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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 99793-4

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

TYLER BAGBY,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF THE RESPONDENT

The State, represented by Dan LeBeau, asks this Court to deny review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. RESTATEMENT OF THE ISSUES

The identity of Mr. Bagby was an issue in the trial, most of the witnesses did not know each other nor Mr. Bagby or Ms. Roberson. There is no prosecutorial misconduct that would indicate explicit bias nor a prime facie showing that the jury verdict was tainted in any way by implicit bias.

C. STATEMENT OF THE CASE

On February 4, 2018, the appellant, Tyler Bagby and his friend of 4 years, Shyla Roberson, were both students at Washington State University. RP 11/26-11/27/18, 22-23, 219,

224.¹ According to Mr. Bagby he and Ms. Roberson were close friends, they would hang out at the bars, she would do laundry at his residence, and he trusted her to look after his dog. *Id.* at 224-227. In the four years they knew each other they generally got along well and Ms. Roberson had no reason to fear Mr. Bagby. *Id.*

On the evening of February 3, 2018 Ms. Roberson joined Mr. Bagby and several of his friends and went to a fraternity party at the Sigma Pi house. *Id.* at 27, 234-35. One of the women in the group was Kailah Chrisostomo with whom Mr. Bagby had been out on several dates. *Id.* at 228. Ms. Roberson had never met Ms. Chrisostomo before that night, but understood that Ms. Chrisostomo attended the University of Idaho and likely lived in Moscow, Idaho. *Id.* at 26-27. The party was crowded and attended by as many as 200 people. *Id.*

¹ The date of the proceedings is added to the transcript references because the transcript titles are repetitive and confusing.

at 41, 52, 236. Mr. Bagby and Ms. Crisostomo split off to go dancing at one point and Shyla Roberson lost track of them. *Id.* at 27, 42, 238.

Sometime after midnight on February 4, 2018, Mr. Bagby asked Ms. Roberson to go into the bathroom to check on Ms. Chrisostomo because she had not come back in some time. *Id.* at 27, 44, 240. Ms. Roberson found Ms. Chrisostomo in a bathroom stall and Ms. Chrisostomo was hysterical, crying, and told Shyla Roberson that she didn't want to go home with Mr. Bagby. *Id.* at 28, 48. Ms. Crisostomo did not stop being hysterical the entire time that Shyla Roberson was in the bathroom stall with her. *Id.*

It should be noted that Ms. Crisostomo's behavior in the stall was likely weird for the jury. The State agreed with defense counsel not to allow testimony that Ms. Crisostomo told Ms. Roberson that Mr. Bagby had raped her, as it was highly prejudicial and would not be admissible. RP 11/16/18

and 11/26/18 at 30. Ms. Roberson would only be allowed to testify as to her observations and the fact that Ms. Crisostomo made it very clear she didn't want to go home with Mr. Bagby. *Id.* at 32. Ms. Roberson testified consistent with this at trial and that she offered to get Ms. Crisostomo home to Moscow Idaho and not see Mr. Bagby again that night. RP 11/26-11/27/18 at 28-29.

At one point while Ms. Roberson was in the stall with the hysterical Crisostomo, Mr. Bagby came to the bathroom stall and asked what was going on. *Id.* at 31. Shyla Roberson told him that "it does not look good" and that Ms. Roberson could get Ms. Crisostomo home. *Id.* Mr. Bagby continued to argue with Ms. Roberson through the stall door to let him take Ms. Crisostomo home. *Id.* at 32. However, as Ms. Roberson continued to say "no," Mr. Bagby became more aggressive, pounded on the door, shook the stall, and scared Ms. Roberson as he demanded that Ms. Roberson let out Ms. Crisostomo. *Id.*

at 32, 78. Even Mr. Bagby acknowledged he could seem aggressive as he was hitting the door. *Id.* at 243.

