerous examples on record [SAG p24-40].

The Court of Appeals improperly ruled that such recorded actions were not so flagrant and ill-intentioned as to be incurable by jury instruction. This is in conflict with most case law on prosecutorial misconduct and a violation of the constitutional right for a fair trial. For this reason, this case merits review under RAP 13.4(b)(1), 13.4(b}(2), and 13.4(b)(3).

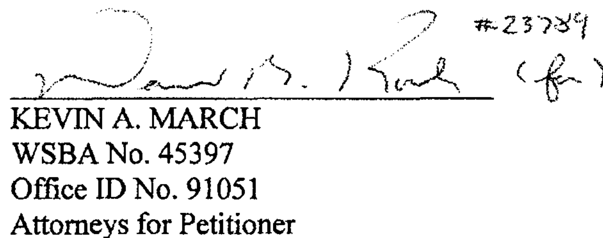
G. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Bowman asks that this petition be granted.

DATED this 17th day of March, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. THOMASDINH NEWSOME BOWMAN, Appellant.	)	No. 73069-0-I UNPUBLISHED OPINION FILED: January 23, 2017

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VERELLEN, C.J. — Thomasdinh Bowman appeals his conviction for first degree murder. He argues that the State's peremptory challenge of Juror 5, an African-American woman, violated the equal protection clause. We conclude the trial court correctly applied the existing legal standards, and the record supports the finding of no purposeful discrimination.

Bowman also argues his counsel was ineffective for deferring to the client the final decision whether to pursue lesser offenses. But defense counsel conferred with Bowman and agreed with the tactical decision not to pursue lesser offenses.

Bowman's other issues are not compelling. His constitutional challenge to the reasonable doubt instruction has recently been rejected, and the trial court did not abuse its discretion in sustaining the State's objections to Bowman's closing arguments misstating the law and referring to facts not in evidence. However, as required by a recent decision of our Supreme Court, the trial court should have considered his ability to pay before imposing any discretionary legal financial obligations.

Therefore, we affirm Bowman's conviction and remand with instructions for the trial court to conduct an on-the-record inquiry consistent with State v. Blazina.[1]

FACTS

Around 7:30 p.m. on August 31, 2012, witnesses heard five gunshots at the intersection of 15th Avenue N.E. and N.E. 75th Street in Seattle's Roosevelt neighborhood. They heard an engine accelerate and saw a silver BMW Z4 convertible with the top down speed off southbound.

Police responded to reports of multiple gunshots and a male bleeding inside a red Subaru. The male, identified as Yancy Noll, was sitting in a normal position in the driver's seat with his hands on the steering wheel. He had four fatal gunshots to the head. The Subaru's windows were intact, but there was glass in the street on the Subaru's driver's side. Investigators concluded the glass came from the shooter's car window.

A description of the silver BMW, a still image of the car taken from a nearby surveillance video, and a sketch of the suspect BMW driver based on witness descriptions were released to the public. As a result of a tip, police began investigating Thomasdinh Bowman, who had a silver BMW in his driveway less than 10 blocks from the scene of the crime.

On the night of the killing, Bowman turned off his cellphone and purchased a new one that he registered using a false identity, Peter Nguyen. Using that name, Bowman called a BMW store and an auto glass company the following morning to ask about having a window replaced on his 2006 silver BMW Z4. That day, Bowman and his wife

[1] 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

drove the BMW to Portland and had the passenger window replaced. Bowman paid the $250 bill in cash.

After the window was replaced, Bowman kept the BMW in his garage. Between September 12 and September 20, 2012, Bowman spray painted the silver BMW wheels black. On September 20, Bowman purchased four tires for his BMW from Big O Tires in Lynnwood, paying in cash. Bowman did not bring the car to the store; he only brought the wheels. The sales manager was surprised the tires were being replaced because they were like new.

Police searched Bowman's workplace and found a slide from a Glock handgun inside a storage container. Forensic experts concluded the cartridge casings found at the scene of the shooting were fired from that particular Glock slide. Bowman's workplace computer contained a collection of documents relating to the investigation of shootings: "Forensic Gunshot Residue Analysis," "Chemical Analysis of Firearms, Ammunition, and Gunshot Residue," "Gunshot Wounds—Practical Aspects of Firearms, Ballistics, and Forensic Techniques," "Advances in Fingerprint Technology," "Automated Fingerprint Identification Systems," "Forensic Interpretation of Glass Evidence," and "Arrest-Proof Yourself." Two more documents found on the computer were guides to committing murder.

