99950-3

NO. 37491-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DONALD LUCUS PRICHARD,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Donald Lucas Prichard requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Prichard seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated June 15, 2021. (Appendix "A" 1-17)

3. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that the State presented sufficient evidence of an assault involving A.S.W.?

2. Is the Court of Appeals analysis of Mr. Prichard's GR 37 challenge in accord with existing caselaw?

4. STATEMENT OF THE CASE

ISSUE 1:

On October 8, 2017 a white SUV stopped in front of 2423 N. Wiscomb, in Spokane. It was playing loud music. Multiple shots were fired at the duplex where Norris Cooley lived. Mr. Cooley resided at the Wiscomb address with Elizabeth Fisher and her two children- K.A.B. and A.S.W. (Cochran RP 96, ll. 21-24; RP 99, ll. 10-12; RP 100, ll. 1-16; RP 103, ll. 24 to RP 104, l. 10; RP 105, l. 16 to RP 106, l. 7; RP 109, ll. 5-13; RP 116, ll. 17-25; RP 118, ll. 20-24; RP 128, l. 7; Ex. P-87A)

Mr. Cooley, Ms. Fisher, K.A.B. and A.S.W. were all inside the home when the shots were fired. Mr. Cooley and Ms. Fisher were in the living room. They immediately dove to the floor. K.A.B. and A.S.W. were in their respective bedrooms. (RP 128, ll. 5-13; RP 129, ll. 20-25; RP 130, ll. 1-16)

K.A.B. described hearing yelling and loud bangs while he was in his bedroom. He went to the living room and saw his mother and Mr. Cooley on the floor. He also observed a broken picture frame and a hole in the television. (Cochran RP 112, ll. 18-22; RP 113, ll. 7-12; ll. 19-20)

A.S.W., who was also in her bedroom at the time the shooting occurred, went to the living room. She saw that the screen door and TV were shattered; there were holes in the walls; and there was a hole in the pillow where he mom usually lay on the couch. She also saw a white SUV leaving. (Cochran RP 121, ll. 7-24)

The Court of Appeals characterizes A.S.W.'s testimony as follows:

> … According to A.S.W., she was walking toward the living room while shots were being fired. A.S.W. was able to see Mr. Prichard's white SUV. She agreed with the prosecutor that she "could have been dead" as a result of the shooting. (1 RP February 26, 2020 at 123) While thin, A.S.W.'s testimony was sufficient to permit a reasonable inference that she saw the shooting as it was happening and feared for her life.

ISSUE 2:

During the course of jury *voir dire* Mr. Prichard exercised a peremptory challenge against Juror No. 9. The State opposed the challenge. Juror No. 9 was seated. Mr. Prichard filed a motion for mistrial. (CP 397; CP 516; Blocher RP 4, l. 15 to RP 5, l. 18; RP 15, l. 6 to RP 16, l. 3)

The trial court denied the motion. In doing so the Court indicated that even if the motion was granted a mistrial would not be appropriate because an alternate juror could replace Juror No. 9. (Blocher RP 4, l. 15 to RP 5, l. 18; RP 8, l. 16 to RP 12, l. 22; RP 16, l. 16 to RP 17, l. 23)

The Court of Appeals relies upon *Rivera v. Illinois*, 556 U.S. 148, 158, 129 S. Ct. 1446, 173 L. Ed.2d 320 (2009) and *Personal Restraint of Meredith*, 191 Wn.2d 300, 311-12, 422 P.3d 458 (2018) in support of its denial of Mr. Prichard's GR 37 argument.

Mr. Prichard more fully discusses the cases in the argument portion of this petition.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

ISSUE 1:

> …[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury is properly instructed, but to determine whether the record evidence could reasonably support *a finding of guilt beyond*

> *a reasonable doubt. Jackson v. Virginia*, 433 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979). This inquiry does not require the reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*." *Jackson v. Virginia*, *supra* at 319 (*Italics ours.)*

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The significant aspects of A.S.W.'s testimony follows:

> Q. Okay. Was your brother in the living room, or was he in – another room?
>
> A. Other room.
>
> Q. Okay. So about how long were you in the living room?
>
> A. Umm, 20 minutes, probably the amount of time that they were outside.
>
> Q. Okay. So at that point what happened next?
>
> A. I went to my room. And probably a good hour went by, and that's when the shooting happened.

Q. Okay. So are you sure about the time? Could it be more or less?

A. It could have been more or less, yes. I mean –

Q. Okay. Just seemed like –

A. Yes.

Q. – that amount of time?

So you say the shooting occurred. Tell the jury specifically what you heard and saw.

A. I was in my room, and I was coming out of my room because I heard the shots. I looked out the window and I seen the white Blazer, I think it was, with four doors and the black tire on the back driving off toward Yoke's.

(Cochran RP 119, l. 12 to RP 120, l. 7)

There is no indication in the record as to where A.S.W.'s bedroom was located in the house.

There is no indication in the record that any of the shots fired into the house went into A.S.W.'s bedroom.

There is no indication in the record that A.S.W. entered the living room while the shots were occurring.

Rather, the following exchange occurred at trial:

> Q. What – when you say there was a shooting, what did you observe in your living room?
>
> A. Umm, well, **I wasn't in the living room** for the shooting. **I was in my room**. But I started walking toward the living room when the shots were happening and then after we called the cops again and then, yeah.
>
> Q. Okay. So when you walked in the room, where was Norris Cooley?
>
> A. He was getting up off the floor?
>
> Q. Where was your mother?
>
> A. Getting up off the floor.

(Cochran RP 121, ll. 6-16) (Emphasis supplied.)

In the absence of any information concerning the physical layout of the residence it is pure speculation on the part of the jury, and the Court of Appeals, as to where A.S.W. was actually located at the time the shooting occurred. She indicates she was in her bedroom when it began. She then

says she left her bedroom and headed toward the living room. Shots may or may not have been occurring while she was doing so.

Nevertheless, the record seems to be clear that the shooting was over prior to her arriving in the living room. Her mother and Mr. Cooley were getting up off the floor at that time. This would indicate that the shots had ceased. When A.S.W.'s testimony is compared to her brother's testimony, Mr. Prichard asserts that this is the only reasonable conclusion to be drawn. K.A.B. testified as follows:

> Q. All right. So did anything else happen that evening?
>
> A. Well, yes. About – I don't know exactly how long, felt like an hour or so, but came back and all I heard was yelling and then immediately the shots. I didn't know they were shots at first. They were just loud bangs. And I heard yelling, so I didn't know.
>
> Q. Who'd you hear yelling?
>
> A. The same two same dudes I heard yelling before.
>
> Q. So you heard – okay. So you heard yelling outside the house?