As Mr. Bagby pounded on the door and demanded that Ms. Crisostomo come with him, Austin Davis, Sabrina Manzo and Leann Griffith watched the events unfold. *Id.* at 59-62, 78-81, 93-98. None of those three people knew Mr. Bagby or either of the two women in the stall. *Id.* In addition, Mr. Davis did not know Ms. Griffith or Ms. Manzo and vice versa. RP 60, 63, 70, 84, 94.

Austin Davis attempted to intervene on behalf of Ms. Roberson and Ms. Crisostomo and get Mr. Bagby to leave the bathroom. *Id.* at 59-62, 78-81, 93-98. Mr. Davis was trying to be polite and friendly about it, and was not aggressive to nor did he strike Mr. Bagby. *Id.* However, still angry and aggressive, Mr. Bagby then punched Mr. Davis and knocked him to the ground and continued to punch the unconscious Mr. Davis. *Id.* Mr. Bagby was then bodily carried from the

bathroom by his friend Solomon Cooper because Mr. Bagby would not calm down and leave on his own. *Id.* at 116-17. Mr. Davis suffered a black eye, cuts, bleeding and a headache from being knocked unconscious during the assault. *Id.* at 65. Only Ms. Manzo could identify Mr. Bagby in the courtroom, Mr. Davis and Ms. Griffith could not. *Id.* at 70, 79, 84, 89, 94, 104.

Ms. Roberson didn't really hear or see the incident between Mr. Bagby and Mr. Davis because she and Crisostomo were crying in the bathroom stall. *Id.* 33. However, Ms. Roberson heard from an unknown person through the stall door that it was "ok to leave." *Id.* at 47. Ms. Roberson peaked out of the stall door, saw a man whom she didn't know unconscious on the ground, and she left the fraternity with Ms. Crisostomo and headed back to her apartment. *Id.* Ms. Roberson did not know Mr. Davis and could not identify him except as a white male. *Id.* at 33-34.

Ms. Roberson then left the fraternity with Ms.

Crisostomo and took Ms. Crisostomo to Ms. Roberson's apartment, and Ms. Crisostomo went to sleep. *Id.* at 132-162. A period of 40 minutes elapsed between the parties leaving the fraternity and Mr. Bagby then forcing his way into Roberson's apartment. *Id.*

Mr. Bagby repeatedly called and contacted Ms. Roberson through phone and social media during those 40 minutes. *Id.* at 132-136, 265-68. Mr. Bagby texted Ms. Roberson that she was an "ugly, fat, stretch mark bitch." *Id.* at 135. He then called her repeatedly, including using somebody else's phone when she stopped answering calls from Mr. Bagby's phone. *Id.* at 135-37, 161-62, RP 11/27/18, 265-68. Mr. Bagby then called Ms. Roberson and left her a voicemail telling her "when I see you I will break your fucking, because you just made me (look bad) with my friends and I'm not bullshitting with you, get a restraining order against me now, because again when I come to

you, I will fuck you up when I see you.” RP 11/26-11/27/18 at 137-40.

Ms. Roberson heard the message and was afraid of Mr. Bagby, she believed he was capable of carrying out this threat so she locked her door and windows. *Id.* at 134, 140-41.

Approximately 10 minutes after the voicemail Mr. Bagby showed up at Ms. Roberson’s apartment. *Id.* 140-41. Mr. Bagby started banging on her door, and when Ms. Roberson asked “who is it” he didn’t answer but forced the door open. *Id.* at 141-42. Mr. Bagby then went to the couch where Ms. Crisostomo was sleeping and began yelling in her face. *Id.* at 143. The entire time Ms. Roberson was yelling for Mr. Bagby to get out and began dialing 911. *Id.* During the 911 call, Ms. Crisostomo ran into Ms. Roberson’s bedroom and locked the door. *Id.* at 144.

