NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see https://www.courts.wa.gov/opinions and the information that is linked there.

Filed
Washington State
Court of Appeals
Division Two

October 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRETT MICHAEL HALE, Appellant.	No. 57057-2-II PART PUBLISHED OPINION

MAXA, J. – Brett Hale appeals his multiple convictions and his sentence arising from a domestic violence incident involving his girlfriend at the time. Hale argues that the trial court erred in denying his peremptory challenge against juror 1 based on the State's GR 37 objection.

We hold that (1) the trial court erred in denying Hale's peremptory challenge because an objective observer could not have concluded that race was a factor in the peremptory challenge, but (2) the juror's presence on the jury did not prejudice Hale under the nonconstitutional harmless error standard. In the unpublished portion of this opinion, we address Hale's additional arguments.

We affirm Hale's convictions, but we remand to the trial court to strike the imposition of community custody for Hale's felony harassment conviction and the community custody supervision fees imposed in the judgment and sentence. The trial court also should determine whether Hale is indigent under RCW 10.01.160(3) and reconsider the imposition of the crime victim penalty assessment (VPA) based on that determination.

FACTS

Background

In September 2021, law enforcement arrested Hale after his girlfriend at the time called 911 during a domestic violence incident at their residence. Law enforcement discovered controlled substances on the premises and in a vehicle at the residence. The State charged Hale with felony harassment-domestic violence, third degree malicious mischief-domestic violence, unlawful possession of a controlled substance with intent to deliver while armed with a firearm, three counts of second degree unlawful possession of a firearm, and possession of a stolen firearm.

Jury Selection

During jury selection, the prosecutor asked if anyone had "any specialized training, education or experience in the subject of physical altercations committed by household [] members or dating partners." Rep. of Proc. (RP) at 108. Juror 1 responded that he was a consultant for Child Protective Services (CPS) and had participated in domestic violence training and substance harm reduction. When the prosecutor asked if he could assess the evidence fairly and impartially, juror 1 replied, "I do believe so." RP at 109.

Juror 9 also worked with CPS and Child Welfare Services. But when asked if she could be fair and impartial, juror 9 responded, "Possibly. I can't say no, but I can't say yes." RP at 111. And juror 35 used to work in victim advocacy and had training on interpersonal conflict between dating partners and household members, but stated that the experience would not affect her ability to be fair and impartial.

Addressing the venire as a whole, Hale asked whether anyone presumed that the prosecution would not take a weak case to trial. Juror 1 replied that based on his experience working with CPS, he saw "situations where some cases may not go to trial because of a lack of evidence or not being as strong of a case." RP at 127.

Hale also asked generally whether anyone felt that they could not be fair and impartial. Juror 10 replied that he did not think he would be incapable of being fair, but that he had "very strong feelings against people that sell drugs" so he was not sure if he always could be impartial to people "that do things like that." RP at 128. Hale asked juror 10 if he could be fair and impartial, and he replied he thought he could be but that he probably would be biased. When asked one more time if he felt he could be fair and impartial, juror 10 replied, "I'll try." RP at 129.

One of the other jurors stated that it would be hard to be fair and impartial because some of the charges involved drugs. RP at 129. Juror 1 commented,

> I think based on my professional experience I have seen how substance use, criminal activity and so forth can impact the families that we serve so there is that (indiscernible), but I would do everything I could to be a fair and impartial juror, but I do have professional experience.

RP at 129-30. Hale then asked juror 1 if he felt his work would emotionally impact him on the case. Juror 1 replied,

> I do not think I'll be emotionally impacted, but however, my professional experience, I do have some, you know, experience at a professional level in dealing with families who are dealing with adverse circumstances. So I have, you know, (indiscernible) too much training in some ways and just (indiscernible) professional experience from what I do that would be in the back of my mind.

RP at 130.

Responding to the same question, Juror 9 stated, "[J]ust in the line of work that I do and people coming into the office every day high, getting high, dying in our restrooms, selling drugs in our parking lot." RP at 131. Hale then had the following discussion with juror 9:

> [Defense Counsel]: Can you be fair and impartial?
>
> JUROR 9: I mean, I can try. It makes me angry to see it every day. So I mean, I can try.
>
> [Defense Counsel]: How are you feeling right now? That's a different question. Are you feeling like you could listen to the evidence in this case and be fair and impartial or is that anger going to be there?
>
> JUROR 9: I can't guarantee that it won't be there.

RP at 132.

The State exercised multiple peremptory challenges, including against jurors 10 and 35. Hale also exercised multiple peremptory challenges, including against juror 9.

Peremptory Challenge Against Juror 1

Hale also attempted to use a peremptory challenge against juror 1. The State objected based on GR 37 because juror 1 was a person of a color. Hale responded,

> [T]he accusation is, for lack of a better term, ridiculous. The problem with juror number one, as he stated, is that he is going to be impacted by his work, working for the government in CPS, DSHS, that sort of thing, and our concern is precisely what he said which is that he's not going to be able to leave behind his -- his history, his work history in dealing with the issues in this case. Has zero to do with his ethnicity or his race.

RP at 136. The State replied, "My recollection of what juror number one said is that he does have that experience, but he would do his best to set aside that and decide this case based on the evidence that was presented. That is what we ask of all jurors." RP at 137.

The trial court noted that it must determine whether the challenged juror is of a particular ethnicity in order for GR 37 to be effective and applicable. The trial court stated,

> Frankly, when I -- when this court looked at juror number one, it did not occur to this court that juror number one might be of a particular ethnicity. So I'll make this ruling only because I'm required to make a ruling, but it's offensive for me personally to do it. Juror number one appears to be a male who might be of Hispanic origin or Latino maybe. There's no clue to the court. But operating under the assumption or the inference that juror number one is a person of color --

RP at 138-39.

The court then asked Hale to state again his basis for the challenge. Hale stated,

> We have exactly the same problem with juror number one that we would have with juror number nine. Juror number one is a social worker according to his answer on his questionnaire, and both of these people have told us of their extensive work in social work dealing with people and their problems and their drug issues, their domestic violence issues, whatever kinds of issues they have going on in their lives. And both of them told us during *voir dire* that they believe they would be impacted by their work experience should they get on the jury in this case. They -- you know, while they both said that they -- at least number one seems to say he thinks he could still be fair and impartial, number nine cannot say that. She simply says that she would try. But there is no reason for anybody in this -- in this *venire* in this case to be stricken on the basis of ethnicity or race, and so that is the reason why we've decided to exercise a peremptory on juror number one.

RP at 139.

The trial court asked both parties whether there were other people on the jury who may be viewed as a particular ethnicity or race. The parties identified at least four other jurors who were not white. The State identified jurors 12 and 21 "as potential jurors who GR 37 would apply to." RP at 141. Hale identified juror 11 as having "a medium skin tone with dark black hair" and juror 37 as having "pretty dark skin" and possibly being "of western European, Portuguese or Spanish descent." RP at 141-42. Hale did not exercise peremptory challenges on any of these jurors. The first three of those jurors sat on the jury and juror 37 was the first alternate.