The State charged Bowman with first degree murder. At trial, Bowman admitted to shooting Noll in self-defense. He testified that he cut Noll off in traffic; Noll became angry, pursued Bowman, yelled a threat, and threw a water bottle onto Bowman's car as they drove onto the freeway. Bowman claimed he tried to get away from Noll, but Noll pursued him off the freeway and to the intersection where the shooting occurred.

Bowman testified that Noll threw another bottle at his BMW that hit Bowman in the back of the head. Bowman claimed he saw Noll searching for something in the passenger seat, and it was then that Bowman pulled his Glock handgun out of his bag and shot Noll.

Bowman admitted going out to dinner with his wife after killing Noll. Later that night, he disassembled his handgun and disposed of the barrel because he thought it could be used to link the gun to the killing.[2] Bowman claimed he also disposed of the bottles Noll threw at him.

The jury found Bowman guilty as charged. At sentencing, Bowman argued that the trial court should consider as mitigation that he acted in self-defense. The court responded, "The jury rejected it as do I."[3] The court observed that Noll had his hands on the steering wheel when he was shot. It further observed that Bowman's actions after the shooting were inconsistent with a person who had just escaped serious injury by an enraged motorist, specifically going out to dinner and disposing of the only evidence that would support his version of events. The court imposed a sentence within the standard range.

Bowman's appeal primarily concerns the State's peremptory challenge of Juror 5, an African-American woman. The court began jury selection by asking the entire panel of prospective jurors whether they had a friend or close relative accused of a crime, "either rightly or wrongly."[4] Juror 5 responded affirmatively. She said she had a

[2] Bowman testified that he kept the slide of the gun because he did not believe it could be used to match ballistic evidence to the gun.

[3] Report of Proceedings (RP) (Jan. 2, 2015) at 42.

[4] RP (Nov. 18, 2014) at 58-59.

50-year-old nephew in California who had been serving time since he was a teenager for murder. Juror 5 also replied that this situation would not impact her ability "to judge this case on its merits."[5]

The court allowed the State and defense counsel two alternating 30-minute rounds of questioning. During its first round, the prosecutor asked Juror 5 her reaction when she heard Bowman's charge. Juror 5 said she did not have a strong reaction. Then the following exchange occurred:

> STATE: Do you believe [your nephew] was rightfully or wrongly accused?
>
> JUROR 5: That's hard because I don't know.
>
> STATE: Okay.
>
> JUROR 5: I don't know that I'll ever know for sure. I know what I'd like to believe, but I don't know for sure.
>
> STATE: From knowledge of that situation, do you have an opinion about how the justice system works?
>
> JUROR 5: Not really. Because we were here in the Northwest and it was—it was in California, so we didn't attend any of the trials, any of that. But hearing from relatives, of course you're going to get their side of it. But what it did for me was that at one time I thought everything was black and white, and then I see that there are gray areas, you know, because there has to be an assurance when you make a decision, you know, there has to be an assurance so you have to look at it.
>
> *So for me, I'm not sure what kind of juror I'd make even* because I want to see, you know, let me see, and then let me experience this and go through the process, because even coming in saying, yeah, that's even like saying—you know, making a decision right there. But, yeah, I had that—that experience. I've talked to that family member and my

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[5] Id. at 60.

> love goes out to him, and, of course, he was quite young. So—*but I don't know.*[6]

Bowman's counsel did not talk to Juror 5 during his first round of questioning. During the State's second round of questioning, the prosecutor asked Juror 5 about her job. Juror 5 said she was in "administrative consulting" and self-employed.[7] She explained, "Just I call it bringing an order out of chaos. . . . The most recent [client] is a person who is very close to me and was in hospice at home, in-home, and just putting everything together for her was a challenge. But it's something I do."[8] The prosecutor then asked about Juror 5's nephew in prison:

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

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[6] Id. at 112-13 (emphasis added).

[7] Suppl. RP (Nov. 19, 2014) at 18.