A. Yeah, I thought it was outside the house.

Q. Okay. And then you heard loud banging?

A. Yes.

Q. Correct? What did you do next?

A. Well, I kind of sat there. I was like what could that be? And then I got up to see what was going on.

Q. Okay.

A. And then I went out into the living room.

Q. And what did you observe when you got in the living room?

A. My mom was on the floor. R.C. was on the floor and there were – they said that they had just --

(Cochran RP 112, l. 17 to RP 113, l. 12)

The only other evidence in the record derives from the prosecuting attorney's leading question to A.S.W. which was without objection. The exchange follows:

Q. Okay, thank you. One final question. You feel like you're lucky to be here today?

A. Yeah.

Q. You could have been dead, right?

A. Yeah.

(Cochran RP 123, ll. 3-7)

State v. Austin, 59 Wn. App. 186, 192-93, 796 P.2d 746 (1990) sets out in detail what must be considered under the facts and circumstances of a case similar to Mr. Prichard's case. There

> [t]he court quoted with approval the following language from W. LAFAVE & A. SCOTT, *Criminal Law* 611 (1972), which indicates that under such circumstances the State is required to prove an actual intent to cause apprehension.
>
> > It is sometimes stated that **this type of assault is committed by an act (or by an unlawful act) which reasonably causes another to fear immediate bodily harm**. This statement is not quite accurate, however, for one cannot (in those jurisdictions which have extended the tort concept of assault to criminal assault) commit a criminal assault by negligently or even recklessly or illegally acting in such a way (as with a gun or a car) as to cause another person to become apprehensive of being struck. **There must be an actual intention to cause apprehension, unless there exists the morally worse intention to cause bodily harm**.

(Emphasis supplied.)

The record is clear that the shooting was directed at the residence. Based upon the incident occurring prior to the shooting the shooters knew that Mr. Cooley was probably inside the residence.

The record does not reflect that either Mr. Prichard or Mr. Cooper had any knowledge of the presence of A.S.W. or K.A.B.

> … [U]nder the common law "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *Byrd* [*State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995)] at 713.
> …
> … We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *Goodman* [*State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004)] at 781. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 883 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

State v. Abuan, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011).

As already stated, A.S.W. and K.A.B. were in their respective bedrooms. K.A.B. did not know a shooting had occurred until he walked into the living room. A.S.W. knew they were shots and went to investigate. The shooting had ended by the time she got to the living room.

It is only through the prosecuting attorney's use of leading questions that the fear of death was introduced.

> The principal test of a leading question is: does it suggest the answer desired? In order to elicit the facts, a trial lawyer may find it necessary to direct the attention of a witness to the specific matter concerning which his testimony is desired, and, **if the question does not suggest the answer, it is not leading. Even though the question may call for a yes or a no answer, it is not leading for that reason, unless it is so worded that, by permitting the witness to answer yes or no, he would be testifying in the language of the interrogator rather than in his own.**

State v. Scott, 20 Wn.(2d) 696, 698-99, 149 P.(2d) 152 (1944). (Emphasis supplied.)

The prosecuting attorney's questions gave the answer. The prosecuting attorney was testifying; not the witness.

The particular exchanges directly implicate the apprehension of fear alternative of assault.

As announced in *State v. Crow,* 8 Wn. App.2d 480, 508, 438 P.3d 541 (2019)

> … [o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Johnston,* 143 Wn. App. 1, 19, 177 .3d 1127 (2007).

The particular testimony was critical to the State's case. It constituted an element of the offense. The prosecutor testified to that element as opposed to the witness. The prosecutor had to pry the desired answer from the witness.

Since the questions included the answers that were critical to an element of the offense they were highly prejudicial to Mr. Prichard.

Finally, in support of this portion of Mr. Prichard's argument is the case of *State v. Bland,* 71 Wn. App. 345, 356, 860 P.2d 1046 (1993) where the Court stated:

> Neither side cites to any case law where fear and apprehension *after* the fact was held to be sufficient to find an assault. Nor does our research unearth any cases so holding. *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 106 (1976) defines apprehension as worry and fear about the *future;* a *pre*sentiment of danger. **Neither have we found any case law stating that the fear and apprehension element can be transferred *along with* the intent element to fulfill the elements of assault**. Thus, any fear and apprehension experienced by Jefferson as a result of being shot at cannot be transferred to Carrington. In sum, the "fear and apprehension" alternative means fails here.

(Emphasis supplied.)

ISSUE 2:

Personal Restraint of Meredith, *supra*, declares:

> As *Rivera* [*supra*] recognized, "it is up to individual states to decide whether such errors [wrongly denying preemptory challenges] deprive a tribunal of its lawful authority and thus require automatic reversal." *Rivera*, 556 U.S. at 161-62.

GR 37 is a rule that implicates a plethora of land mines for conducting voir dire including exercising challenges for cause and preemptory challenges. It is a developing area of the law.

Mr. Prichard raised the GR 37 issue in his Additional Statement of Grounds. The Court of Appeals, as did the trial court, found that no violation of the rule occurred.

It is undisputed that juror number 9 is a racial minority. Mr. Prichard was charged with one count of malicious harassment involving Mr. Cooley, a black man. Juror number 9 is a black woman. Mr. Prichard is a white man. He is an obvious racist.

It is in this context that he asks you to review the GR 37 analysis.

> "Since 1879, the United States Supreme Court has recognized that race discrimination in the selection of jurors violates the Fourteenth Amendment's guaranty of protection." [*State v. Saint Calle*, 178 Wn.2d 34, 43, 309 P.3d 326 (2013)] … However, various tests that were used to identify and eliminate racial

> discrimination in jury selection proved ineffective because such tasks were "equipped to root out only '*purposeful*' discrimination, which many trial courts probably understand to mean conscious discrimination. *Id.* at 38…. As a result, even though it has been empirically proved that preemptory challenges are routinely exercised in a racially unequal manner, it is exceedingly rare for appellate courts to reverse convictions on that basis. *Id.* at 44-46.
>
> To address this ongoing problem, we adopted a GR 37, which goes beyond forbidding purposeful discrimination in jury selection by addressing the influence of implicit racial bias. Rather than requiring a showing of purposeful discrimination, GR 37 (e) provides, "If the Court determines that an objective observer could view race or ethnicity as a factor in the use of [a] preemptory challenge, then the preemptory challenge shall be denied." In addition, "[f]or purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37 (f).

State v. Beerhe, 193 Wn.2d 647, 664-65, 444 P.3d 1172 (2019).

Due process requires that a criminal defendant receive a fair and impartial trial. This requires that the composition of a jury also be fair and impartial.

Const. art I, §§ 3 and 22 additionally support these concepts.