Initially, the trial court stated that based on its experience with Hale's defense counsel for over 20 years, "[r]ace, ethnicity are not a factor in how [defense counsel] practices law or

conducts his personal business. That I'm very confident of." RP at 144. The court emphasized, "I want the record to reflect that this court is more than confident, one hundred percent convinced, that [defense counsel] is not exercising a peremptory challenge on behalf of his client because of the color of a person's skin." Clerk's Papers (CP) at 145. But the court noted that under GR 37(e), the key circumstance is whether an objective observer could view race or ethnicity as a factor.

The trial court then stated that it was "not readily apparent to this court that this panel includes many, if any, people of color or of a particular ethnic background." RP at 146. The court was not certain of juror 1's ethnic background, but "for purposes of this issue and this challenge," the court ruled that juror 1 appeared to be "nonwhite." RP at 146. And in the court's opinion, no other jurors appeared to have a similar skin tone to juror 1. The court again emphasized that "the court must look at this issue from the perspective of an objective observer, not this court's point of view." RP at 147.

Applying GR 37, the trial court concluded,

> [T]he court understands and appreciates the arguments made by [defense counsel]. It appears to the court that [defense counsel] has an articulable reason to exercise a peremptory challenge on behalf [of] his client. That being said, the court must also take into consideration whether an objective observer could view the challenge as being based on race or ethnicity.
>
> The court concludes that the challenge could be based -- from an objective observer, not from this court's perspective, but an objective observer's perspective, that the challenge could be viewed as being based on ethnicity or race.

RP at 147-48. Accordingly, the court denied Hale's peremptory challenge against juror 1. Juror 1 served on the jury that convicted Hale.

Hale appeals his convictions and sentence.

ANALYSIS

A. DENIAL OF PEREMPTORY CHALLENGE UNDER GR 37

Hale argues that the trial court erred in denying his peremptory challenge against juror 1. We agree, but we conclude that the error was harmless under the nonconstitutional harmless error standard.

1. Standard of Review

The parties disagree regarding the standard of review for a trial court's decision under GR 37. Hale argues that the standard of review is de novo. The State acknowledges the de novo standard, but argues that we should give deference to the trial court's observations.

GR 37 does not address the proper appellate standard of review. However, several Court of Appeals cases, including cases from this court, have applied a de novo standard of review in GR 37 cases. *E.g.*, *State v. Harrison*, 26 Wn. App. 2d 575, 582, 528 P.3d 849 (2023); *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 (2020).

The Supreme Court has not definitively decided this issue. In *State v. Tesfasilasye*, the Supreme Court stated that "most courts have effectively applied de novo review because the appellate court 'stand[s] in the same position as does the trial court' in determining whether an objective observer could conclude that race was a factor in the peremptory strike." 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022) (quoting *State v. Jefferson*, 192 Wn.2d 225, 250, 429 P.3d 467 (2018)). The court agreed with a de novo standard of review under the facts of that case because "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." *Tesfasilasye*, 200 Wn.2d at 356. However, the court

stated, "[W]e leave further refinement of the standard of review open for a case that squarely presents the question based on a well-developed record." *Id.*

Like the Supreme Court, we decline to hold that de novo review applies in all circumstances in GR 37 cases. For example, a trial court's finding that a particular juror was a person of color is a factual finding, and arguably de novo review would not apply to such a finding. *See Listoe*, 15 Wn. App. 2d at 331-32 (Melnick, J., concurring).

In addition, these determinations often rely on subtleties in human interactions that are absent from a cold written record. In some cases the demeanor, body language, and other nuances such as voice inflections of the jurors (and possibly the attorneys) may affect whether an objective observer could view race as a factor for a preemptory challenge. Appellate courts often have acknowledged that trial courts are in the best position to evaluate jurors because they can observe the jurors' demeanor. *See*, *e.g.*, *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012); *State v. Lawler*, 194 Wn. App. 275, 282, 374 P.3d 278 (2016). And as the Supreme Court noted in *Tesfasilasye*, there may be cases where the trial court's determinations are based on factual findings or credibility assessments. 200 Wn.2d at 356.

Here, the trial court's finding that juror 1 was a person of color was a factual finding, but Hale does not challenge that finding. In addition, there is no indication that the demeanor of juror 1 played any role in the trial court's GR 37 ruling. And as in *Tesfasilasye*, the GR 37 ruling did not involve any other factual findings or credibility issues. Therefore, under the specific facts of this case, we apply a de novo standard of review of the trial court's GR 37 ruling.

2. GR 37 Framework

GR 37 was designed "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a).

Before GR 37 was adopted, courts used the *Batson*[1] test in evaluating whether a peremptory challenge was racially motivated. *Listoe*, 15 Wn. App. 2d at 320. Under *Batson*, the party opposing the peremptory challenge had to establish a prima facie case that the challenge was exercised for a discriminatory purpose. *Id.* If the party exercising the challenge provided a race-neutral justification, the court had to determine whether the contesting party established purposeful discrimination. *Id.*

GR 37 was adopted to "address the shortcomings of *Batson*." *Tesfasilasye*, 200 Wn.2d at 357. Under GR 37, a party contesting a peremptory challenge no longer is required to establish a prima facie case of racial discrimination. *Listoe*, 15 Wn. App. 2d at 321. And the trial court no longer must find purposeful discrimination in order to deny a peremptory challenge. *Tesfasilasye*, 200 Wn.2d at 357.

GR 37(c) provides that when a party exercises a peremptory challenge, the opposing party may object to raise the issue of improper bias. Following an objection, "the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised." GR 37(d).

The trial court then must evaluate the justifications "in light of the totality of circumstances." GR 37(e). The peremptory challenge must be denied "[i]f the court determines that an objective observer *could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphasis added). "[A]n 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). And as noted, "[t]he court need not find purposeful discrimination to deny the peremptory challenge." GR 37(e).

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Requiring the denial of a peremptory challenge if an objective observer "could view" race or ethnicity as a factor as opposed to "would view" was a conscious choice. *See Tesfasilasye*, 200 Wn.2d at 357. This standard is more likely to prevent peremptory challenges based on the unconscious or implicit biases of counsel. *Id.*

In determining whether to deny the peremptory challenge, the trial court's consideration should include, but not be limited to, the following circumstances:

> (i) the number and types of [q]uestions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to [q]uestion the prospective juror about the alleged concern or the types of [q]uestions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more [q]uestions or different [q]uestions 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.

GR 37(g). "[T]his is not a checklist for trial courts to cross off but, instead, factors to be considered in making a determination." *Tesfasilasye*, 200 Wn.2d at 358.

In addition, GR 37(h) provides that certain reasons for peremptory challenges are presumptively invalid. And under GR 37(i), a party must give advance notice before relying on certain specified reasons for peremptory challenges that "have historically been associated with improper discrimination in jury selection."