[8] Id.

STATE: Which I have to tell you has nothing to do with what happens in real life.

JUROR 5: I understand that. I understand that.

STATE: So . . .

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

STATE: Uh huh.

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

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

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

JUROR 5: *I don't believe that.* I don't. I don't believe that.[9]

The prosecuting attorney also asked Juror 5 what she meant the prior day when she said, "I'm not sure what kind of juror I'd make":

STATE: Okay. Now, yesterday when [co-counsel] was talking to you about case proof, you said "I'm not sure I'd make a good juror." And the reason was you said "I need to see." Can you expand on that a little bit more?

JUROR 5: What did I say?

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

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[9] Id. at 19-21 (emphasis added).

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

STATE: About what?

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

STATE: Uh huh, please do.

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

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

JUROR 5: Thank you.

STATE: To make that—

JUROR 5: That's correct.[10]

During the defense's second round of questioning, Bowman's counsel addressed Juror 5 about her reluctance to sit in judgment:

DEFENSE: [The State] asked you whether you'd feel uncomfortable judging a person, *and you said after some thought yes, right?*

JUROR 5: *Yes.*

DEFENSE: Yeah. There's no—I'm just remembering what you said. Right? Is it clear to you, and this is probably the most important question, from my perspective, of course, that you'll hear in this whole process, do you think you are here

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[10] Id. at 21-22 (emphasis added).

to judge Dinh Bowman, or do you think you're here to judge their case? . . .

JUROR 5: I think I'm here to judge to the best of my ability the evidence that's presented about the young man and—and to determine whether I feel he did it or if there are extenuating cir—I don't know. You'd have to put it all together.[11]

During a sidebar conference after the defense's second round of questioning, the State indicated it intended to exercise a peremptory challenge to Juror 5. Bowman's counsel responded that he needed to think about whether he would raise a Batson v. Kentucky[12] challenge. At a subsequent sidebar, Bowman's counsel indicated he wanted to make a record as to a Batson challenge, and the court excused the jurors.

Without prompting from the court, the State set forth its reasons for requesting the challenge:

> She has a nephew . . . in prison for murder. She would like to believe that he's innocent. In which case she believes she has an innocent nephew in prison for murder.
>
> Her statement yesterday was "I'm not sure I would make a good juror." She said today that she wasn't sure about her ability to follow things and it will be difficult for her to sit in judgment.
>
> She—frankly, we have found it a little hard to track what she was saying in a lot of cases. Her sentences stopped halfway, but she talked about the old Apple commercial where a woman comes in in a ball and breaks the ball and that seemed to have nothing to do with anything. She defined herself as being an administrative consultant, but she was not—the way she described that was that she pulls things together and puts a system together, and the example she gave was helping someone who is in hospice. . . . We are not exactly sure what she does. We have concerns about her ability to track in a whole.
>
> But the two main reasons, Your Honor, are the relationship to someone in her family who is in prison for murder, which is what this crime is, that she would like to believe that he's innocent. She thinks he

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[11] Id. at 44-45 (emphasis added).

[12] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

> probably isn't, but she would like to believe that. And that means that she believes that there are innocent people in prison for murder in her family.
>
> The second thing is that she would find it difficult to sit in judgment, and in talking to her it was clear, it seemed clear to us that she would be probably unable to reach a verdict at all. Certainly a verdict of guilty because that would be sitting in judgment. And it would be sitting in judgment on someone who is charged with the same thing her nephew is in prison for. I think that's far and away enough to validate the fact that we are not excusing her based on her race in any way, that's the bottom line question, and I would note that there are numerous minorities on this panel.
>
> There are one or two in the box itself. There[] [are] several who are going to be coming up. This has nothing to do with Juror 5's race. I actually think she's a pleasant and intelligent woman, but given her perspective on the world and criminal justice system, we cannot keep her.[13]

Neither defense counsel nor the trial judge disputed the State's observation that there were other potential jurors who were minority members; one or two were in the box already and several were in position to join the panel when peremptory challenges were exercised. Defense counsel's argument was brief. Counsel criticized the State for saying Juror 5 was not intelligent, and the trial court clarified that the State had said she was intelligent. Defense counsel noted the Apple computer commercial Juror 5 referenced "was basically about how your world changes when you learn things."[14] Because Juror 5 "could be only an African-American woman even close to being seated in this case has a relative who is in prison perhaps wrongfully," Bowman's counsel questioned the prosecutor's motive.