"GR 37 provides no guidance as to an appellate court's standard of review." *State v. Omar*, 12 Wn. App.2d 747, 750, 460 P.3d 225 (2020).

The *Omar* court went on to declare that a GR 37 review is a de novo review. In doing so, the Court staed at 751, n.6 that the decision in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018) was a plurality opinion and not binding.

Nevertheless, the *Omar* Court proceeded to apply GR 37.

The *Omar* Court's analysis of the challenge, at 753, reflects the inherent difficulties that defense counsel face when, based upon their experience and observations of the responding juror, it becomes apparent there is an uneasiness which makes it tantamount to undermining their ability to select a fair and impartial jury.

QUERY: Would any criminal defendant charged with malicious harassment of a minority consider that a juror of that same minority could be fair juror?

As set out in *State v. Listoe*, 15 Wn. App. 2d 308, 324 (2020)

> … GR 37 represents a sweeping change that focuses instead on the prospective of an objective observer who is presumed to be aware that implicit, institutional, and unconscious bias, as well as purposeful discrimination, have all contributed to the unfair exclusion of jurors. In light of the totality of the circumstances and in consideration of GR 37's purpose of creating a more scrupulous approach

> to eliminating the unfair exclusion of jurors on the basis of implicit or unconscious bias….

A trial court must balance the defendant's due process right to a fair trial with a potential juror's right to protection from racial discrimination.

Recently, Division III of the Court of Appeals issued an opinion, "published in part." *State v. Lahman, slip opinion* 37092-5-III (June 15, 2021). The Court reversed Mr. Lahman's conviction pursuant to a GR 37 violation by the State in exercising a preemptory challenge. (Appendix "B," pages 1-18)

The Court stated at p.6:

> In addition to enforcing juror qualification standards and challenges for cause, **parties may** use "peremptory challenges" to **strike a** limited **number of otherwise qualified jurors from the venire for no stated reason.** *See* RCW 4.44.130-140; CrR 6.4 (e). **The justification of peremptory strikes is that trial attorneys have instincts about which jurors will be best for their case.** Peremptory challenges enable parties to rely on their instincts and experiences to select a jury that they think will be best for their case.
>
> Not surprisingly, the use of instincts to render judgment about other people's thought processes and beliefs have historically opened the door to implicit and explicit bias. The parties and the jurors themselves have the right to a trial process free from discrimination. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 411 (1991).

(Emphasis supplied.)

GR 37 (g) lists five nonexclusive circumstances relevant to the assessment of whether or not a peremptory challenge is based on bias. Mr. Prichard asserts that only GR 37 (g)(iv) has any application to the challenge.

GR 37 (h) also sets out seven specific presumptively invalid justifications. None of those seven are applicable under the facts and circumstances of Mr. Prichard's case.

As in Mr. Prichard's case, the *Lahman* trial court had difficulties in applying GR 37 to the facts and circumstances in that case. The Court of Appeals noted at p.15

> We recognize GR 37 as a new rule and appellate decisions interpreting the rule postdate Mr. Lahman's trial. The trial court understandably struggled with application of the rule to Mr. Lahman's case. Nevertheless, our de novo standard of review does not allow deference to the trial court's decision.

6. CONCLUSION

Mr. Prichard contends that the Court of Appeals decision runs contrary to existing cases involving sufficiency of the evidence pursuant to RAP 13.4 (b)(1).

It is Mr. Prichard's further contention that the GR 37 issue constitutes a significant question of law under the Constitution of the State of

Washington. It is also an issue of substantial public interest that needs to be clarified. *See:* RAP 13.4 (b)(3) and (4).

Therefore, Mr. Prichard respectfully requests that his petition be granted.

DATED this 1st day of July, 2021.

Respectfully submitted,

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APPENDIX “A”

FILED
JUNE 15, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 37491-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DONALD LUCAS PRICHARD,	)	
	)	
Appellant.	)	

PENNELL, C.J. — Donald Lucas Prichard appeals his convictions for first degree burglary, malicious harassment, and four counts of second degree assault. We affirm in part, reverse in part, and remand as set forth below.

FACTS[1]

Donald Lucas Prichard and Jason Cooper identify as white separatists who do not believe people of different races should intermix. Both men regularly carry firearms. During a late night in October 2017, Mr. Prichard and Mr. Cooper were together at Mr. Cooper's house. They were drunk and went outside where they "jokingly" hurled obscenities at each other. *See* 1 Report of Proceedings (RP) (Feb. 27, 2020) at 284-85.

[1] Based on the nature of the contested issues on appeal, the facts from trial are presented in the light most favorable to the State.

Next door to Mr. Cooper, Norris Cooley lived in a garage converted to living space that was slightly behind but connected to a house. A woman named Elizabeth Fisher lived in the main residence of the house along with her son, 17-year-old K.A.B., and her daughter, 14-year-old A.S.W.[2] Mr. Cooley was a Black man.[3] Ms. Fisher is white.

At the time Mr. Prichard and Mr. Cooper were engaged in their drunken banter, Mr. Cooley was going in and out of his residence. He was with his friend, Chad Taylor. Mr. Taylor was working on his car in Mr. Cooley's driveway.

At some point, Mr. Cooper began yelling at Mr. Cooley instead of Mr. Prichard. He used racist slurs. Mr. Prichard ran to join Mr. Cooper. The men told Mr. Cooley he should not be with white people. Mr. Prichard said something to the effect of, "'Smile in the dark, n[*****], so I can see you. I might shoot you.'" *Id.* at 335.

The racist taunts against Mr. Cooley turned physical. Witnesses saw Mr. Cooley and the men running in and out of his residence. Mr. Taylor tried yelling at the men, but he got in his car after one of them lifted his shirt to expose what appeared to be a firearm. At some point during the altercation, Mr. Cooper punched Mr. Cooley. Witnesses could

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[2] To protect the privacy interests of Ms. Fisher's minor children, we use their initials throughout this opinion. Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

hear Mr. Cooley was in pain. Mr. Prichard and Mr. Cooper then took off in Mr. Prichard's white sport utility vehicle (SUV). Various witnesses called 911.

After leaving, Mr. Prichard and Mr. Cooper went to a nearby Yoke's Fresh Market. The men sat in Mr. Prichard's SUV drinking and waiting for what they thought would be enough time for the police to respond to the 911 calls and leave. The men had three firearms with them inside the vehicle.

Mr. Cooper and Mr. Prichard returned prior to any police response to the 911 calls. Mr. Prichard got out of the SUV and began shooting toward the Fisher / Cooley residence. Mr. Cooper joined in the shooting. Mr. Cooley and Ms. Fisher were in the living room of the main residence at the time. Ms. Fisher testified that "bullets were spraying everywhere."[4] 1 RP (Feb. 26, 2020) at 130. She ducked to the floor at the urging of Mr. Cooley. Both Ms. Fisher and Mr. Cooley narrowly escaped injury.

