SUPREME COURT NO. 99309-2
COURT OF APPEALS NO. 79734-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARLAND DECASTRO ABBOTT,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

HANNAH R. GODWIN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. INTRODUCTION

Arland Abbott seeks review of the Court of Appeals decision affirming his conviction because there were no African American jurors on his jury. He does not allege intentional discrimination in jury selection or deliberations. Nor does Abbott argue African Americans have been systematically excluded from serving on Washington juries. Instead, Abbott argues that because the presence of African American jurors generally reduces the likelihood of wrongful convictions when the defendant is African American, he was entitled to African American jurors as a matter of constitutional right. He provides no authority to support such a dramatic extension of the Sixth Amendment. And while Washington courts have long used the systematic exclusion test to evaluate claims that a defendant's jury did not comprise a fair cross section of the community, Abbott declares without authority that the traditional analysis is no longer viable.

Abbott also contends he was prejudiced by ineffective counsel. At trial, his attorney introduced a civil settlement between the victim, A.R., and their employer, Elements Massage, to support the defense's theory A.R. falsely accused Abbott for financial gain. In light of his conviction, Abbott now argues this strategy was

unwise. The record belies Abbott's argument. The settlement served as key evidence in his defense. Because the case depended on A.R.'s credibility, it was a reasonable course of action for the defense to argue A.R. had a financial motive to falsely accuse Abbott. The fact the jury failed to be persuaded does not make the strategy unreasonable.

Finally, Abbott contends the prosecutor minimized the burden of proof and that his attorney was deficient by failing to object to the prosecutor's closing argument. But the record shows that the prosecutor accurately conveyed and explained the reasonable doubt standard and properly argued that if the jury believed the complaining witness, no further evidence was needed to establish guilt beyond a reasonable doubt. Abbott fails to establish prosecutorial misconduct and ineffective assistance of counsel.

The Court of Appeals decided this case correctly. Its decision does not conflict with other Court of Appeals or Supreme Court decisions. Moreover, this case presents no substantial issue of public interest. Abbott's Petition should be denied.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

A.R. worked with Abbott as a massage therapist at Elements Massage in Bellevue. They maintained a professional relationship and did not spend time together outside of work. 3RP 424-25.

Elements gifted employees one free monthly massage. 4RP 408. About one year into her employment, A.R. scheduled her free massage with Abbott. During the massage, Abbott departed from industry practice by grabbing and massaging A.R.'s undraped buttocks with his open hand. 3RP 435-36. A.R. felt the drape slide down her chest while Abbott massaged her arm, and Abbott laughed at A.R. when she adjusted it for modesty. 3RP 442.

Toward the end of the massage, Abbott asked A.R. to turn face down for a second time so he could work on her inner thigh. 3RP 444. Abbott again strayed from standard practice and did not drape the blanket for modesty. 3RP 446-47. He then began to "scrub" her inner thigh with his knuckles "very, very hard" under the sheet onto her bare skin. 3RP 447. Abbott asked if the pressure was too much, but when A.R. said yes, he dug into her with his knuckles even harder. 3RP 449. It seemed like Abbott was angry and A.R. grew scared. 3RP 449.

At the end of the massage, as A.R. lay on her stomach, Abbott reached up between her thighs and rubbed four fingers over her underwear on her genitals for about ten seconds. 3RP 452, 454, 455. Even though the movement felt "slow and intentional," A.R. convinced herself the touch must have been inadvertent. 3RP 453, 455. After the massage, A.R. got dressed and opened the door, where she encountered Abbott again. 3RP 456. Abbott asked A.R. if she felt violated and laughed at her. 3RP 456, 457. A.R. was "dumbfounded" but still wanted to believe what happened was an accident. 3RP 457, 462.

Abbott then asked A.R. for a ride. 3RP 457. After driving him to a marijuana dispensary, a bank, and through a Starbucks drive

thru, A.R. felt increasingly uncomfortable and declined Abbott's invitation to lunch. 3RP 463-64. On the drive back to Elements, Abbott told A.R., "You know that last five minutes of the massage wasn't an accident, right?" 3RP 465. A.R. understood this to mean that Abbott had touched her genitals intentionally. 3RP 465.