Rebecca Nelson and Daniel Robinette went to Ms. Roberson’s apartment because they had both heard a woman

yelling and screaming and were concerned about what was going on. *Id.* at 146, 179-81, 187-90. Ms. Nelson was passing by on the way to a friend's residence when she heard Ms. Roberson screaming and yelling from her basement apartment. *Id.* at 180. Ms. Nelson saw a man she did not know (later identified as Mr. Robinette) standing outside. *Id.* Ms. Nelson was asked about Mr. Robinette's gender, ethnicity and height, to which she responded "male," "white" and of "average height," and she testified just prior to Mr. Robinette. *Id.*

Mr. Robinette lived in the apartment above Ms. Roberson and heard Ms. Roberson screaming even though he had his doors and windows closed. *Id.* at 189. Mr. Robinette came outside to see what was going on and was standing there when Ms. Nelson came by, and together the two strangers entered Ms. Roberson's apartment because they were afraid for Ms. Roberson based on the screaming. *Id.* at 179-81, 189-90. Ms. Nelson and Mr. Robinette did not know each other nor Ms.

Roberson, Ms. Chrisostomo, or Mr. Bagby. *Id.* at 180-83, 190-91. Mr. Robinette did identify the genders of the people in the room, but not the color of their skin or their ethnicity. *Id.* at 190-91. Ms. Nelson and Mr. Robinette could identify Mr. Bagby in the courtroom and were never asked about his ethnicity or skin color, or any other identifying information of Mr. Bagby. *Id.* at 178-93.

Ms. Nelson and Mr. Robinette tried to get Mr. Bagby to leave, and during this short interaction officers from the Pullman Police Department arrived and escorted Mr. Bagby out and the events came to an end. *Id.* at 147, 179-81, 187-90, 198, 206. Officer Emerson from the Pullman Police Department was one of the officers on scene and could identify and connect all the witnesses and parties to the incident at Ms. Roberson's apartment. *Id.* at 185, 192, 198.

The cross examination of Mr. Davis by Mr. Bagby's attorney was the first time that Mr. Bagby's race was referred to

during the evidence portion of the trial. *Id.* at 71. Mr. Bagby's race was not brought up by the State during Ms. Roberson's testimony because she knew him, nor during Mr. Davis' testimony even though Mr. Davis could not identify the defendant. RP 22-75, 132-78. However, defense counsel asked Mr. Davis if the person(s) standing outside the stall with the two women in it were "...African American, or were they white?" *Id.* at 73. Mr. Davis responded that they were African American. *Id.* Mr. Davis could not describe the clothing or anything else about the person (Mr. Bagby) outside of the stall. *Id.* Defense counsel asked Mr. Davis if there were "any other black people in the bathroom" and Mr. Davis replied that he did not know *Id.*

It was only during the testimony of Ms. Manzo and Ms. Griffith that race was brought up by both counsel in regards to Mr. Bagby and Mr. Davis during direct and cross-exam questioning. *Id.* at 75-107. This is because neither woman knew

Mr. Davis, Mr. Bagby, or Ms. Roberson. *Id.* at 70, 79, 84, 89, 94, 104. Several times defense counsel referred to Mr. Davis as “the guy with red hair.” *Id.* at 89, 104. Defense counsel even says “I wish I had a better word to describe him.” *Id.* at 89. Ms. Roberson was referred to as Asian, or having darker skin. *Id.* at 79.

The State rested after the testimony of officer Harris and then Mr. Bagby testified. *Id.* at 209, 218. Mr. Bagby’s direct testimony discussed his friendship with Ms. Roberson. Mr. Bagby described how they hung out with friends, went out drinking and that she would do laundry at his house. *Id.* at 222-28. Mr. Bagby further discussed on direct examination how he and Ms. Roberson were close friends because he would also let her watch his dog, Poseidon. *Id.* at 227, 234. When discussing the fraternity party at the Sigma Pi house, Mr. Bagby discussed how he was recognized as Poseidon’s owner and further described Poseidon for the jury, and again reiterated how he had

never had fights with Ms. Roberson before and had instilled a lot of trust in her. *Id.* at 234-35.