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[13] Suppl. RP (Nov. 19, 2014) at 66-68.

[14] Id. at 69.

The trial court noted the seriousness of excluding jurors based on race:

> [I]t's been particularly disturbing because . . . there's a high percentage of minority people that are charged with crimes and yet predominantly we have nonminorities sitting on juries. So the Court is certainly sensitive to the issue.[15]

The court also noted the distinction between whether the court agrees with the State's doubts about Juror 5 versus whether "the grounds that are being given are a pretext for what is essentially a challenge based on race."[16] The court concluded that "the reasons that have been provided by the State . . . are not racially-based and . . . they're not a pretext for race."[17] It identified as the most important factor Juror 5's statement that

> she would have trouble sitting in judgment of somebody . . . And it seems to me that a completely race neutral reaction to that statement would be this is a person who might have difficulty finding a judgment of guilt against Mr. Bowman regardless of the evidence. That is a legitimate concern.[18]

As to the juror's feelings about her nephew, the court noted Juror 5 "never said that she thought her nephew was innocent. She said she would like to think he's innocent."[19] The court observed that it probably would not be as bothered by that, but "it's not a pretext for racial challenge . . . reasonable people could differ about what inferences they drew from that statement."[20] Juror 5 was excused from the jury panel.

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[15] Id. at 70.

[16] Id.

[17] Id.

[18] Id. at 70-71.

[19] Id. at 71.

[20] Id.

ANALYSIS

I. Batson Challenge

Bowman assigns error to the trial court's determination that the State did not engage in purposeful discrimination. Bowman fails to demonstrate reversible error.

We review Batson challenges "for clear error, deferring to the trial court to the extent that its rulings are factual."[21] "Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed."[22]

The United States Supreme Court in Batson established the test to determine whether a juror was peremptorily challenged pursuant to discriminatory criteria. First, the defendant must establish a prima facie case of purposeful discrimination;[23] second, the burden shifts to the State to articulate a race-neutral explanation for challenging the juror;[24] and third, the trial court must decide whether the defendant has demonstrated purposeful discrimination.[25] The ultimate burden of persuasion that there has been purposeful discrimination rests with the defendant.[26]

In State v. Saintcalle, our Supreme Court recognized a need to change the existing Batson procedures in Washington but declined to do so on the briefing before

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[21] State v. Saintcalle, 178 Wn.2d 34, 41, 309 P.3d 326 (2013); accord State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995); Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

[22] Saintcalle, 178 Wn.2d at 41; accord Ass'n of Rural Residents v. Kitsap County, 141 Wn.2d 185, 196, 4 P.3d 115 (2000).

[23] Batson, 476 U.S. at 93-96.

[24] Id. at 97-98.

[25] Id. at 98.

[26] Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (citing id.).

it.[27] The court found that "Batson . . . is failing us" because modern day racism is not overt but rather is embodied in "stereotypes that are ingrained and often unconscious."[28] "Unconscious stereotyping upends the Batson framework," which is "equipped to root out only '*purposeful*' discrimination, which many trial courts probably understand to mean conscious discrimination."[29]

Nonetheless, the lead opinion applied Batson, leaving it as the controlling authority we must follow. The lead opinion confirmed the deference a reviewing court must give to the trial court under the existing Batson "purposeful discrimination" standard:

> A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of the juror and the attorney. Batson, 476 U.S. at 98 n.21. The defendant carries the burden of proving purposeful discrimination. Id. at 93. The trial judge's findings are "accorded great deference on appeal" and will be upheld unless proved clearly erroneous. Hernandez [v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)]. Deference to trial court findings is critically important in Batson cases because the trial court is much better positioned than an appellate court to examine the circumstances surrounding the challenge. Further, deference is important because trial judges must have some assurance that the rest of the trial will not be an exercise in futility if it turns out an appellate court would have ruled on a Batson challenge differently.[30]

Under the existing Batson standard, where the State articulates a race-neutral explanation for its challenge, the trial court is not required to analyze the first step

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[27] 178 Wn.2d 34, 52-55, 309 P.3d 326 (2013).