After reporting the incident to the authorities, A.R. filed a lawsuit against Abbott and the owners of Elements. 3RP 487. A.R. received a settlement from Elements for $60,000. 3RP 487.

The State charged Abbott with one count of indecent liberties for knowingly causing a client to have sexual contact with him during a massage therapy session.

D. THIS COURT SHOULD DENY REVIEW

1. THE COURT OF APPEALS CORRECTLY HELD ABBOTT DID NOT DEMONSTRATE THE JURY'S COMPOSITION VIOLATED HIS CONSTITUTIONAL RIGHTS.

In his opening brief, Abbott argued the absence of African American jurors deprived him of a fair trial but did not analyze his claims under federal or state systematic exclusion caselaw. Because Abbott failed to meet his burden establishing the composition of the jury panel violated his constitutional rights, the Court of Appeals denied his claim. Abbott incorrectly asserts that

the Court of Appeals refused to hear his fair jury claim because he had not briefed the six Gunwall factors. Instead, the Court of Appeals held that Abbott failed to establish that his jury's composition violated his constitutional rights. Slip op. at 4-6.

In his Petition, Abbott still does not apply the systematic exclusion test to the facts of his case. Instead, he argues the test is outdated. But he presents no alternative analysis—under the Sixth Amendment or under the state constitution—beyond the simplistic and unsupported assertion that he is entitled to the participation of some number of African American jurors because he is an African American man. Because Abbott fails to address binding law, this Court should refuse review.

a. Relevant Facts.

The trial court ordered two separate pools of prospective jurors. 1RPVD 1; 2RPVD 69. In both rounds of jury selection, Abbott highlighted the lack of African American individuals in the jury pool but made no motion to supplement the jury or for any other remedy. 1RPVD 91; 1RP 113. Both parties formally accepted the jury as empaneled. 2RPVD 327.

b. The Court Of Appeals Correctly Applied Binding Caselaw To Abbott's Fair Cross-Section Claim.

Abbott contends the King County jury that heard his case was underrepresentative of African Americans. This claim is properly understood as a "fair cross section" claim governed by the Sixth Amendment. Duren v. Mississippi, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). "To establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Id. at 364. See also State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977).

The Court of Appeals properly rejected Abbott's claim. Abbott has made no effort to satisfy the requirements of a fair-cross-section claim and fails to show that the decision in his case conflicts with any authority from this Court. He argues a systematic exclusion analysis is no longer sufficient given what we now know

about unconscious bias but offers no persuasive authority articulating an alternative way to evaluate a fair-cross-section claim.

Consequently, Abbott presents no significant constitutional question and no resolvable issue of substantial public interest. This Court should deny review.

c. The Court Of Appeals Dismissed Abbott's Claim Because He Failed To Prove Systematic Exclusion, Not Because He Failed To Address *Gunwall*.

In his initial briefing to the Court of Appeals, Abbott asserted a right to a jury comprised of members of his race under the Washington State Constitution, but he did not argue for a separate constitutional standard under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). In reply, Abbott cited State v. Saintcalle for the proposition that a Gunwall analysis was unnecessary. 178 Wn.2d 34, 51, 309 P.3d 623 (2013), *abrogated by* City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1112 (2017). There, this Court recognized that Washington courts may "extend greater-than-federal Batson protections to defendants under the greater protection afforded under our state jury trial right[.]" Id. But Saintcalle is silent about Gunwall, which the Court of Appeals pointed out. Abbott, slip op. at 7, fn. 3 ("Saintcalle does not stand

for the proposition that state courts may expand state constitutional rights beyond a federal minimum without first conducting a Gunwall analysis."). Further, even when the state constitution has been held more protective than the federal constitution in one specific context, this only obviates the need for a Gunwall analysis in subsequent cases presenting the same issue. State v. Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Just because the state constitution is held to provide broader protection in one context does not necessarily mean that it will be found to be broader in all contexts. State v. Martin, 171 Wn.2d 521, 528, 252 P.3d 872 (2011). Because Abbott's claim differs from Saintcalle—which dealt with peremptory challenges and not the composition of the venire—he was obligated to undertake a Gunwall analysis.