Ms. Fisher's children were in their rooms at the time of the shooting. K.A.B. heard loud bangs that he did not immediately realize were gunshots. He then heard yelling and went downstairs to the living room where he saw his mother and Mr. Cooley on the floor. K.A.B. saw a bullet hole in the television and a broken picture frame.

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[3] Mr. Cooley died prior to trial for reasons unrelated to this case.

[4] Law enforcement later documented 12 bullet strikes to the house and former garage. *See* Ex. 30.

A.S.W. started walking from her bedroom to the living room when she heard the gunshots. She was able to see Mr. Prichard's white SUV outside. As she entered the living room, A.S.W. noticed damage to the television and the screen door, bullet holes in the walls, and a bullet hole through a pillow on the couch. A.S.W. then helped place another call to 911. Others did the same. Mr. Prichard and Mr. Cooper took off again in the SUV.

Police eventually apprehended Mr. Prichard and Mr. Cooper. Mr. Cooper agreed to cooperate against Mr. Prichard in return for a favorable plea agreement. Mr. Prichard was charged in superior court with first degree unlawful possession of a firearm, first degree burglary, malicious harassment, and five counts of first degree assault (against Norris Cooley, Elizabeth Fisher, K.A.B., A.S.W. and Chad Taylor). Mr. Prichard pleaded guilty to the firearm charge and took the remaining counts to trial.

Mr. Prichard took the stand at trial in his own defense. He admitted to being with Mr. Cooper at the time of the initial altercation, but claimed the dispute was purely between Mr. Cooper and Mr. Cooley. Mr. Prichard also testified he parted company with Mr. Cooper after the two men left Yoke's. According to Mr. Prichard, he was not with Mr. Cooper during the shooting.

The jury convicted Mr. Prichard of first degree burglary, malicious harassment,

and four counts of the lesser included offense of second degree assault. Mr. Prichard was acquitted of assaulting Mr. Taylor. At sentencing, the trial court determined Mr. Prichard qualified as a persistent offender based on his criminal history. He received a mandatory sentence of life without the possibility of early release on all counts but the firearms charge. Mr. Prichard appeals.

ANALYSIS

Uncharged alternative means (malicious harassment)

The parties agree Mr. Prichard's conviction for malicious harassment must be reversed without prejudice based on nonconformity between the original charge and the court's instructions to the jury. We accept this concession.

Malicious harassment is an alternative means crime that can be committed in three distinct ways. Former RCW 9A.36.080(1) (2010). The charge against Mr. Prichard specified one of the three alternative means: harassment by threat. Former RCW 9A.36.080(1)(c). However, the trial court's instructions to the jury went beyond the scope of the information and defined malicious harassment in terms of two alternative means: harassment by threat and harassment by causing physical injury to the victim. Clerk's Papers (CP) at 540; *see also* former RCW 9A.36.080(1)(a), (c). In addition, the court's to-convict instruction advised the jury the malicious harassment charge required proof Mr. Prichard "caused

physical injury to Norris Russell Cooley." CP at 541. The to-convict instruction made no mention of the State's obligation to prove harassment by issuance of a threat.

"[I]t is error for a trial court to instruct the jury on uncharged alternative means." *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)). On appeal, the error is presumed prejudicial and it is the State's burden to show the error was harmless beyond a reasonable doubt to avoid reversal. *See id.* (quoting *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). If the error was not harmless, the appropriate remedy is reversal and a new trial. *Severns*, 13 Wn.2d at 563.

The State does not argue harmless error. Given the wording of the to-convict instruction and the fact that the State argued harassment by injury during summation, we accept the State's concession. The variance between the original charge and the trial court's jury instructions was not harmless. Mr. Prichard's conviction for malicious harassment must be reversed.

Sufficiency of the evidence

Mr. Prichard challenges the sufficiency of the State's evidence as to burglary and two of his assault convictions. In this context, our analysis requires substantial deference to the jury's verdict. We must view "'the evidence in the light most favorable to the

prosecution'" and ask whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019), *cert. denied*, *Scanlan v. Washington*, __U.S.__, 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Burglary

Mr. Prichard claims the State failed to produce sufficient evidence to justify his conviction for first degree burglary because there was no evidence showing entry into a building.[5] The trial evidence belies this claim. A.S.W. pointed to Mr. Prichard as one of

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[5] The court's instructions identified four elements of first degree burglary:

> (1) That on or about October 8, 2017, the defendant entered or remained unlawfully in a building;
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
> (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person; and
> (4) That any of these acts occurred in the State of Washington.

CP at 535.

the men she saw going "from the garage to the side of the house." 1 RP (Feb. 26, 2020) at 117. Chad Taylor testified he saw Mr. Prichard coming out of the door leading to Mr. Cooley's living space in the former garage. A neighbor named Amelia Marshall testified that she saw men fighting and running through the same door. This evidence was more than sufficient to permit the jury to infer Mr. Prichard unlawfully entered Mr. Cooley's residence.

Assault

The parties agree Mr. Prichard's second degree assault convictions required proof that each of the named victims actually and reasonably perceived themselves to be in imminent danger of bodily injury. According to Mr. Prichard, the State failed to produce sufficient evidence on this front with respect to K.A.B. and A.S.W. We agree as to K.A.B., but not as to A.S.W.

K.A.B.'s trial testimony was very brief. He said he was upstairs at the time of the shooting. He heard loud bangs that he did not immediately recognize as gunshots. He then went downstairs and saw his mother and Mr. Cooley on the living room floor, along with a bullet hole in the television and a broken picture frame. K.A.B. was never asked whether he feared he might have been injured during the shooting. There is no evidence K.A.B. was even aware a shooting had occurred until after it was over. Given these

circumstances, the State did not present sufficient evidence to justify Mr. Prichard's assault conviction against K.A.B.

A.S.W.'s testimony was also brief, but differed from that of her brother. According to A.S.W., she was walking toward the living room while shots were being fired. A.S.W. was able to see Mr. Prichard's white SUV. She agreed with the prosecutor that she "could have been dead" as a result of the shooting. 1 RP (Feb. 26, 2020) at 123. While thin, A.S.W.'s testimony was sufficient to permit a reasonable inference that she saw the shooting as it was happening and feared for her life.

Assistance of counsel

Mr. Prichard contends he was deprived of effective assistance of counsel because his attorney failed to object to leading questions to A.S.W. and her mother about their luck in surviving the shooting. The State answers that Mr. Prichard's attorney reasonably refrained from objecting to the prosecutor's questioning, and no prejudice resulted from the questions. We agree with the State.