[28] Id. at 46.

[29] Id. at 48.

[30] Id. at 55-56.

whether the defendant established a prima facie case of purposeful discrimination.[31] Here, the State mentioned four grounds for challenging Juror 5: she would not be able to sit in judgment of others; she would like to believe her nephew in prison for murder is innocent and therefore believes he is innocent; it was a "little hard to track what she was saying," noting her reference to the Apple computer commercial; and the State did "not feel like she was being completely forthcoming" about her job.[32] The State believed Juror 5 was "a pleasant and intelligent woman," but was concerned about "her perspective on the world and criminal justice system."[33]

The second step of the process does not demand an explanation that is persuasive or plausible:

> "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[34]

Bowman's argument that the State's proffered reasons were pretextual and mere proxies for race concerns the third step, which requires the trial court to consider the State's explanations and determine whether the defendant has demonstrated purposeful discrimination.[35] The State's explanations "must be viewed in the totality of

[31] State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (citing Hernandez, 500 U.S. at 359).

[32] Suppl. RP (Nov. 19, 2014) at 66-68.

[33] Id. at 68.

[34] Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (alteration in original) (quoting Hernandez, 500 U.S. at 360).

[35] Batson, 476 U.S. at 98; see also Reed v. Quarterman, 555 F.3d 364, 368 (5th Cir. 2009); Purkett, 514 U.S. at 768 ("implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination").

the prosecutor's comments."[36] The reviewing court considers the overall circumstances, including any red flags of a discriminatory motive.[37]

If a State's proffered reason for striking a minority panelist applies just as well to an otherwise similar nonminority panelist who is permitted to serve, "that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."[38] Here, however, there is no meaningful record of the makeup of the jury panel or the ultimate jury other than the prosecutor's mention that several members of the panel were minorities, including "one or two in the box itself."[39] Therefore, on this record, it is not possible to conduct any comparability analysis.

Bowman argues the trial court erred by accepting the prosecutor's challenge of Juror 5 based on her inability to sit in judgment of others. He emphasizes that Juror 5 repeatedly said she was capable of being a juror, describing herself as "analytical," not in a "rush," and that she "would be as fair as I know how to be," and that she had no concern over her nephew's conviction.[40]

But Juror 5's exact statements about her ability to sit as a juror provided a race-neutral basis for the State a to exercise a peremptory challenge: "*I'm not sure . . . . [a]bout my ability.* I think I better be honest."[41] Using her nephew as an example,

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[36] State v. Cook, 175 Wn. App. 36, 43, 312 P.3d 653 (2013).

[37] See id. at 43-44 (prosecutor's peremptory challenge based in part on defense counsel's use of the term "brother" when speaking to an African-American juror and prosecutor's purportedly "confusing" one African-American juror with another "raises a red flag that there is some discriminatory intent").

[38] Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

[39] Suppl. RP (Nov. 19, 2014) at 68.

[40] Suppl. RP (Nov. 18, 2014) at 115.

[41] Suppl. RP (Nov. 19, 2014) at 21-22 (emphasis added).

Juror 5 noted, "he should be where he is," but on the other hand, "my heart says that's not what I would want for his life or anyone's life."[42] She agreed it would be difficult for her to sit in judgment. Therefore, the record does not support Bowman's argument.

Bowman also argues the State distorted Juror 5's statements about her nephew into a conclusion that she did believe her nephew was innocent. But the trial court clearly recognized that Juror 5 had merely stated she wanted to believe her nephew was innocent.

The State's other concerns relating to the ability to communicate with Juror 5 here do not appear to be race-based. While Juror 5's statements about the Apple commercial ultimately led to a conclusion about the importance of not being biased, the path to that conclusion was meandering. Thus, the State's difficulty in being able to track her responses was not a remark on her intelligence but rather her communication skills. And while the State's concern that Juror 5 was not being forthcoming about her job is perhaps strained, it also suggests the State was concerned about communicating well with Juror 5. We conclude the State's concerns were not on their face racially-motivated observations.