Abbott is mistaken in asserting that the Court of Appeals refused to consider his claim just because he did not present a Gunwall analysis. Petition of Appellant, at 11. The court rejected his claim because Abbott did not acknowledge, let alone present, the necessary Sixth Amendment analysis to support his fair-cross-section claim. Abbott, slip op. at 5-6. While the court touched on the

fact Abbott did not argue for a separate constitutional standard under Gunwall, it did not reject his claim for that reason.

d. There Is No Issue Of Public Interest That Warrants Review.

RAP 13.4(b) allows review in circumstances where an issue of substantial public interest should be addressed by the state's high court. It is unquestionable that racial diversity on juries is a matter of substantial public interest. However, Abbott's simplistic claim that criminal defendants may not be tried unless one or more members of that defendant's race are seated on the jury does not present a significant issue that must be resolved by this Court. Indeed, the suggestion has been repeatedly and explicitly repudiated by both this Court and the United States Supreme Court. See Commonwealth of Virginia v. Rives, 100 U.S. 313, 323, 25 L. Ed. 667 (1879) ("A mixed jury…is not essential to the equal protection of the laws"); Powers v. Ohio, 499 U.S. 400, 404, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) ("[A] defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race'") (quoting Strauder v. Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)); Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) ("Defendants are not entitled

to a jury of any particular composition"); Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (reiterating there is no right to a jury that includes persons of one's own race and observing, "'[t]he number of our races and nationalities stands in the way of evolution of such a conception of the demand of equal protection'") (quoting Akins v. Texas, 325 U.S. 398, 403, 65 S. Ct. 1692, 89 L. Ed. 1692 (1945)); State v. Cienfuegos, 144 Wn.2d 222, 231, 25P.3d 1011 (2001) (while "petit juries must be drawn from a source fairly representative of the community," the Sixth Amendment "impose[s] no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population") (quoting Taylor, 419 U.S. at 538).

The State acknowledges this Court has been willing to expand protections under the state constitution as our collective understanding of various issues evolves. For example, in State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), a majority of this Court eschewed the long-standing analysis for state cruel punishment claims in favor of an alternative categorical bar analysis promoted by the defendant and amici and adopted by at least one other state's supreme court. But here, Abbott offers no alternative

analysis. Accordingly, his case presents no issue of substantial public interest that should—or even can—be resolved by this Court.

2. ABBOTT'S ATTORNEY'S DECISION TO INTRODUCE SETTLEMENT EVIDENCE WAS A REASONABLE TRIAL STRATEGY DESIGNED TO ILLUSTRATE THE VICTIM'S ALLEGED FINANCIAL INCENTIVE.

Abbott argues his attorney was ineffective by introducing evidence of the settlement between A.R. and Elements. The settlement served as key evidence in Abbott's theory of the case that A.R. falsely accused him for financial gain. The Court of Appeals correctly concluded that the introduction of the settlement was strategic and Abbott failed to prove his counsel was constitutionally ineffective. Abbott does not articulate why his claim warrants further review.

a. Relevant Facts.

The record plainly shows that counsel was aware of the lawsuit—it was he who brought it to the State's and trial court's attention. 1RP 27. Counsel also gave a reasonable explanation for eliciting this evidence, arguing that A.R.'s act of suing and receiving a settlement amount demonstrated her pursuit of financial gain. 1RP 29, 30. Furthermore, counsel contended in opening argument that money was important to understand motive. 2RP 303. Counsel

maintained this theme through to closing, where it was argued A.R. was "on the verge" of losing her job. 4RP 642. Counsel referenced the $60,000 settlement amount and stated, "[y]ou heard that there may be 60,000 reasons why somebody might make a claim, might make an allegation." 4RP 642.

b. The Court Of Appeals Correctly Held Abbott's Attorney Was Not Deficient.