To prove deprivation of the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, a defendant must show "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Failure to show either deficient performance or prejudice precludes relief. *Id.* at 700. Mr. Prichard does not meet either prong of this test.

We disagree with Mr. Prichard that his attorney's failure to object constituted deficient performance. Mr. Prichard's defense at trial was not that there was no assault on the victims; he claimed he was not even present at the time of the shooting. Objecting to the State's questions would not have furthered Mr. Prichard's line of defense. Doing so may have detracted from Mr. Prichard's attempt to place blame solely on Mr. Cooper. The decision not to object to the prosecutor's leading questions to two of the victims was reasonably strategic.

Counsel's failure to object also was not prejudicial. An objection to the State's questions likely would have allowed the prosecutor to rephrase the questions to A.S.W. and her mother. Had this occurred, the same information would have been in front of the jury, only now with more emphasis. Counsel's failure to object was not prejudicial.

No-contact order sentencing condition

The parties agree that because Mr. Prichard was not convicted of assaulting Chad Taylor, the court's judgment and sentence should not have included a no-contact order regarding Mr. Taylor. We accept this concession. This may be corrected on remand.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Prichard brings 13 more claims in his pro se statement of additional grounds for review.

Challenges regarding GR 37

GR 37 is a relatively new procedural rule, applicable to the exercise of peremptory challenges at trial. Peremptory strikes are notorious for providing "a cloak for race discrimination" in jury selection. *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). There is "'no constitutional right to [exercise] peremptory challenges.'" *In re Pers. Restraint of Meredith*, 191 Wn.2d 300, 309, 422 P.3d 458 (2018) (quoting *State v. Kender*, 21 Wn. App. 622, 626, 587 P.2d 551 (1978)). Prior to the adoption of GR 37, there was some talk of eliminating peremptory challenges altogether. *Saintcalle*, 178 Wn.2d at 51-52. Rather than take this approach, GR 37 was written to regulate the exercise of peremptory strikes with an eye toward eliminating "the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a).

At trial, Mr. Prichard attempted to strike a prospective juror (Juror 9) from the venire panel using a peremptory challenge. The State and the trial judge recognized Juror 9 as a person of color. The State objected to Mr. Prichard's strike pursuant to GR 37(c),

which then required Mr. Prichard to supply a race-neutral justification for the strike. GR 37(d).[6] Mr. Prichard claimed he struck Juror 9 from the panel because she expressed confusion over the presumption of innocence. The trial court observed Juror 9 had been rehabilitated on this point. The court denied Mr. Prichard's peremptory strike and Juror 9 was allowed to remain on the panel. At a posttrial hearing on a mistrial motion brought by Mr. Prichard as a result of the GR 37 ruling, the trial court reiterated that "an objective observer could view race or ethnicity as a factor" in the use of the peremptory challenge. RP (Feb. 27, 2020) at 17; *see also* GR 37(e).

On appeal, Mr. Prichard contends GR 37 is unconstitutional and application of the rule in his case was unwarranted. The four claims encompassed in these challenges fail.

Mr. Prichard's constitutional claims are not sufficiently developed to warrant review. Mr. Prichard fails to explain how the concepts of burden shifting or vagueness apply to GR 37. We are not obliged to research legal authorities that might support Mr. Prichard's arguments. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHerr v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[6] The rule does not explicitly state the party exercising the peremptory challenge must supply a justification for the strike that is race neutral, but this is implicit given the nature of GR 37 and its legal underpinnings.

Looking to the issue of the trial court's application of GR 37, we discern no impropriety. GR 37 does not require proof of purposeful discrimination. Instead, so long as an objective observer, aware of problems with implicit bias, *could* have viewed race or ethnicity as *a* factor in the exercise of the peremptory challenge, the strike may be denied. Particularly given the nature of the case on trial, the trial court correctly surmised that an objective observer could deem race was a factor in Mr. Prichard's decision to strike Juror 9.

In addition, even if the trial court misapplied GR 37, it is not clear Mr. Prichard would be entitled to relief. The "mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." *Rivera v. Illinois*, 556 U.S. 148, 158, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). We are unaware of any authority to support the claim that the Washington Constitution provides greater protection.[7] Nor does Mr. Prichard argue as much. The trial court's GR 37 determination is affirmed.

[7] Prior to the United States Supreme Court's decision in *Rivera*, the Washington Supreme Court had held that a trial court's erroneous denial of a peremptory strike could constitute structural error. *State v. Vreen*, 143 Wn.2d 923, 933, 26 P.3d 236 (2001). *Vreen* was based on our Supreme Court's interpretation of federal case law that has since been overruled. *See Meredith*, 191 Wn.2d at 311-12.

Challenges regarding constitutional privacy rights

Mr. Prichard brings four challenges regarding his constitutional privacy rights. He argues:

(1) the State's creation of a mirror image of his cell phone's data, and its examination of the timeline of that data, exceeded the scope of the warrant;

(2) his attorney rendered ineffective assistance by failing to call the State's detective and the FBI (Federal Bureau of Investigation) forensic examiner to the stand to testify during the CrR 3.6 hearing;

(3) the State's use of GPS (Global Positioning System) tracking with "ZetX" constituted a warrantless search; and

(4) his attorney rendered ineffective assistance by failing to challenge at trial the GPS tracking and search warrant for Mr. Prichard's home.

The first two arguments fail for lack of factual support. The claim that law enforcement could have searched Mr. Prichard's cell phone through means less intrusive than the creation of a mirror image copy of the data is purely speculative. There is no information that additional witnesses, such as the State's detective or FBI examiner, would have shed light on this issue. If Mr. Prichard has evidence indicating the State could have searched his cell phone data through the use of less invasive means, his

recourse is to seek relief through the filing of a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant 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.").

Mr. Prichard's second two claims fail on their merits. ZetX is an online service that allows law enforcement to identify the carrier associated with a specific cell phone number. Law enforcement here used ZetX in two ways: (1) identify the carrier for Mr. Prichard's cell phone and (2) organize records obtained from the cell phone provider in response to a warrant. Nothing about the use of ZetX implicated Mr. Prichard's right to privacy. Mr. Prichard's attorney was therefore not ineffective in failing to object to the use of ZetX.

Miscellaneous assistance of counsel challenges

Mr. Prichard brings three additional ineffective assistance of counsel challenges. He asserts his trial attorney:

(1) opened the door to harmful testimony when cross-examining Mr. Taylor about the photo lineup;

(2) failed to consult him about the State's request for instruction on lesser included offenses; and

(3) failed to object when the prosecutor mentioned Mr. Prichard and Mr. Cooper served time together in prison.