Bowman argues the amount of time spent questioning Juror 5 reveals the State was on a fishing expedition for pretextual reasons to exercise a peremptory challenge. Although Saintcalle recognized that prosecutors cannot go fishing for race-neutral

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[42] Id. at 22.

reasons for using a peremptory strike and then hide behind the legitimate reasons they do find,[43] that does not mean that merely asking follow up questions is a red flag for purposeful discrimination.

Although implicit bias in jury selection of minority jurors in the criminal setting is problematic, Bowman does not establish that the trial court applied the wrong standard or should not be entitled to deference when analyzing whether the State purposefully discriminated. The trial court had the opportunity to observe the prosecutors' demeanor, and there were no red flags suggesting racial motives as were present in State v. Cook.[44] The record supports the trial court's determination that the reasons offered by the State for exercising a peremptory challenge of Juror 5 were race-neutral.

II. New Standard

Bowman alternatively proposes an entirely new limitation on peremptory challenges exercised by the State, to be applied retroactively to his case. Although our Supreme Court in Saintcalle advocated a change to the existing Batson procedures in Washington, it has not made any such change.[45] The lead Saintcalle opinion applied Batson, leaving it as the controlling authority we must follow.[46]

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[43] Saintcalle, 178 Wn.2d at 43.

[44] 175 Wn. App. 36, 43, 312 P.3d 653.

[45] Efforts are pending to dramatically alter the standard applied to the exercise of peremptory challenges of minority panel members. We note the proposed rule would preclude the type of opening questioning made by the court here. See Proposed adoption of GR 36 cmt. 4(c), Wash. St. Reg. 16-23-014 (Nov. 2, 2016), http://lawfilesext.leg.wa.gov/law/wsr/2016/23/16-23MISC.pdf.

[46] State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009) ("It is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court.").

III. Lesser Included Offenses

Bowman next argues his counsel was ineffective for deferring to the client the decision whether to pursue lesser offenses. We disagree.

We review ineffective assistance of counsel claims de novo.[47] To prevail, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[48]

The decision not to request a lesser included offense instruction is a tactical one. "Although risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal."[49] Here, Bowman's counsel consulted with Bowman on this issue "many times in depth," advised Bowman the defense could offer the jury lesser included offense options, and acknowledged the decision not to seek lesser included offenses "could be characterized easily as a tactical decision" and "I agree with it."[50]

Defense counsel's approach is appropriate under State v. Grier:

> Even where the risk is enormous and the chance of acquittal is minimal, *it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision.* . . . [A] criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her. Thus, *assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action.*[51]

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[47] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

[48] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

[49] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

[50] RP (Dec. 9, 2014) at 5.

[51] Grier, 171 Wn.2d at 39 (emphasis added).

There is nothing in the record to suggest that defense counsel believed Bowman's decision was unreasonable in this case. And the fact that the strategy proved unsuccessful is irrelevant because "hindsight has no place in an ineffective assistance analysis."[52] Defense counsel's performance here was not deficient.

IV. Reasonable Doubt Instruction

Bowman claims the jury instruction defining "reasonable doubt" used at his trial is constitutionally defective.[53] But in State v. Lizarraga,[54] State v. Bennett,[55] and State v. Kalebaugh,[56] the use of the instruction has been affirmed. Because controlling authority approves the use of this standard instruction, we reject Bowman's claim.

V. Objections to Defense Closing Argument

Bowman next claims the trial court erred in sustaining an objection to the defense's closing argument that "*[t]he State has the burden of proving* beyond a reasonable doubt that *the homicide was not justifiable.* If you find, and keep in mind *this is all subjective,* because you have to view things from Mr. Bowman's standpoint."[57] But

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[52] Id. at 43.

[53] See 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 93 (4th ed. 2016).

[54] 191 Wn. App. 530, 567, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016).

[55] 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

[56] 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015).

[57] RP (Dec. 9, 2014) at 104 (emphasis added).

the justifiable homicide standard is not all subjective.[58] Because the defense's statement was misleading,[59] we conclude the trial court did not abuse its discretion.