During cross examination the deputy prosecutor did ask Mr. Bagby about his dog in the context of Ms. Roberson, just as defense counsel did, pointing out that Mr. Bagby loved and cared for the very dog he trusted Ms. Roberson to care for. RP 11/27/18 at 261-62. Closing arguments from the State and Mr. Bagby's counsel referred to the trust he put in Ms. Roberson specific to his dog Poseidon, twice for the defense and three times for the state. *Id.* at 323, 331, 349, 354.

At no point during opening statement nor closing argument did the State make reference to any person's color of skin, nationality or ethnicity. RP 11/26-11/27/2018 at 9-17, RP 11/27/18 at 306-27, 349-61.

D. ARGUMENT

Mr. Bagby was not deprived of a fair trial because no explicit racial stereotypes were used by the State at trial and there is no prima facie showing that implicit bias played a factor in regards to the jury verdict.

Defendants are among the people that a prosecutor represents, and a prosecutor who intentionally seeks to secure a conviction by resorting to racist arguments violates the constitutional promise of an impartial jury trial. *State v. Monday*, 171 Wash.2d 667, 676, 680 (2011). “[R]esorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system” that it does not need to be explained. *Id.* “[A]ppeals to racial prejudices cannot be minimized or easily rationalized as harmless.” *Id.* Therefore, when a prosecutor intentionally resorts to racist arguments the test is constitutional harmless error. *Id.* Under the constitutional harmless error standard a conviction will be vacated unless the misconduct did not affect the verdict beyond a reasonable doubt. *Id.*

In *Monday*, the prosecutor vouched for the credibility of the State’s case during opening statement and was admonished

by the Court not to do so, and further admonished not to give personal views on the credibility of the case or the guilt of any person. *Id.* at 671. Despite the admonishment, during trial the prosecutor also used the term “po-leese” when examining an African American witness, and referred to a code that “black folk don’t testify against black folk” both during examination of that witness and in closing argument. *Id.* at 671-74. This Court held that “appeals to racial prejudice cannot be minimized or easily rationalized as harmless” unless they pass the constitutional harmless error doctrine. *Id.* at 680. In order to make this determination the Court will examine the conduct of the prosecutor “in the full trial context, including the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* at 675, *Citing and quoting State v. McKenzie*, 157 Wash.2d 44, 52 (2006).

Mr. Bagby argues in his petition that the State explicitly resorted to racial arguments when asking for identity traits of the witnesses, including color of skin, because “almost every witness knew Mr. Bagby” and also because “Mr. Bagby did not contest his identity.” Brief of Petitioner (BOP) 14. However, in the full context of the trial, questions from defense counsel, and opening statement and closing argument, it can be seen that the prosecutor did not resort to racist arguments. The citation in the BOP to every witness knowing Mr. Bagby is inaccurate. The extensive record clearly shows that very few of the witnesses knew Mr. Bagby, Ms. Roberson, or even any of the other people who testified at trial. In addition, Mr. Bagby, for obvious reasons, didn’t testify until after the State rested. The State needed to prove identity beyond a reasonable doubt and could not rely on Mr. Bagby to provide that information.

“To establish guilt in a criminal case, the State must prove ... the defendant's identity, and any statutory elements of

a charged crime beyond a reasonable doubt in order to sustain a conviction.” *State v. Cardenas-Flores*, 189 Wash.2d 243, 274 (2017), citing *City of Bremerton v. Corbett*, 106 Wash.2d 569, 573-74 (1986). The defendant can’t be forced to testify against himself. Wash. Const. art. 1 § 9. Therefore, in order for the State to prove identity, the State can’t rely on the testimony of the defendant.

The identity of Mr. Bagby, as well as witnesses that interacted with each other on February 4, 2018, was very much an issue in the case at bar. There were two incidents where Mr. Bagby was charged with crimes, the incident at the fraternity house, and the incident at Ms. Roberson’s apartment.