Mr. Prichard's miscellaneous ineffective assistance of counsel claims are unsuccessful. His claim regarding his attorney's failure to consult him is outside the scope of the trial record and cannot be reviewed in his direct appeal. *See McFarland*, 127 Wn.2d at 335. His remaining two claims are not sufficiently supported to rebut the presumption of his trial attorney's competence. *See id.* at 336. Neither does Mr. Prichard attempt to show prejudice. *See Strickland*, 466 U.S. at 694. These claims are not bases for appellate relief.

Prosecutorial misconduct

Mr. Prichard alleges the prosecutor committed misconduct by discussing the time Mr. Prichard and Mr. Cooper served together in prison. There was no objection at trial. Given the lack of objection, Mr. Prichard must show not only that the prosecutor's statement was improper, but it was "so flagrant and ill intentioned that an instruction could not have cured the prejudice." *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Mr. Prichard has not met this standard. To the extent the prosecutor's comments were improper, they could have been addressed by a corrective instruction.

Cumulative error

Mr. Prichard's final claim is he should be afforded relief under a theory of cumulative error. This argument fails as well. Mr. Prichard has not shown multiple errors compounded on each other in a way to deprive him of a fair trial. Relief based on cumulative error is unwarranted.

CONCLUSION

Mr. Prichard's conviction on count 2, malicious harassment, is reversed without prejudice. The conviction on count 7, second degree assault against K.A.B., is reversed with prejudice. The remainder of Mr. Prichard's convictions are affirmed. This matter is remanded for further proceedings. On remand, the no-contact order sentencing conditions will be corrected to conform to the counts of conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

APPENDIX “B”

FILED
JUNE 15, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 37092-5-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED IN PART
	)	
TRAVIS VERN LAHMAN,	)	
	)	
Appellant.	)	

PENNELL, C.J. — General Rule 37 of the Washington Court Rules restricts a party's ability to remove prospective jurors from a jury panel without cause. The rule was intended to reduce racial discrimination in jury selection by focusing on the danger of implicit bias. Under GR 37, a judge must deny a party's attempt to remove a juror without cause (known as a peremptory challenge) if an objective observer *could* view race or ethnicity as *a* factor in the attempted removal. Under the terms of the rule, an objective observer must be deemed aware of implicit, institutional, and unconscious bias, in addition to purposeful discrimination.

The prosecutor handling Mr. Lahman's trial exercised a peremptory challenge against a prospective juror with an Asian surname. It is undisputed that the juror was one of the few racial or ethnic minorities on the jury venire. The prosecutor explained she

sought to remove the juror because he was young and inexperienced in domestic matters.[1] The record indicates the prospective juror was 23 years old. However, the juror was never asked any questions about his experiences in domestic matters. In fact, he was not asked many questions at all. Given the limited basis from which the prosecutor could conclude the juror was inexperienced, along with the possible influence of implicit stereotyping,[2] it is conceivable an objective observer could conclude race or ethnicity played some sort of role in the decision to strike the prospective juror from the venire. Mr. Lahman's GR 37 objection to the prosecutor's use of the peremptory challenge therefore should have been sustained.

Under our case law, the remedy for the erroneous exclusion of a juror from service on the basis of race or ethnicity is reversal and remand. We invoke this remedy, reverse Mr. Lahman's convictions, and remand for retrial.

FACTS

In December 2018, Travis Lahman was arrested for the brutal assault of his long-term girlfriend. He was charged with one count of first degree kidnapping and one count

[1] Mr. Lahman's case involved allegations of domestic violence.

[2] In recognizing the existence of stereotypes, we in no way wish to condone or endorse any stereotypes.

of second degree assault. The State later amended the charges to include four firearm enhancements. Mr. Lahman exercised his right to a jury trial.

Jury selection took place over two days in 2019. One of the prospective jurors on the venire was a 23-year-old man with an Asian surname (Juror 2). Juror 2 worked for Target and appeared to be one of the few racial minorities on the venire. In his answers to a written questionnaire submitted prior to voir dire, Juror 2 did not report any past experience with domestic violence. Twenty-two additional prospective jurors provided the same answer; i.e., that they had no past experience with domestic violence either personally or through a close associate.

The parties did not engage Juror 2 in much dialogue during voir dire. Other than his initial introduction, Juror 2 spoke twice. The first comments were made in response to a question posed by the prosecutor:

> [THE PROSECUTOR]:
> . . . .
> Is it important that you serve as members of a jury? I'm going to go to Juror No. 2.
> Is it important to serve?
> PROSPECTIVE JUROR NO. 2: Yes.
> [THE PROSECUTOR]: And why is that?
> PROSPECTIVE JUROR NO. 2: It's your civil duty.
> [THE PROSECUTOR]: Civic duty.

3 Report of Proceedings (RP) (June 4, 2019) at 787. The second set of comments

were made in response to questions from defense counsel:

> [DEFENSE COUNSEL]:
>
> . . . .
>
> If you disagree with another juror on the verdict, could you stick to your guns unless you became convinced?
>
> Number, how about 2?
>
> PROSPECTIVE JUROR NO. 2: Similar sentiment [to that of a previous juror[3]].
>
> [DEFENSE COUNSEL]: Okay.
>
> PROSPECTIVE JUROR NO. 2: Solid with my opinion based on the evidence and what I see.
>
> [DEFENSE COUNSEL]: And how would you feel if you were the only one to hold your viewpoint?
>
> PROSPECTIVE JUROR NO. 2: Probably awkward, but given the evidence, I don't think that would be likely.
>
> [DEFENSE COUNSEL]: Okay.
>
> But would you stick to your viewpoint unless you became convinced otherwise?
>
> PROSPECTIVE JUROR NO. 2: Yes.

Id. at 826-27.

The State used a peremptory challenge against Juror 2, to which Mr. Lahman objected under GR 37. The State provided the following explanation to the trial court in response to the challenge:

> Your Honor, with regard to [Juror 2], he is a younger juror. He did respond to the questions; however, given his age and then some of his questions, I felt that he was not going to be an acceptable juror. He—has

[3] The previous juror had stated: "It would be hard but you have to stick to what you know in order to keep the whole trial process fair, you know." *Id.* at 826.

> nothing to do with this—Your Honor, he's more than [sic] his age and then I got limited answers out of him in my questioning.

1 RP (Jun. 4, 2019) at 44. The State proceeded to clarify:

> He's a younger juror, works at Target. Yeah, I would generally not have a younger person sit on a case like this. They don't have life experiences and he didn't have any with [domestic violence].

Id. at 45.

The trial judge determined the basis for the State's peremptory challenge was Juror 2's age and lack of life experience. Initially the judge granted Mr. Lahman's GR 37 challenge. But the judge later relented, explaining age and lack of experience were valid race-neutral reasons for the State's peremptory challenge. Juror 2 was therefore stricken from the venire and did not serve further. The record reflects that of the 13 jurors seated on the panel, nine of them likewise did not report any experience with domestic violence. After a four-day trial, the jury found Mr. Lahman guilty as charged, including the four firearm enhancements. He was sentenced to 254 months' imprisonment.