We also conclude the trial court did not abuse its discretion in sustaining an objection to defense counsel's closing argument about Bowman's books:

> So I'm going to somehow arrange for Mr. Noll to have this road rage incident with me. And then he's going to go on . . . and do what the State believes he did as a student of murder. The thrill kill concept makes no sense in light of the facts. And I don't mean to be condescending because I'm not at all. . . . But if we can—*if you can focus on the facts.* The thrill kill thing makes no sense at all.
>
> If Dinh Bowman was a student of murder because he possessed this manual, and this book, he certainly did not follow the lessons, *all the lessons prescribed in those books.*[60] *Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car.*[61]

Because the portions of those books admitted into evidence did not include the lessons defense counsel listed as "prescribed in those books," the defense's argument improperly relied on information outside the record.[62]

VI. Discretionary Legal Financial Obligations

Bowman argues that the trial court imposed $665 in discretionary legal financial obligations without considering his present or future ability to pay. Based on our Supreme Court's recent decision in Blazina, which held that "RCW 10.01.160(3)

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[58] See State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (the defense of justifiable homicide includes both objective and subjective elements).

[59] See State v. Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000) (closing argument by counsel "must be restricted to the facts in evidence and the applicable law, lest the jury be confused or misled").

[60] The "books" defense counsel referenced were the two guides to committing murder found on Bowman's work computer.

[61] RP (Dec. 9, 2014) at 117 (emphasis added).

[62] See Perez-Cervantes, 141 Wn.2d at 474.

requires *the record to reflect* that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes [legal financial obligations]," we agree.[63] We remand for a hearing limited to this issue.

VII. Cumulative Error

Finally, Bowman asserts that cumulative error deprived him of a fair trial. But the cumulative error doctrine applies only when there have been several errors that standing alone, may not justify reversal, but in combination, have the effect of denying the defendant a fair trial.[64] Here, because Bowman has not shown several errors, the cumulative error doctrine does not apply.

VIII. Statement of Additional Grounds

Bowman filed a 41-page single-spaced pro se statement of additional grounds. Many of his challenges are to the sufficiency of the evidence and credibility claims. He ignores that this court reviews a sufficiency challenge viewing the record in the light most favorable to the State and that credibility determinations are for the trier of fact and not subject to review.[65] And when viewed in the light most favorable to the State, there was sufficient evidence to support his conviction.

Bowman raises several challenges to the admissibility of evidence. Bowman ignores that "[d]ecisions involving evidentiary issues lie largely within the sound discretion of the trial court."[66] He also raises several other issues related to the court's

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[63] 182 Wn.2d 827, 839, 344 P.3d 690 (2015) (emphasis added).

[64] State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012).

[65] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (the panel defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence").

[66] State v. Nava, 177 Wn. App. 272, 311 P.3d 83 (2013).

discretionary rulings, including impeachment, lack of proper foundation, and relevance. But he fails to establish that any of the challenged rulings were unreasonable or based on untenable grounds.[67]

Bowman makes several prosecutorial misconduct claims. Prosecutorial misconduct allegations are reviewed for an abuse of discretion.[68] Where a defendant fails to object to the challenged conduct, he must show that the conduct was so flagrant and ill-intentioned that a jury instruction could not have cured any resulting prejudice.[69] Bowman fails to make such a showing here.

Finally, Bowman argues ineffective assistance of counsel, but only as a general proposition.[70] He thus fails to inform the court of the nature and occurrence of counsel's alleged errors.[71] Further, he ignores that ineffective assistance claims do not relate to counsel's tactical decisions, and that this court strongly presumes counsel's conduct constituted sound trial strategy.[72] Further, if Bowman "wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition."[73]

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[67] See Falk v. Keene Corp., 53 Wn. App. 238, 247, 767 P.2d 576 (1989).

[68] State v. Thorgerson, 172 Wn.2d 438, 460, 258 P.3d 43 (2011).

[69] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

[70] Statement of Additional Grounds at 4 (arguing that "an [i]neffective [a]ssistance of [c]ounsel claim will be held for all issues of this case as the record should have been protected").

[71] RAP 10.10(c).

[72] Grier, 171 Wn.2d at 33 (quoting State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

[73] State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Accordingly, we affirm and remand to the trial court to make an individualized finding on Bowman's ability to pay the discretionary legal financial obligations.

Verellen, CJ

WE CONCUR:

Trickey, ACJ

Becker, J.

NIELSEN, BROMAN & KOCH, PLLC
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Comments:

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