3. Applicable Cases

a. Error in Overruling GR 37 Objection

The cases analyzing GR 37 have held that a trial court errs if it overrules a GR 37 objection to a peremptory challenge under several specific circumstances.

First, the trial court must sustain a GR 37 objection if the reason given is *similar* to one that is presumptively invalid under GR 37(h) or the challenge has "historically been associated with improper discrimination in jury selection" under GR 37(i). *Tesfasilasye*, 200 Wn.2d at 359 (proffered reason to challenge an Asian juror was that the juror had a traumatic personal experience with the legal system when her son was convicted of sexual assault, which is presumptively invalid under GR 37(h)(iii)); *State v. Orozco*, 19 Wn. App. 2d 367, 376, 496 P.3d 1215 (2021) (proffered reason to challenge an African American juror was that the juror associated with people engaged in criminal activity, which is presumptively invalid under GR 37(h)(i) and (iii)); *Listoe*, 15 Wn. App. 2d at 322 (the challenged juror had expressed some skepticism of the criminal justice system, which "echo justifications for exclusion from a jury that have historically been associated with discrimination").

In *Harrison*, this court emphasized that it could determine based on the totality of the circumstances that GR 37(h) was implicated even if the reason given did not expressly fall under one of the presumptively invalid reasons. 26 Wn. App. 2d at 582-83. In that case, the State challenged a juror who was a member of a racial or ethnic minority who questioned whether he could be fair in light of police officers and Black Lives Matter. *Id.* at 577. The court held that the trial court erred in overruling the GR 37 objection. *Id.* at 583-84. The court stated,

> [E]ven though the State's proffered reason for excluding juror 28 based on the juror's mindfulness of the Black Lives Matter movement and media coverage on racial justice issues did not explicitly reference the juror's distrust of law enforcement or the belief that law enforcement officers engaged in racial profiling,

> this reason is nevertheless implicated by the State's peremptory challenge and is presumptively invalid under GR 37(h)(ii). The presumption of invalidity is not overcome merely because the State used different language when giving its reasons for using its challenge.

Id. at 583 (footnote omitted).

Second, the trial court must sustain a GR 37 objection if the record does not support the reason given. In *Tesfasilasye*, the proffered reason for challenging an Asian juror was that the juror could not be fair to both sides. 200 Wn.2d at 359. But the Supreme Court concluded that this reason was not supported by the record and that the trial court should have denied the peremptory challenge. *Id.* at 359-60. In addition, the proffered reason for challenging a Latino juror was that he would harbor unreasonable doubts if not presented with concrete evidence. *Id.* at 360. But the Supreme Court concluded that the State misrepresented the juror's answers, which reflected that he understood the burden of proof. *Id.* at 361. Therefore, the trial court should have denied the peremptory challenge. *Id.*

In *Listoe*, the prosecutor asked the challenged juror what he would do if there was a law that prohibited eating cookies and a person was charged with eating a cookie. 15 Wn. App. 2d at 315. The juror stated that he would question the law and would have problems following it. *Id.* The State's proffered reason to challenge the juror was the response to the cookie hypothetical, which the State believed showed an inability to follow the law. *Id.* at 316. This court emphasized that the juror never stated that he would refuse to follow the law. *Id.* at 323. The court stated that "asking someone if they have a problem convicting someone of violating a plainly ridiculous law is not the same as asking them whether they would follow the law as given to them by the court. Any rational person would have a problem with convicting someone for eating a cookie." *Id.* Therefore, the trial court erred in overruling the GR 37 challenge. *Id.* at 325.

Third, the trial court must sustain a GR 37 objection if the reason given is vague or questionable. In *Omar*, the defendant attempted to exercise a peremptory challenge against an Asian woman. 12 Wn. App. 2d at 749. The proffered reason for the challenge of an Asian woman was that the defendant did not like some of the juror's responses and that he would be uncomfortable with her on the jury. *Id.* The appellate court affirmed the trial court's denial of the challenge, stating that "[b]ecause [the] offered reasons were nebulous, an objective observer could view race as a factor in the challenge." *Id.* at 754-55.

In *State v. Lahman*, the State attempted to use a peremptory challenge against a 23-year-old man with an Asian surname. 17 Wn. App. 2d 925, 929, 931, 488 P.3d 881 (2021). The justification was that the juror was younger and did not have life experiences. *Id.* at 931. The appellate court held that the trial court erred in overruling the GR 37 objection. *Id.* at 938. The court stated, "The prosecutor's focus on [the juror'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." *Id.* at 937-38.

b. Error in Sustaining GR 37 Objection

On the other hand, a trial court errs in denying a peremptory challenge under GR 37 when the party making the challenge has a legitimate reason for striking the juror and totality of the circumstances, including an assessment of the considerations in GR 37(g), do not support the conclusion that race or ethnicity could be a factor. *State v. Booth*, 22 Wn. App. 2d 565, 576-80, 510 P.3d 1025 (2022).

In *Booth*, the defendant in a driving under the influence case attempted to exercise a peremptory challenge against a juror (juror 6) who was a member of a cognizable racial minority. 22 Wn. App. 2d at 567-68. The juror stated that he would be comfortable with a law

that completely prohibited drinking and driving. *Id.* at 570. Later the juror stated that a person probably should consent to a sobriety test and follow a law enforcement officer's instructions. *Id.* The defendant attempted to use a peremptory challenge against juror 6. *Id.*

In response to a GR 37 objection, defense counsel stated that the juror harbored certain positions about drinking and driving that were inconsistent with being able to balance the issues. *Id.* at 575-76. Defense counsel focused on the juror's comment that he would change the law to prohibit all driving after drinking. *Id.* at 576. Further, defense counsel struck two other jurors (jurors 7 and 13) who gave similar answers. *Id.* at 578-79. The trial court denied the exercise of the peremptory challenge. *Id.* at 570.

Division One analyzed the considerations in GR 37(g) and concluded that they did not support denying the peremptory challenge. *Id.* at 576-79. Regarding GR 37(g)(iii), defense counsel did not strike a juror (juror 14) who also gave a zero tolerance answer. *Id.* at 578. But the court concluded that defense counsel had a legitimate reason for using peremptory challenges on jurors 6, 7, and 13 and not on juror 14. *Id.* at 579. In conclusion, the court stated,

> Unlike *Omar*, defense counsel here articulated specific reasons to challenge juror 6, and those reasons were supported by the record. And, unlike *Lahman*, defense counsel exercised a peremptory challenge on juror 6 after he spoke extensively during voir dire and expressed considerable discomfort with people who drink and drive. Although the State urges us to focus exclusively on the possibility that race could have been a factor, because defense counsel did not challenge juror 14, we review a GR 37 decision objectively and comprehensively, not superficially and narrowly. Because the totality of the circumstances, including the considerations under GR 37(g), would not lead an objective observer to conclude race could have been a factor in defense counsel's decision to exercise a peremptory challenge on juror 6, the trial court erred by granting the State's GR 37 motion and denying defense counsel's strike.

Id. at 579-80.