Mr. Lahman now appeals, arguing the trial judge improperly overruled his objection to the State's use of a peremptory challenge against Juror 2.

ANALYSIS

Peremptory challenges and the problem of discrimination

The state and federal constitutions protect the right of the criminally accused to a

fair and impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Standards for juror qualification and the ability to strike jurors for cause enable the court and parties to ensure a biased juror does not sit in judgment on a particular case. *See State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000). This is all that is constitutionally required. *See Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988). Nevertheless, tradition, statutes, and court rules go further. In addition to enforcing juror qualification standards and challenges for cause, parties may use "peremptory challenges" to strike a limited number of otherwise qualified jurors from the venire for no stated reason. *See* RCW 4.44.130.-.140; CrR 6.4(e). The justification for peremptory strikes is that trial attorneys have instincts about which jurors will be best for their case. Peremptory challenges enable parties to rely on their instincts and experiences to select a jury that they think will be best for their case.

Not surprisingly, the use of instincts to render judgment about other people's thought processes and beliefs has historically opened the door to implicit and explicit bias. The parties and the jurors themselves have the right to a trial process free from discrimination. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Judges have been assigned an important role in protecting these rights and ensuring peremptory challenges are not used in a discriminatory manner. Because

"the Constitution forbids striking even a single prospective juror for a discriminatory purpose," mistakenly allowing a party to dismiss a juror for reasons of race or ethnicity requires reversal and remand for a new trial. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (cited with approval by *Snyder v. Louisiana*, 552 U.S. 472, 486, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). This remedy applies regardless of the strength of the prosecutor's case or the hardship to victims or witnesses.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court developed a three-part test for assessing whether a peremptory challenge was based on improper discrimination. First, the party objecting to the challenge had to establish a prima facie case giving rise to an inference of discriminatory purpose. *Id.* at 92-93. If this was met, the burden shifted to the party asserting the challenge to provide a neutral explanation. *Id.* at 97. If this was accomplished, the judge had to decide whether the objecting party "established purposeful discrimination." *Id.* at 98.

Batson's requirement of proving purposeful discrimination has been problematic. *State v. Saintcalle*, 178 Wn.2d 34, 53, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

Intent is difficult to prove and judges may be loath to ascribe invidious motives to an attorney who regularly practices in their court. *Id.* In addition, harmful discrimination is often not purposeful in the ordinary sense. *Id.* at 46. Most Americans condemn overt acts of racism. Yet the plague of racism persists. The problem is not so much a conscious desire to discriminate. *Id.* at 48. It is that negative stereotypes and assumptions operate on a subconscious level and lead people to make discriminatory decisions without any sort of purposeful plan or deliberation. *Id.* at 46 ("Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.").

GR 37 as a method of addressing discrimination in peremptory challenges

In 2018, the Supreme Court of Washington adopted GR 37 to address unconscious bias and the difficulties in meeting *Batson*'s three-part test. *See State v. Jefferson*, 192 Wn.2d 225, 243, 429 P.3d 467 (2018) (plurality opinion). Under GR 37(c), a party or the court "may object to the use of a peremptory challenge to raise the issue of improper bias." Once an objection is raised, the party exercising the challenge is obliged to articulate the reasons for the challenge. GR 37(d). The court must then evaluate the reasons given for the challenge, taking into account the totality of the circumstances.

GR 37(e). "If the court determines that an objective observer *could* view race or ethnicity as *a* factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." *Id.* (emphasis added). For purposes of this rule, an "objective observer" is one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f).

GR 37 provides a guided process for how to assess the issue of bias and peremptory challenges. The rule lists five nonexclusive circumstances relevant to assessing the nature of a peremptory challenge. GR 37(g).[4] The rule also specifies seven

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[4]

> (i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.
>
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
>
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

presumptively invalid justifications for peremptory challenges. GR 37(h).[5] Finally, the rule identifies juror conduct (e.g., juror inattentiveness, body language, or demeanor) as suspect justification for a peremptory challenge. GR 37(i). If a party intends to offer juror conduct as a justification for a peremptory challenge, the party must provide timely notice so the juror's behavior can be "verified and addressed in a timely manner." *Id.*

Application of GR 37 to Mr. Lahman's case

Mr. Lahman argues Juror 2 was improperly stricken from his jury in violation of GR 37. Because the GR 37 analysis is purely objective, this claim is one we review de novo. *State v. Listoe*, 15 Wn. App. 2d 308, 321, 475 P.3d 534 (2020); *State v. Omar*, 12 Wn. App. 2d 747, 750-51, 460 P.3d 225, *review denied*, 196 Wn.2d 1016, 475 P.3d 164 (2020).

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[5]

(i) having prior contact with law enforcement officers;
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
(iv) living in a high-crime neighborhood;
(v) having a child outside of marriage;
(vi) receiving state benefits; and
(vii) not being a native English speaker.

The first step in the GR 37 process is for a party or the court to raise the issue of improper bias on the basis of race or ethnicity. GR 37(a), (c). Here, Mr. Lahman claims the prosecutor was biased in striking Juror 2, a racial or ethnic minority, from the venire. As an appellate court, we are unable to physically observe any juror's appearance. In some circumstances, this might hamper our de novo GR 37 analysis. *See Listoe*, 15 Wn. App. 2d at 331-32 (Melnick, J. concurring). But here, Juror 2 has an Asian surname. This circumstance is enough to raise the concern that an objective observer could perceive Juror 2 as a racial or ethnic minority.[6]

Because Mr. Lahman has objected to the use of a peremptory challenge against an individual who appears to be a member of a racial or ethnic minority, we proceed to the second part of the GR 37 analysis. Under GR 37(d), the party exercising the peremptory challenge must provide a race-neutral justification.[7] Here, the prosecutor claimed to strike

[6] We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.

[7] GR 37(d) does not explicitly state that the party exercising the peremptory challenge must supply a justification for the strike that is race neutral, but this is implicit given the nature of the rule and its legal underpinnings.

Juror 2 based on his young age and lack of experience with domestic violence and limited life experience.

The third step of the GR 37 analysis is to evaluate the justification given for the peremptory challenge. Our assessment is guided by the nonexclusive circumstances set forth in GR 37(g). We also must keep in mind that the test is whether an objective observer, aware of implicit, institutional, and unconscious biases, "*could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphasis added).