Regarding the witnesses that testified about the events at the fraternity house, only Mr. Bagby, Mr. Cooper and Ms. Roberson knew each other. RP 11/26-11/27/18, 22-23, 108-10, 219, 224. Austin Davis, Sabrina Manzo and Leann Griffith were all witnesses to the assault on Mr. Davis, but Sabrina

Manzo and Leann Griffith did *not* know Mr. Bagby, Ms. Roberson, or Mr. Davis. *Id.* at 59-62, 78-81, 93-98. Mr. Davis could not recognize *any* of the other people who were present in the bathroom of the fraternity on February 4th, including Ms. Manzo and Ms. Griffith, even though they helped him out after the assault. *Id.* at 63. Further, Mr. Davis could not identify Mr. Bagby in the Courtroom at trial. *Id.* at 58. Through the State's first two witnesses, Ms. Roberson and Mr. Davis, the State did not ask one question about Mr. Bagby's nationality, color, or ethnicity, despite Mr. Davis having no ability to identify Mr. Bagby. *Id.* at 22-38, 48-69, 73-75. The State did elicit from Ms. Roberson that a white male was lying on the ground after she heard the altercation between Mr. Davis and Mr. Bagby because that was the best she could do since she crying and hiding within the stall. *Id.* at 33-34.

Defense counsel was the first person to address the fact that Mr. Bagby was African American and/or black while cross-

examining Mr. Davis. *Id.* at 71, 73. The issue of color of skin did come up during both direct and cross-examination of Sabrina Manzo and Leann Griffith. Ms. Manzo didn't know Mr. Bagby, Mr. Davis nor Ms. Roberson. *Id.* at 84. The State inquired of Ms. Manzo about Ms. Roberson by asking about her ethnicity, to which Ms. Manzo replied "[s]he looked to be Asian," and having darker skin. *Id.* at (79). The State then asked about the nationality of Mr. Bagby, to which she replied "[h]e was African American." *Id.* Finally, the state asked about the nationality of Mr. Davis, to which the witness replied "[h]e looked white," and tall and thin *Id.* at 80.

Likewise, with Ms. Griffith, the State did ask about the nationality of Mr. Bagby, then corrected and asked about ethnicity, to which Ms. Griffith replied "[h]e was black, I think." *Id.* at 94. Ms. Griffith could not identify Mr. Bagby in the Courtroom during trial. *Id.* at 95. She also, at the State's request, did identify Mr. Davis as a tall, thin white male. *Id.* at

95. Again, defense counsel addressed his client as the black guy, and Mr. Davis as the guy with red hair. *Id.* at 102-104.

Regarding the incident at Ms. Roberson's apartment, Ms. Nelson and Mr. Robinette did observe part of the confrontation after Mr. Bagby entered into her apartment. *Id.* at 178-94. Both witnesses could identify Mr. Bagby in the courtroom, and no questions were asked of them about any identifying information for Mr. Bagby, nor his color of skin or ethnicity. *Id.* at 182, 191. Finally, the State also did not ask any such questions of the Pullman Police Department officers who testified.

The State concedes that "nationality" was the wrong word to use and was clearly an error. However, there is no evidence it was an intentional use of the word in order to slander Mr. Bagby or discredit him based on the color of his skin. The term nationality never appeared in opening statement of closing argument, and the term was used three times during the testimony of Ms. Manzo to describe the color of skin of Mr.

Bagby, Mr. Davis, and two other “white” men in the bathroom. The term was corrected from nationality to ethnicity once during the testimony of Ms. Griffith, though the term ethnicity would also be incorrect. However, the witnesses seemed to understand the question all four times as their answer went directly to color of skin. Defense did not object to the use of the word nationality and clearly struggled to identify and keep straight the participants these two witnesses and Mr. Davis testified to. *Id.* at 86, 88, 102-04. Regarding the testimony of both Ms. Griffith and Ms. Manzo, both parties were trying to establish a picture of who the players were. The State had to piece together the identification of Mr. Bagby as the assailant of Mr. Davis since Mr. Davis, Ms. Roberson, and Ms. Griffith could not identify who did it on their own.