4. GR 37 Analysis

Here, Hale attempted to exercise a peremptory challenge against juror 1 and the State objected under GR 37 because juror 1 appeared to be a person of color. However, the totality of the circumstances show that the trial court erred in denying the peremptory challenge.

Initially, it is unclear from the record whether juror 1 actually was a member of a racially cognizable group. Although the trial court categorized juror 1 to be "of Hispanic origin or Latino maybe," it did so reluctantly and because it felt it was required to make the determination. RP at 138-39. But the court repeatedly stated it was unsure and that juror 1 did not seem to be of a particular ethnicity. However, Hale does not contest the trial court's ruling that juror 1 was a person of color.

Once the State objected to the peremptory challenge against juror 1, Hale was required to articulate the reasons for the challenge. GR 37(d). Here, Hale stated that he exercised the challenge because juror 1 (1) worked for CPS and had dealt with people with domestic violence issues and drug issues, (2) stated that he would be impacted by his work experience and training, and (3) stated that he would not be able to leave behind that work experience.

These were legitimate, race-neutral reasons. The charges against Hale involved both domestic violence and drugs. Hale legitimately might have had concerns about a juror with training and experience in those areas who said he might not be able to set aside that experience. Even the State acknowledges that Hale's reasons were valid.

The State points out that there was no indication that juror 1 actually was biased, and he stated that he could be fair and impartial. However, whether a juror would be subject to a for cause challenge – which actual bias would support – cannot be the test. Peremptory challenges are designed to allow a party to remove a juror who cannot be removed for cause. As the

Supreme Court emphasized in *Tesfasilasye*, "[i]f a juror can be excused for cause, they should be excused for cause. Biased jurors simply should not be seated. But GR 37 is qualitatively different and is aimed at curing a different problem. It is not an alternate way to dismiss jurors for cause." 200 Wn.2d at 359.

Next, on de novo review we must consider the circumstances listed in GR 37(g). *See Booth*, 22 Wn. App. 2d at 576. Circumstances (i) and (ii) require the court to consider the number and types of questions posed to juror 1 and whether more or different questions were asked to other jurors. GR 37(g)(i)-(ii). When the State asked the venire about their education and experience, jurors 1 and 9 indicated that they worked with CPS, and juror 35 worked in victim advocacy. Jurors 1, 9, and 10 all gave answers that implied their personal or professional experiences may impact them. Hale asked each one follow up questions. Although Hale did not ask juror 1 as many follow up questions as some of the other jurors, he did ask the same type of questions to all of the relevant jurors and questioned juror 1 about the alleged concern. Viewed objectively, circumstances (i) and (ii) do not support the conclusion that juror 1's race or ethnicity could be a factor in the peremptory challenge.

Circumstance (iii) requires the court to consider whether other jurors provided similar answers as juror 1 but were not subjected to peremptory challenges. GR 37(g)(iii). Among the jurors who provided similar answers as juror 1, the State exercised a peremptory challenge against juror 10. Hale exercised a peremptory challenge against juror 9.[2] Viewed objectively, circumstance (iii) does not support the conclusion that juror 1's race or ethnicity could be a factor in the peremptory challenge.

[2] Two other jurors gave similar answers – jurors 23 and 32. Juror 23 was excused for hardship, and juror 32 was excused for cause.

Circumstance (iv) requires the court to consider whether Hale's stated reason for the peremptory challenge might be disproportionately associated with race or ethnicity. GR 37(g)(iv). Hale's basis for exercising a peremptory challenge on juror 1 was that he was a social worker who had dealt professionally with drug and domestic violence issues and that his work experience may impact his ability to be fair and impartial in the case. These reasons are not associated with race or ethnicity. Viewed objectively, circumstance (iv) does not support the conclusion that juror 1's race or ethnicity could be a factor in the peremptory challenge.

Circumstance (v) requires the court to consider whether Hale has disproportionately used peremptory challenges against a given race or ethnicity in the present case or past cases. GR 37(g)(v). The record reflects that there were four other persons of color on the venire, and Hale did not exercise peremptory challenges against any of them. In addition, the trial court made clear that defense counsel did not exercise the challenge disproportionately based upon the court's 20 years of experience with him. The court stated, "Race, ethnicity are not a factor in how [defense counsel] practices law or conducts his personal business. That I'm very confident of." RP at 144. Viewed objectively, circumstance (v) does not support the conclusion that juror 1's race or ethnicity could be a factor in the peremptory challenge.

In addition to the GR 37(g) analysis, Hale's reasons for the preemptory challenge were not presumptively invalid under GR 37(h) or historically associated with improper discrimination in jury selection under GR 37(i).

Under the totality of all the circumstances, we conclude that an objective observer could not view race or ethnicity as a factor in Hale's peremptory challenge against juror 1. Hale's legitimate reason for the challenge was based on juror 1's professional experiences and not on race or racial stereotypes. Hale did not exercise peremptory challenges against four other jurors

of color, all who sat on the jury. And all of the jurors who provided similar responses to juror 1 were removed from the jury. Viewed objectively, nothing in the record suggests that Hale's peremptory challenge against juror 1 had anything to do with the fact that he was a person of color.

Accordingly, we hold that the trial court erred in denying Hale's peremptory challenge against juror 1.

B. HARMLESS ERROR

The State argues that even if the trial court erred in denying Hale's peremptory challenge, the error was harmless under the nonconstitutional harmless error standard. We agree.

1. Applicable Standard

Hale argues that the erroneous empaneling of juror 1 violated his jury trial right under article I, section 21 of the Washington Constitution, requiring application of the constitutional harmless error standard. The State argues that the nonconstitutional harmless error standard applies. We agree with the State.

Under the constitutional harmless error standard, the State must prove beyond a reasonable doubt that the verdict would have been the same without the error. *State v. Charlton*, 23 Wn. App. 2d 150, 168, 515 P.3d 537 (2022), *rev. granted,* 200 Wn.2d 1025 (2023). Under the nonconstitutional standard, an error is harmless if there is no reasonable probability that the error materially affected the outcome of the trial. *Booth*, 22 Wn. App. 2d at 584.