The first three circumstances we look to are how the prospective juror was questioned and whether there were differences between the challenged juror and other members of the venire. GR 37(g)(i)-(iii). Juror 2 was not questioned about his life experiences. In fact, the prosecutor posed very few questions to Juror 2, thus depriving Juror 2 of a realistic opportunity to explain himself and his circumstances. GR 37(g)(i). Juror 2 did state on his questionnaire that he did not have any prior experiences with domestic violence. However, 22 other members of the venire provided the same answer. It appears that nine of the individuals who sat on Mr. Lahman's petit jury answered the juror questionnaire in the same way as Juror 2; i.e., they also did not have past experience with domestic violence. The prosecutor's limited interactions with Juror 2 fail to reveal

whether he truly stood out from other jurors in terms of his age or other experiences.[8] GR 37(g)(iii).

The next circumstance we consider asks whether the reason stated for the challenge might be disproportionately associated with race or ethnicity. GR 37(g)(iv). Here, stereotyping can come into play. A stereotype is a trait imposed on a group of people based on a shared characteristic such as race or ethnicity. Reliance on a stereotype may seem positive, negative, or benign. Regardless, stereotyping is harmful and can have an improper disparate impact. Research shows that a common stereotype of Asian Americans is that they are strong in academics, to the detriment of interpersonal skills.[9] In explaining why Juror 2 was preemptively struck from the venire, the prosecutor

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[8] There was no record made of the ages of other members of the venire. This would have been helpful to our analysis.

[9] Adeel Hassan, *Confronting Asian-American Stereotypes*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/us/confronting-asian-american-stereotypes.html; *see also* Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti–Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34, 37 (2005) (research study showing Asian-Americans are perceived as being less sociable, overly academic, lacking "street smarts"), https://www.researchgate.net/profile/Susan-Fiske/publication/8152313_Stereotype_Content_Model_Explains_Prejudice_for_an_Envied_Outgroup_Scale_of_Anti-Asian_American_Stereotypes/links/0c960529d08ca13f6b000000/Stereotype-Content-Model-Explains-Prejudice-for-an-Envied-Outgroup-Scale-of-Anti-Asian-American-Stereotypes.pdf.

focused on Juror 2's youth and lack of life experiences. While Juror 2's age may have prompted much of the prosecutor's concerns, there was little else to support the prosecutor's assessment of Juror 2. Instead, the record left open the possibility that the prosecution implicitly and unsuitably relied on a stereotype in deciding Juror 2, an Asian American, lacked the frame of mind to side with the State.

The last of the circumstances we consider focuses on a party's use of peremptory challenges in the present case or past cases. GR 37(g)(v). The record on review is insufficient to allow us to analyze this factor.

On balance, the State's explanation for why it struck Juror 2 is insufficient to dispel the concern that "an objective observer *could* view race or ethnicity as *a* factor" in Juror 2's exclusion from the jury pool. GR 37(e) (emphasis added). Juror 2's statements during voir dire did not differ markedly from those of other prospective jurors. The prosecutor received limited information from Juror 2 largely due to the fact that Juror 2 was asked few questions. The prosecutor's focus on Juror 2's youth and lack of life experiences played into at least some improper stereotypes about Asian Americans, particularly given the lack of any record about the relative ages of other jurors.

Our assessment of this case does not mean the prosecutor's decision to strike Juror 2 was in fact driven by improper discrimination, purposeful or not. GR 37 was

written in terms of possibilities, not actualities. The rule recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent. The switch from *Batson*'s focus on purposeful discrimination to GR 37's emphasis on the objective possibility of discrimination is significant. The exercise of peremptory challenges is a privilege, not a constitutional right. GR 37 teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution.

We recognize that GR 37 is a new rule and appellate decisions interpreting the rule postdate Mr. Lahman's trial. The trial court understandably struggled with application of the rule to Mr. Lahman's case. Nevertheless, our de novo standard of review does not allow deference to the trial court's decision. We disagree with the trial court's assessment of Mr. Lahman's GR 37 objection, as set forth above. The GR 37 objection should have been sustained. The applicable remedy is to reverse Mr. Lahman's convictions without prejudice and remand for a new trial.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Mr. Lahman has lodged several additional challenges to his convictions. All but his sufficiency challenge are mooted by our decision reversing his convictions.[10] We therefore limit the remainder of our analysis to Mr. Lahman's sufficiency claim.

In a pro se statement of additional grounds for review, Mr. Lahman raises a sufficiency challenge to the jury's imposition of firearm enhancements. Mr. Lahman claims the evidence was insufficient to prove the instruments used in his offense qualified as firearms. Our analysis of a sufficiency challenge is governed by a very deferential standard of review. The State's evidence is presumed as true and all credibility issues are resolved in favor of the jury's verdict. *See State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

A defendant who is armed with a deadly weapon at the time of an offense may be subject to a firearms enhancement. RCW 9.94A.825, .533(3)-(4). "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11). To support a firearm enhancement, the State must present evidence that the firearm used in the commission of a crime was a firearm in-fact, rather than a gun-like object. *State v. Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310

[10] A successful challenge to the sufficiency of the evidence would bar the State from retrial. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

(2016). "Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." *Id.* at 594. Sufficient evidence of a firearm is presented when a victim, even one who has little experience with firearms, testifies to seeing and hearing an object used in the commission of a crime that is visually and audibly consistent with a firearm. *Id.* at 595.

Here, the victim testified to seeing Mr. Lahman use two firearms. First, Mr. Lahman confronted the victim with what she believed was his .38-caliber handgun, and used it to coerce her into the master bedroom. The victim was familiar with this specific firearm as a result of her 26-year relationship with Mr. Lahman, and testified she oftentimes witnessed Mr. Lahman carrying the handgun. Second, Mr. Lahman produced a shotgun from the bedroom closet, checked to make sure it was loaded, and pointed it at the victim while threatening to kill her. The victim testified she was also familiar with this firearm, and that Mr. Lahman commonly kept it in that specific closet. This is direct evidence that the devices appeared to be real guns and were wielded in the commission of a crime.

Mr. Lahman criticizes the victim's testimony as not credible. He claims she lacked familiarity with firearms and therefore could not be relied upon to differentiate between a true firearm and a firearm-like object. Mr. Lahman's complaint is one that might find

success with a jury, but it fails here given the irrelevance of credibility assessments on appellate review.

The State presented sufficient evidence for the jury to find Mr. Lahman had used firearms in the commission of his crimes. Therefore, he is not entitled to reversal with prejudice.

CONCLUSION

We reverse Mr. Lahman's convictions without prejudice and remand for a new trial.

Pennell, C.J.

WE CONCUR:

Fearing, J.

Staab, J.

NO. 37491-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. DONALD LUCUS PRICHARD, Defendant, Appellant.	)	SPOKANE COUNTY NO. 17 1 04081 0 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of July, 2021, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

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