Identity was an issue the State had to prove beyond a reasonable doubt, the questions the State and defense counsel asked were not inappropriate considering the witnesses had

little or no knowledge of each other, and the use of the word “nationality” was awkward and error, but not intentionally used to prejudice the jury.

Mr. Bagby also claims that the State focused inappropriately on stereotypes regarding Mr. Bagby’s dog ownership and in referring to Mr. Bagby as dangerous while a woman was trapped in a bathroom stall. BOP at 16-17. However, this is inaccurate and the questions from the State make sense in the context of the full trial.

Regarding Mr. Bagby’s size, at the time of the questioning it was early in the testimony of Ms. Roberson. Ms. Roberson had already stated how they had been friends for some time and that she had no problems with Mr. Bagby prior to the incident in the bathroom where she had gotten scared. RP 1126-11/27/2018 at 33. The State logically inquired why she was scared and she responded that Mr. Bagby worked out at the gym so he was bigger than her, and that he was getting more

aggressive as the bathroom incident continued. *Id.* The state had to prove Ms. Roberson had a reasonable fear the later threats would be carried out, and both incidents occurred within the span of an hour, it was a logical conclusion to draw. Petitioner argues that at no time did Mr. Bagby try to break into the stall, however his actions caught the attention of 4 witnesses; Roberson, Davis, Manzo and Griffith. *Id.* at 32-33, 59-62, 78, 93-94.

Regarding Mr. Bagby's dog, his direct testimony opened the defense's case in chief. Mr. Bagby discussed his close friendship with Ms. Roberson and used the example that he would let her watch his dog, Poseidon. RP 11/26-11/27/18 at 227, 234. Mr. Bagby went into this issue regarding his dog more than once on direct examination and reiterated how he had instilled a lot of trust in Ms. Roberson. *Id.* at 234-35.

During cross examination the State opened by asking about the friendship between Mr. Bagby and Ms. Roberson, and

as part of that questioning pointed out that Mr. Bagby loved and cared for the very dog he trusted Ms. Roberson to care for. RP 11/27/18 at 261-62.

The reference to the dog as a basis of trust came into the arguments for both the State and Mr. Bagby's attorney. *Id.* at 307, 323, 331, 349. Both sides were trying to explain why Ms. Roberson was being so protective of Ms. Crisostomo even though Roberson was good friends with Mr. Bagby and barely knew Ms. Crisostomo. *Id.* at 306-61. While both counsel knew about the rape allegation Ms. Crisostomo stated during the incident, the jury didn't know about it and both counsel tried to address this in their respective arguments. RP 11/16/18 & 11/26/18, 30, 32, RP 11/27/18, 306-349. Defense counsel argued that Ms. Roberson was untrustworthy and acting weird despite the years of friendship and the care of Mr. Bagby's dog. RP 327-49. Defense counsel was alleging that Ms. Roberson's conduct in the bathroom was so out-of-place that her testimony

left room for reasonable doubt. *Id.* Defense counsel included the fact that Mr. Bagby let Ms. Roberson care for Poseidon to emphasize this point. *Id.*

The State's argument was that Mr. Bagby cared for and trusted Ms. Roberson enough to watch his beloved dog, but his anger and perhaps alcohol use on February 4, 2018 overcame that trust and he intentionally assaulted Mr. Davis, and committed Residential Burglary and Harassment.. *Id.* at 306-27, 349-61. The State specifically said in closing argument that Mr. Bagby "trusted her (Roberson), he trusted her to watch his dog." *Id.* at 323. Further, the State emphasized that Ms. Roberson had previously felt safe around Mr. Bagby, but the message he left her on voicemail gave her a reasonable fear that he would assault her when he arrived despite the trust they previously shared. *Id.* at 277, 282, 315, 349, 354, 358. The State again referred to her watching his dog in rebuttal closing. *Id.* at

Both parties referred to race or color of skin, along with gender, height and weight, only when identity was an issue. The State did not ask inappropriate questions about Mr. Bagby's dog or his physical size. All questions asked and arguments made were in support of the fact that the State had to prove every element of every crime beyond a reasonable doubt. The vast majority of witnesses were not asked about Mr. Bagby's skin color because they could identify him in the courtroom.