To establish ineffective assistance of counsel, a defendant must prove both that 1) counsel's representation was deficient and 2) that counsel's deficient representation prejudiced the defendant. In re Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A defendant's failure to prove either prong ends the reviewing court's inquiry. State v. Wilson, 174 Wn. App. 328, 351, 298 P.3d 148 (2013).

To demonstrate deficient performance, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. In re Gomez, 180 Wn.2d 337, 356, 325 P.3d 142 (2014). Courts apply a high level of deference to defense counsel's strategic decisions. Id. Counsel is presumed to be effective, and the burden is on the defendant to prove otherwise.

Gomez, 180 Wn.2d at 347-48. The presumption of reasonable performance can be defeated only by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." In re Caldellis, 187 Wn.2d 127, 141, 385 P.3d 135 (2016) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). To establish prejudice, the defendant must show a "reasonable probability" that the proceedings would have turned out differently had counsel's unreasonable conduct not occurred. State v. Lopez, 190 Wn.2d 104, 125, 410 P.3d 1117 (2018).

In hindsight, Abbott now argues his attorney's strategy to highlight A.R.'s possible financial motive to falsely accuse him was unwise. But "this court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics.'" State v. Garratt, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (quoting State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)). Defense counsel's decision to introduce the settlement was a legitimate tactic. Although counsel originally indicated he did not believe Abbott to be a party to the lawsuit, counsel knew otherwise days before any trial testimony had begun. 1RP 139-40. Accordingly, counsel was aware that Abbott had been named in A.R.'s lawsuit when he sought to admit the settlement.

Because his case depended on A.R.'s credibility, it was reasonable and legitimate to introduce the civil settlement as evidence demonstrating a possible financial motive to falsely accuse Abbott. The fact that the jury was ultimately not persuaded does not make the strategy unreasonable.

Moreover, Abbott failed to meet his burden demonstrating a substantial likelihood the proceedings would have been different had it not been for the civil settlement evidence. A.R. provided powerful testimony to the jury explaining how Abbott repeatedly departed from massage standards, reached under the sheet to "slowly brush[] his fingers" over her genitals, laughed about the likelihood that A.R. felt "violated" by this conduct, and told her it was not an accident. This testimony was corroborated by evidence that A.R. promptly disclosed her concern that she had been assaulted during the massage to her friend and to her fiancé, reported the incident to her assistant manager the next day, and went to the police the day after that. 3RP 472-74, 477, 480, 484. A.R. candidly acknowledged that she was initially unsure whether Abbott meant to touch her genitals but became certain of the assault when Abbott told her it "wasn't an accident." 3RP 465.

Despite counsel's effort to cast A.R. as an opportunist willing to accuse an innocent man for profit, it is not surprising that the jury did not credit the defense theory. The jury evaluated A.R.'s credibility in light of the fact that she profited from a lawsuit against Elements, and evidently believed her testimony. There is no reason to think the jury would have decided otherwise had counsel performed a more searching inquiry about her lawsuit. Given the evidence in this case and the strategic importance of eliciting any evidence to show A.R. might be lying, the Court of Appeals correctly concluded Abbott established neither deficient performance nor resulting prejudice related to counsel's use of the settlement evidence in this case.

Abbott has identified nothing in this ruling that conflicts with published case law or that raises a substantial issue of public interest. There is no unique constitutional issue, and no principled reason to disagree with the Court of Appeals' decision. This Court should deny review of the ineffective assistance of counsel claim.

3. THE PROSECUTOR ARGUED THE CORRECT BURDEN OF PROOF.

Abbott also seeks review of the Court of Appeals' determination that the prosecutor's closing argument was not

improper, let alone so flagrant and ill-intentioned as to create incurable prejudice. Because the Court of Appeals correctly concluded that the prosecutor articulated the correct burden of proof and that any error would have been harmless, this Court should deny review.

To prevail on a claim of prosecutorial misconduct, the defendant must establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). To demonstrate prejudice, the defendant must prove there is a substantial likelihood the instances of misconduct affected the jury's verdict. Id. at 443. "The 'failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" Id. (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

a. Relevant Facts.