The United States Supreme Court "has consistently held that there is no freestanding constitutional right to peremptory challenges." *Rivera v. Illinois*, 556 U.S. 148, 157, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). "If a defendant is tried before a qualified jury composed of

individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Id.*

Our Supreme Court also has concluded that the denial of peremptory challenges is not constitutional error. In *In re Personal Restraint of Meredith*, the trial court erroneously gave the parties one less peremptory challenge than the number to which they were entitled. 191 Wn.2d 300, 303, 422 P.3d 458 (2018). The Supreme Court and both parties recognized that a defendant had no constitutional right to peremptory challenges. *Id.* at 309. Therefore, the Court of Appeals in that case could have refused to consider the peremptory challenge issue under RAP 2.5(a) because the error was not manifest constitutional error. *Id.* at 312

In *State v. Lupastean*, the Supreme Court addressed a juror's failure to disclose information during jury selection, which impaired the defendant's ability to intelligently exercise peremptory challenges. 200 Wn.2d 26, 30, 513 P.3d 781 (2022). The court stated that the right to exercise peremptory challenges was "nonconstitutional." *Id.* at 31. The court stated, "[W]e recognize that peremptory challenges 'are but one state-created means to the constitutional end of an impartial jury and a fair trial,' which may be restricted or 'withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.' " *Id.* at 48 (quoting *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

Division One in *Booth* addressed the harmless error standard for an erroneous denial of a defendant's peremptory challenge under GR 37. 22 Wn. App. 2d at 580. The court noted that "there is no right to a peremptory challenge under either the United States Constitution or the Washington Constitution, so the erroneous loss of a peremptory challenge does not undermine the fundamental judicial process." *Id.* at 581 (citing *Rivera*, 556 U.S. at 157 and *Meredith*, 191 Wn.2d at 309). The court concluded, "Because erroneous denial of a peremptory challenge

alone does not present a constitutional issue, we analyze the error using the nonconstitutional harmless error standard." *Id.* at 584.

Division Three provided a similar analysis in *State v. Hillman*, 24 Wn. App. 2d 185, 519 P.3d 593 (2022). The court noted that both the United States Supreme Court and the Washington Supreme Court have held that the right to a jury trial under the federal and state constitutions does not encompass the right to exercise peremptory challenges. *Id.* at 194-95. The court stated, "Given there is no constitutional right to exercise peremptory challenges, it appears unlikely that the erroneous denial of a peremptory challenge is a matter that can be remedied on review." *Id.* at 195.

Hale urges this court to conduct a *Gunwall*[3] analysis to determine whether the improper denial of a defendant's peremptory challenge is constitutional error. He claims that *Meredith* and *Lupastean* do not control because they did not address the erroneous denial of a peremptory challenge. And he argues that we should not follow *Booth* because it is a decision from another division and because the court in that case did not conduct a *Gunwall* analysis.

We decline to conduct a *Gunwall* analysis and conclude that the nonconstitutional harmless error standard applies. As noted above, our Supreme Court has made it clear that there is no constitutional right to peremptory challenges. In fact, GR 37 itself recognizes that peremptory challenges can be restricted by rule. We follow *Booth* and conclude that the nonconstitutional harmless error standard applies to the erroneous denial of a defendant's peremptory challenge under GR 37.

[3] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

2. Analysis

Under the nonconstitutional harmless error standard, the question here is whether there is reasonable probability that the error materially affected the outcome of the trial. *Booth,* 22 Wn. App. 2d at 584. As the court noted in *Booth*, "We recognize that this standard may be difficult to meet because it requires proving prejudice from the presence of a competent, unbiased juror." *Id.* at 585.

Hale argues that juror 1's professional background in domestic violence and substance abuse necessarily prejudiced juror 1's evaluation of the evidence admitted at trial. However, Hale's claim is based on speculation. When the prosecutor asked if he could be fair and impartial despite his experience with CPS, juror 1 replied, "I do believe so." RP at 109. And although juror 1 acknowledged that his training and experience with CPS would be in the back of his mind, he stated that "I would do everything I could to be a fair and impartial juror." RP at 130. As a result, there is no question that juror 1 could not have been challenged for cause, and Hale did not attempt to make such a challenge. "A juror who is not subject to a for-cause challenge is necessarily competent and unbiased." *Hillman,* 24 Wn. App. 2d at 195.

Hale may have had legitimate concerns about juror 1's CPS training and experience, but there is no indication that juror 1's presence on the jury affected the outcome of the trial. Therefore, we hold that the trial court's error in denying Hale's peremptory challenge was harmless under the nonconstitutional harmless error standard.

CONCLUSION

We affirm Hale's convictions, but we remand this case to the trial court to strike its imposition of community custody for Hale's felony harassment conviction and the community

custody supervision fees. The trial court also should determine whether Hale is indigent under RCW 10.01.160(3) and reconsider the imposition of the VPA based on that determination.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we hold that (1) the prosecutor improperly misstated evidence by arguing facts not in evidence during closing and rebuttal arguments, but Hale waived this claim because he failed to object and the improper conduct did not result in incurable prejudice; (2) the prosecutor improperly made a generic tailoring argument during rebuttal, but Hale waived this claim because he failed to object and the improper conduct did not result in incurable prejudice; (3) defense counsel's performance was deficient in failing to object to some of the prosecutor's improper statements, but Hale cannot establish prejudice; (4) as the State concedes, the term of community custody for Hale's felony harassment conviction must be stricken; (5) as the State concedes, the community custody supervision fees must be stricken because RCW 9.94A.703(2) no longer authorizes the imposition of such fees; and (6) because the recent amendment to RCW 10.01.160(3) provides that the VPA cannot be imposed if the defendant is indigent, we remand for the trial court to reconsider whether to impose the VPA.

ADDITIONAL FACTS

Background

On the night of Hale's arrest, Rebecca Rickett, Hale's girlfriend at the time, had returned home in the evening. Hale was there with a friend, later identified as William Ufford. Ufford was Hale's drug dealer. Hale and Rickett began to argue and Hale threw a machete at the wall. He threatened to kill Rickett and she called 911 from her bedroom. Hale broke her bedroom

door and Rickett pretended to be on the phone with a friend. Rickett then stated to dispatch, "[H]e is trying to kill me." CP at 2.

When law enforcement arrived at the residence, Hale and Ufford were outside loading items into the Jeep. When they spotted the police, Hale and Ufford ran into the garage and closed the door. After removing Rickett from the house and serving a search warrant, the police arrested Hale.

Once in custody, Hale stated that when they first arrived he did not know they were police and he thought he was being robbed. Upon entering the house, officers found a rifle, a pistol holster, several machetes, knives, a methamphetamine pipe, a container with white crystals in it, a pistol magazine, and a container with bullets in it. Officers also found a digital scale with white residue on it in the garage. In the Jeep they found the safe, the key to the safe, shotgun shells, Hale's wallet, a pistol magazine, a scale with heroin residue on it, two boxes of ammunition, and a container with black tar heroin and methamphetamine in it. The safe contained two large bags of methamphetamine, a pistol with three pistol magazines, a container with empty baggies, and $3,960 in cash.

Trial Testimony

Rickett testified that when she arrived home on the night of the incident, she saw Hale with Ufford, a person she had never seen before and who looked "sketchy." RP at 282. Hale accused Rickett of taking his money and the Jeep keys. Rickett then told Hale and Ufford to leave. Rickett and Hale's argument began to escalate and she threatened to call the police if he did not leave. Rickett stated that she hid upstairs to get away from Hale and that Hale was throwing hatchets into the wall. Rickett called 911 and was trying to explain the situation to the dispatcher when Hale broke through the bedroom door. Rickett testified that she did not

remember saying, "He's trying to kill me" and that maybe she had been exaggerating. RP at 333. She claimed that she never feared that Hale would kill her but she had felt threatened that he would "put his hands on" her. RP at 334.