The State did not make any reference to any person's color of skin, nationality or ethnicity during opening statement or closing argument. RP 11/26-11/27/2018 at 9-17, RP 11/27/18 at 306-27, 349-61. The State acknowledged that Mr. Bagby's actions on February 4 may have been out of character and fueled by alcohol but that he still had to be held accountable for those actions. RP 11/27/18 at 319. Further, the State referred to Mr. Bagby as "the gentleman" that committed the alleged acts 9 times during examination of witnesses and

closing argument. RP 11/26-11/27/18 at 23, 58, 60, 67, 68, 79, 99, 100, RP 11/27/18 at 308. The State also referred to the other male witnesses as gentleman, this included Mr. Cooper, Mr. Davis and Mr. Robinette. RP 11/26-11/27/2018 at 11-12, 16, 80, 83, 99, 100. Every time the State referred to a male as “the gentleman it was because the witness was not acquainted with the male they were talking about.

Based on the total circumstances of the trial, opening statements, closing argument, issues, crimes charged, and questions asked as well as how they were asked, the State did not intentionally seek to secure a conviction by resorting to racist arguments. There was no explicit racial bias in Mr. Bagby’s trial.

“[I]dentifying the influence of ... implicit bias ... presents unique challenges. *State v. Berhe*, 193 Wash.2d 647, 657 (2019). “[I]mplicit racial bias exists at the unconscious level, where it can influence our decisions without our

awareness” and the “biased person is unlikely to be aware that it even exists.” *Id.* at 658, 663. In *Behre*, the had been only one African American juror serving on the jury, that juror came forward and stated that she experienced racial bias directed at her during deliberations. *Id.* at 651-54. The trial court failed to properly control proceedings and conduct a hearing on the matter, and the case was sent back in order for that hearing to occur. *Id.* at 661-62. This Court held that if there is a prima facie showing that race was a factor in the verdict the trial court must conduct an evidentiary hearing. *Id.* at 665. “A ‘prima facie showing’ is defined ... as ... ‘evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.’” *Id.*

There is no doubt the appellant and his counsel, Mr. Collins, were aware of the possibility of implicit racial bias. The appellant’s counsel raised the issue during voir dire. RP 11/16/18 & 11/26/18, 97. Mr. Collins specifically asked all the

jurors if there was anybody there who thought it was more likely for an African American to commit a crime, and received no response that there was. *Id.* No person came forward after the trial and alleged any discrimination against Mr. Bagby had occurred during deliberations. While it is possible no juror was brave enough to respond, it is also demonstrative that had the State been stepping over that line in trial Mr. Collins would have raised the issue with the trial court. No such issue was raised. No objections to any questions with regard to race. No issues raised by a juror or any other participant that race may be part of the verdict reached. There is no prima facie showing that discrimination based on race occurred in Mr. Bagby's trial.

E. CONCLUSION

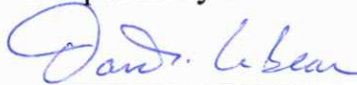
Explicit and Implicit bias exists, the State is not contesting this. But the State did not explicitly use bias in this case and there is no prima facie showing that discrimination

was a factor in the verdict. The State respectfully requests that this court deny the petition for review.

This document contains 4894 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 5th day of October, 2021.

Respectfully Submitted,



Daniel F. LeBeau,
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WHITMAN COUNTY PROSECUTOR'S OFFICE

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Transmittal Information

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