The prosecutor properly argued the criminal standard of proof as one where a reason exists and may arise from the

evidence or lack of evidence. 4RP 629. Comparatively, Abbott's closing argument focused on A.R.'s credibility and argued she purposefully made a false allegation for "60,000 reasons"—the dollar amount awarded in the civil settlement. 4RP 642. During rebuttal, the prosecutor sought to rebuild A.R.'s credibility with the jury, which included the statement now at issue:

> But if you believe her, if you believe her when she says he touched my vagina, if you believe her when she says he asked me, do you feel violated, if you believe her when she says that he told her it was just an accident –- it was not an accident, if you believe her, that is testimonial evidence and that is enough. That is different than might. *That is different than maybe. That is I believe her. This happened, and that is an abiding belief. And an abiding belief is beyond a reasonable doubt.*

4RP 652 (emphasis added).

Seventeen minutes into deliberations, the trial court called the jury back into the courtroom to amend jury instruction 8. 4RP 654. Instruction 8 set forth the elements of indecent liberties. CP 90. After listing the elements, the instruction provided that if the jury found the elements were proved beyond a reasonable doubt, then it was their duty to return a verdict of guilty. CP 90. The trial court changed this language to read "If you find from the evidence that each of the elements, (1), (2), and (3), have been proved beyond a

reasonable doubt, then it will be your duty to return a verdict of guilty." CP 90; 4RP 656-57.

The jury was excused to begin deliberations anew. 4RP 657. Five minutes later, the jury asked the court to define abiding belief. CP 76. After conferring with the parties, the court instructed the jury it received all instructions and to resume deliberations. CP 77.

b. The Court Of Appeals Correctly Held The Prosecutor Argued The Proper Standard Of Proof.

In closing argument, the prosecutor maintains "wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." Thorgerson, 172 Wn.2d at 448. Here, the prosecutor accurately conveyed and explained the reasonable doubt standard and properly argued that if the jury believed the complaining witness, no further evidence was needed to establish guilt beyond a reasonable doubt. Accordingly, the Court of Appeals determined the State did not misstate the burden of proof. Slip op. at 13.

Abbott presents no conflicting caselaw that demonstrates how the prosecutor's statements were improper. An alleged victim's testimony does not need to be corroborated in an indecent liberties case. RCW 9A.44.020(1). "The direct and positive testimony of the

complaining witness, even though uncorroborated and denied by the accused, is sufficient to present a jury question." State v. Johnson, 9 Wn. App. 766, 768, 514 P.2d 1073 (1973). Further, the Court of Appeals noted that even if the statements were improper, it would not conclude it prejudiced Abbott because Abbott did not object at trial. Slip op. at 12. Such conduct "strongly suggests" counsel did not view the comment to be critically prejudicial. Id.

Finally, Abbott's counsel was not ineffective when he did not object to the prosecutor's closing argument. The Court of Appeals correctly ruled that because the State's remarks were not improper, Abbott's ineffective assistance of counsel claim fails. Slip op. at 13.

Because Abbott does not show that the Court of Appeals erred, that its decision conflicts with any published case, presents any issue of substantial public concern, or implicates a significant question of constitutional law, this Court should deny review.

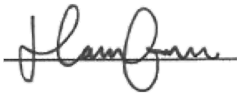
E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 5th day of January, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
HANNAH R. GODWIN, WSBA #56657
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

January 05, 2021 - 11:22 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99309-2
Appellate Court Case Title:	State of Washington v. Arland Decastro Abbott

The following documents have been uploaded:

- 993092_Answer_Reply_20210105112047SC530348_8993.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 99309-2 - States Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- james@dixoncannon.com
- jennifer.joseph@kingcounty.gov
- litigators@dixoncannon.com
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: Wynne Brame - Email: wynne.brame@kingcounty.gov
Filing on Behalf of: Hannah Rebecca Godwin - Email: hgodwin@kingcounty.gov (Alternate Email: hgodwin@kingcounty.gov)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9497

Note: The Filing Id is 20210105112047SC530348