Rickett also testified that she still cared about Hale. She stated that she still had an "amorous" relationship with Hale, "put money on his books at the jail," sent him letters, and had phone calls with him where they both said "I love you" to each other. RP at 337. Rickett did not testify that she picked out the clothes Hale wore at trial.

Rickett's 911 call was played for the jury. Law enforcement officers testified to what occurred when they arrived at Rickett's house.

Hale testified that on the day of the incident, Ufford had called Hale asking for a ride because Ufford and his girlfriend were having a domestic issue. Hale took Rickett's Jeep to get Ufford and brought him back to the house, where they both consumed methamphetamine. Ufford then asked Hale to help him move and Hale loaned Ufford the Jeep in exchange for the methamphetamine. Ufford used the Jeep to pick up his belongings and came back to Rickett's house because Hale was going to help Ufford take his things to a storage unit. Ufford had also asked Hale to borrow his safe and so Hale emptied the contents of the safe and gave it to Ufford along with the key.

Hale and Ufford consumed more methamphetamine once Ufford returned to Hale's house. Hale stated that when Rickett came home she was upset about Ufford being at the house and that she had an aggressive demeanor and was throwing things. Hale testified that when Rickett threatened to call the police he had tried "to get away from the whole situation." RP at 437. But when he could not find the Jeep key he thought that Rickett had taken the key and his

money due to his paranoia from consuming methamphetamine. He admitted that when Rickett was in the bedroom he broke down the bedroom door.

Hale testified that the guns and ammunition that were found did not belong to him and that the container with methamphetamine and heroin belonged to Ufford. He also stated that he had never seen the drugs that were found in the safe.

On cross examination, the prosecutor questioned Hale about whether he had access to police reports and statements:

> Q. You've had a copy of the police reports and statements in this case in your possession since around mid-April, correct?
>
> A. I can't be sure the exact date I've had them. I know it took about five months for me to get the discovery or so five or six months.
>
> Q. Sir, that wasn't my question. My question was: For approximately the last month you've had in your possession the police reports and statements in this case[?]
>
> A. The last month? So I've had them for about a month, three weeks or so, yes.
>
> Q. Mid-April.
>
> A. Yes.
>
> Q. And you've had the opportunity to review them[?]
>
> A. Yes.
>
> Q. And you have in fact reviewed them[?]
>
> A. Not so much, no.
>
> Q. Isn't it true that you spoke with someone and you told them that you have been reviewing the police reports with your roommate? Yes or no.
>
> A. I might have. I'm not quite sure.
>
> Q. And *in that conversation the person you were speaking with you said that you and your roommate were coming up with some ideas*.

A. *I don't remember -- recall that at all, no*.

RP at 481-82 (emphasis added).

Closing and Rebuttal Arguments

The trial court gave a jury instruction stating that (1) the jury "are the sole judges of the credibility of each witness," (2) "the lawyers' statements are not evidence," and (3) the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law." CP at 51.

During closing argument, the prosecutor discussed how Rickett still cared about Hale – "You heard that she has been still providing him with money. She writes letters. They still say 'I love you' to each other. *And in fact, she picked out the clothes that he's worn for the last week.*" RP at 552 (emphasis added). Hale did not object to the statement about picking out Hale's clothes.

The prosecutor noted that Hale had access to the police reports and statements. She then stated, "He had talked on the phone to someone and described that he and his roommate were reviewing the reports, and *he also testified that he told this person on the phone that as he and his roommate were reviewing the reports were coming up with some ideas*." RP at 562 (emphasis added). Hale did not object to this argument.

During Hale's closing argument, defense counsel discussed what was and was not evidence for the jury to consider. He addressed the prosecutor's statements about Hale's testimony:

> [The prosecutor] tries to introduce as evidence this issue of Mr. Hale talking on the phone with somebody about coming up with a plan. That was in her question. What was his answer? I believe his answer was something along the lines of "I don't recall that." [The prosecutor] didn't play any phone calls for you. That is not in evidence, and you may not consider it as evidence, folks.

RP at 602.

The prosecutor again addressed Hale's credibility during rebuttal argument. She argued,

> When I asked Mr. Hale about making a phone call and discussing with the person he had called how he and his roommate had been reviewing the report, he did not deny that. He agreed. And *when I asked Mr. Hale about making a statement that he and his roommate were going to come up with some ideas, he again did not deny making that statement*. He acknowledged that that was a statement that he had made.
>
> If Mr. Hale, as you're assessing his credibility, is telling you what he remembers happening on September 14th, then why in the world were him and his roommate coming up with some ideas?

RP at 607 (emphasis added).

The prosecutor then stated regarding Hale's testimony that it was "ironic that that's the testimony *after he sat and listened to all of the other testimony*, reviewed police reports and talks with his roommate to come up with something, that that's what he came up with." RP at 608 (emphasis added). Hale did not object to any of these statements.

Verdict and Sentence

The jury convicted Hale of felony harassment, third degree malicious mischief-domestic violence, unlawful possession of a controlled substance with intent to deliver while armed with a firearm, and three counts of second degree unlawful possession of a firearm. In addition to sentencing Hale to a term of confinement, the trial court imposed nine months of community custody for the felony harassment conviction. The trial court also ordered Hale to pay community custody supervision fees and the $500 VPA.

ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Hale argues that the prosecutor repeatedly engaged in misconduct during her closing and rebuttal arguments by (1) misstating evidence regarding Hale's testimony about discussing his

testimony with his roommate, (2) claiming without supporting evidence that Rickett picked out Hale's clothes, and (3) arguing that Hale tailored his testimony to align with other evidence. We conclude that the prosecutor engaged in misconduct but Hale waived his claims by failing to object because the improper conduct did not result in incurable prejudice.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Our analysis considers "the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). To show prejudice, the defendant is required to show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

When the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Zamora*, 199 Wn.2d at 709 (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in incurable prejudice." *Zamora*, 199 Wn.2d at 709. If a defendant fails to make this showing, the prosecutorial misconduct claim is waived. *Slater*, 197 Wn.2d at 681.

Courts have found flagrant and ill-intentioned conduct in a "narrow set of cases," including "where the prosecutor otherwise comments on the evidence in an inflammatory manner." *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018). And it is less likely that improper statements will cause incurable prejudice when they do not have an

inflammatory effect. *See State v. Emery*, 174 Wn.2d 741, 762-63, 278 P.3d 653 (2012). The defendant "must show that the prejudice was so inflammatory that it could not have been defused by an instruction." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

2. Misstating Evidence

Hale argues that the prosecutor misstated evidence regarding Hale's testimony when she (1) claimed that Hale admitted to "coming up with some ideas" for his testimony, and (2) alleged that Rickett picked out the clothes Hale wore at trial. We agree, but we conclude that the improper comments did not result in incurable prejudice.

It is improper for the prosecutor to misstate the evidence presented at trial and thereby mislead the jury. *State v. Meza*, 26 Wn. App. 2d 604, 620, 529 P.3d 398 (2023). And a prosecutor engages in misconduct when he or she encourages the jury to consider evidence that is outside of the record. *State v. Teas*, 10 Wn. App. 2d 111, 128, 447 P.3d 606 (2019). However, the prosecutor has wide latitude to assert reasonable inferences from the evidence. *Slater*, 197 Wn.2d at 680.

a. Statements Regarding Coming Up with a Plan

The prosecutor argued in both closing and rebuttal that Hale testified that he and his roommate were coming up with some ideas about his testimony. There is no question that the prosecutor's comments misstated the evidence and constituted misconduct. The prosecutor suggested to Hale that he had made such a statement, but Hale expressly denied recalling that. And the prosecutor's statements did not constitute a reasonable inference from the evidence.

However, Hale did not object to these statements. We conclude that Hale fails to show that any prejudice was incurable. If he had objected, the trial court could have stricken the comment and reminded the jury on the instruction previously given that the prosecutor's

comments were not evidence and that they must disregard any statement not supported by the evidence. We presume that jurors follow the court's instructions. *State v. Carte*, ___ Wn. App. 2d ___, 534 P.3d 378, 387 (2023). And the statements were not so inflammatory that the instruction could not have cured any prejudice. Finally, in his closing argument Hale specifically told the jury that it could not consider the prosecutor's statement about Hale coming up with a plan because he had testified that he did not recall that.

Because any prejudice caused by the prosecutor's improper statements could have been cured by instruction, we hold that Hale waived his prosecutorial misconduct claim regarding these statements.

b. Statement Regarding Picking Out Clothes

The prosecutor stated during closing argument that Rickett "picked out the clothes that [Hale has] worn for the last week." RP at 552. This comment misstated the evidence and constituted misconduct. The evidence, including Rickett's and Hale's testimony, did not show or suggest that Rickett picked out Hale's clothes. And the prosecutor's statement did not constitute a reasonable inference from the evidence that Rickett still had a relationship with Hale.

However, Hale did not object to this statement. We conclude that Hale fails to show that any prejudice was incurable. If he had objected, the trial court again could have stricken the comment and reminded the jury of the instruction stating that the prosecutor's comments were not evidence and that they must disregard any statement not supported by the evidence. And the statements were not so inflammatory that the instruction could not have cured any prejudice in light of Rickett's testimony that she still cared about Hale, still had a relationship with him where she provided him money at the jail, sent him letters, had phone calls with him, and said "I love you" to him over the phone.

Because any prejudice caused by the prosecutor's improper statement could have been cured by instruction, we hold that Hale waived his prosecutorial misconduct claim regarding this statement.

3. Generic Tailoring Argument

Hale argues that the prosecutor violated his rights under article I, section 22 of the Washington Constitution when the prosecutor made a generic tailoring argument during rebuttal argument. We agree, but we conclude that the improper comments did not result in incurable prejudice.

a. Legal Principles

A prosecutor's claim of "tailoring" refers to an argument that a defendant has changed their testimony to conform to the evidence presented at trial. *Carte*, 534 P.3d at 385. "Specific" tailoring arguments are based on the defendant's actual testimony. *Id.* "Generic" tailoring arguments are based only on the defendant's presence at trial without reference to specific testimony. *Id.*

In *Portuondo v. Agard*, the United States Supreme Court held that tailoring arguments do not violate a defendant's Sixth Amendment right to be present at trial. 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). In a dissenting opinion, Justice Ginsburg agreed that during cross-examination the State can make any tailoring allegations and at any stage can "accuse a defendant of tailoring specific elements of his testimony to fit with particular testimony given by other witnesses." *Id.* at 78 (Ginsburg, J., dissenting). However, Justice Ginsburg asserted that generic tailoring arguments during closing argument are improper. *Id.* at 78-79 (Ginsburg, J., dissenting).

In *State v. Martin*, our Supreme Court noted the holding in *Portuondo*, but determined that whether tailoring was prohibited under article I, section 22 of the Washington Constitution[4] should be analyzed independently from the Sixth Amendment. 171 Wn.2d 521, 527, 533, 252 P.3d 872 (2011). In discussing *Portuondo* as part of the independent analysis, the court summarized Justice Ginsberg's position as "distinguish[ing] a comment in closing argument that is 'tied only to the defendant's presence in the courtroom and not to his actual testimony' from accusations made during cross-examination of the defendant. *Id.* at 535 (quoting *Portuondo*, 529 U.S. at 77 (Ginsburg, J., dissenting)).

The court in *Martin* adopted Justice Ginsberg's position regarding cross-examination:

> We believe that Justice Ginsburg's view, that suggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22. It is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.

Martin, 171 Wn.2d at 535-36. The court acknowledged the disagreement between the majority and the dissent in *Portuondo* regarding whether generic tailoring arguments are proper during closing argument, but declined to address whether generic accusations violate article I, section 22 because the accusation in *Martin* was specific rather than generic. *Id.* at 536 n.8.

However, in *Carte* Division One of this court recently stated,

> [W]e take this opportunity to clarify and hold that a generic tailoring argument raised only in the prosecution's closing argument, and untethered to the defendant's direct testimony or cross-examination, violates article I, section 22 of the Washington Constitution.

534 P.3d at 386.

[4] Article I, section 22 states, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . to testify in his own behalf, to meet the witnesses against him face to face."

In *Carte*, the prosecutor argued in closing that the defendant had the benefit of hearing all the evidence and how everyone else had testified, and conformed his testimony to fit certain facts. 534 P.3d at 386. Division One stated,

> The prosecution did not point to any specific portion of Carte's testimony that he conformed "to fit for certain facts." Nor did the prosecution suggest Carte's testimony differed in any way from statements he made before trial. Instead, the prosecution asserted Carte "conform[ed] his testimony" to the other evidence based only on the benefit of his right to attend his trial and confront the witnesses against him. The prosecution's tailoring argument violated article I, section 22 and was improper.

Id.

However, the court concluded that the defendant had waived his prosecutorial misconduct claim because he did not object to the improper statement. *Id.* at 386-87. The court emphasized that (1) if the defendant had objected the trial court could have instructed the jury not to draw any adverse inferences from his testimony; and (2) the misconduct was not pervasive, consisting of only a single sentence that was not repeated. *Id.* at 387.

b. Analysis

Here, during cross-examination the prosecutor did not suggest that Hale tailored his testimony to conform to the evidence presented at trial.[5] But the prosecutor stated during rebuttal regarding Hale's testimony that it was "ironic that that's the testimony after he sat and listened to all of the other testimony, reviewed police reports and talks with his roommate to come up with something, that that's what he came up with." RP at 608. The prosecutor did not specify what "that's what he came up with" referred to.

[5] During cross-examination, the prosecutor suggested that Hale and his roommate were reviewing police reports and coming up with some ideas about his testimony. But that is not a tailoring argument. Tailoring is when the defendant conforms their testimony to testimony and evidence they observe *during trial*. *Carte*, 534 P.3d at 385.

We conclude that this statement constituted a generic tailoring argument. The prosecutor did not raise tailoring during cross-examination and did not reference specific testimony when implying that Hale had based his trial testimony on other testimony and evidence that had been presented. Hale's testimony in some respects was inconsistent with his statements to the police, but the prosecutor did not connect her tailoring claim to those statements.

However, Hale did not object to this statement. The key question is whether Hale can show that any prejudice was incurable. *Carte*, 534 P.3d at 387.[6]

We conclude that Hale fails to show that any prejudice was incurable. First, if he had objected, the trial court could have stricken the comment and reminded the jury of the instruction stating that the prosecutor's comments are not evidence, that they must disregard any statement not supported by the evidence, and that they are the sole judges of credibility.

Second, the comment was somewhat vague. The prosecutor did not directly argue that Hale had tailored his testimony. Instead, she focused on the implausibility of Hale's story – "that's what he came up with", RP at 608 – in light of the fact that he had the opportunity to hear other testimony.

Third, the prosecutor's statement was extremely brief – a single sentence. The court in *Carte* stated, "We look also to the pervasiveness of the misconduct. A single fleeting improper comment is likely curable, while prejudice may be unavoidable when an improper argument is repetitive and thematic." 534 P.3d at 387. Here, the prosecutor never repeated or emphasized this brief comment.

[6] The court in *Carte* rejected the defendant's argument that the manifest constitutional error standard of RAP 2.5(a)(3) should be used to address whether this issue can be raised for the first time on appeal. 534 P.3d at 387-88. Hale does not make this argument.

Because any prejudice caused by the prosecutor's improper statement could have been cured by an instruction, we hold that Hale waived his prosecutorial misconduct claim regarding the prosecutor's improper tailoring argument.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In the alternative, Hale argues that he received ineffective assistance of counsel when defense counsel did not object to the prosecutor's improper statements. We agree in part, but we hold that any deficient performance did not prejudice Hale.

1. Legal Principles

A defendant who claims that he received ineffective assistance of counsel must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). Representation is deficient if after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Id.* at 247-48. Prejudice exists if there is a reasonable probability that but for defense counsel's errors, the result of the proceeding would have differed. *Id.* at 248.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* at 247. Defense counsel's conduct is not deficient if it was based on legitimate trial strategy or tactics. *Id.* at 248. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any legitimate strategic or tactical reason explaining defense counsel's conduct. *Id.* Whether and when to object typically is a strategic or tactical decision. *Id.* And a legitimate trial strategy is to forgo an objection when defense counsel wishes to avoid highlighting certain evidence. *Id.*

2. Misstatement of Testimony During Closing

The prosecutor argued in closing that Hale testified that he and his roommate were coming up with some ideas about his testimony, which misstated Hale's testimony. Defense counsel did not object to the prosecutor's statement. However, he did respond to the statement during his own closing argument, emphasizing that the statement was "not in evidence, and you may not consider it as evidence." RP at 602. Because we presume that counsel's performance was reasonable, we conclude that defense counsel's decision to not object and instead to address the statement in closing was a strategic or tactical decision. Therefore, defense counsel was not deficient regarding this issue.

3. Misstatement of Testimony During Rebuttal

The prosecutor improperly misstated Hale's testimony two more times during rebuttal argument, again stating that Hale testified that he and his roommate were coming up with some ideas. Defense counsel did not object to either of the statements. Although it is possible that defense counsel had a tactical reason for not objecting, we assume without deciding that defense counsel's failure to object was deficient.

But even if defense counsel's performance was deficient, Hale cannot show that he was prejudiced. Hale argues that the prosecutor's improper statements undermined his credibility and that his truthfulness was the cornerstone of his defense. But defense counsel defused the impact of these statements by pointing out the prosecutor's misstatement in his closing argument, and the jury presumably recalled that Hale had denied saying that he had come up with ideas with his roommate. There is no indication that the result of the proceeding would have differed if defense counsel had objected.

4. Generic Tailoring Argument

The prosecutor improperly suggested that Hale tailored his testimony after hearing the testimony and evidence presented at trial. Defense counsel did not object. However, this was a brief statement in a compound sentence that did not directly reference tailoring. Defense counsel may have decided not to object because he did not want to highlight the suggestion of tailoring. This is a legitimate trial tactic. *Vazquez*, 198 Wn.2d at 248. And generally whether to object is a classic example of trial tactics. *Id.*

Even if defense counsel's performance was deficient, Hale cannot show that he was prejudiced. Hale argues that the prosecutor's improper statement undermined his credibility. But the prosecutor's statement was brief and somewhat vague, and the statement was not repeated. There is no indication that the result of the proceeding would have differed if defense counsel had objected.

C. COMMUNITY CUSTODY FOR FELONY HARASSMENT

Hale argues, and the State concedes, that the trial court exceeded its authority when it imposed community custody on Hale's felony harassment conviction. We agree.

A trial court is not authorized to impose community custody for a felony harassment conviction. *State v. France*, 176 Wn. App. 463, 473, 308 P.3d 812 (2013). This is because under RCW 9.94A.701(3)(a), a court must impose community custody when an offender is sentenced to "[a]ny crime against persons." Felony harassment is not a crime against persons. RCW 9.94A.411(2). Therefore, we remand for the trial court to strike its imposition of community custody on the felony harassment conviction.

D. COMMUNITY CUSTODY SUPERVISION FEES

Hale argues, and the State concedes, that the community custody supervision fees imposed in the judgment and sentence must be stricken. We agree.

Effective July 2022, RCW 9.94A.703(2) no longer authorizes the imposition of community custody supervision fees. *See State v. Ellis*, 27 Wn. App. 2d, 1, 17, 530 P.3d 1048 (2023). Although this amendment took effect after Hale's sentencing, it applies to cases pending on appeal. *Id.* Therefore, we remand for the trial court to strike the imposition of the community custody supervision fees.

E. CRIME VICTIM PENALTY ASSESSMENT

Hale argues that the $500 VPA should be stricken from his judgment and sentence. The State claims that the issue should be remanded to the trial court for it to determine whether the VPA should be waived. We agree with the State.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See Ellis*, 27 Wn. App. 2d at 16. The amendment also states that upon motion by an offender, trial courts are required to waive any VPA imposed prior to the effective date of the amended statute if the offender is indigent. RCW 7.68.035(5)(b). Although this amendment took effect after Hale's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

However, there has been no clear finding that Hale is indigent and the State does not concede this issue. Therefore, we remand for the trial court to determine whether Hale is indigent under RCW 10.01.160(3) and to reconsider the imposition of the VPA based on that determination. *Ellis*, 27 Wn. App. 2d at 16-17.

CONCLUSION

We affirm Hale's convictions but remand this case to the trial court to strike its imposition of community custody for Hale's felony harassment conviction and the community custody supervision fees. The trial court also should determine whether Hale is indigent under RCW 10.01.160(3) and reconsider the imposition of the VPA based on that determination.

MAXA, J.

We concur:

GLASGOW, C.J.

PRICE, J.