Supreme Court No. 103024-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,

v.

SERGEY KOVALENKO,
Petitioner.

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# PETITION FOR REVIEW

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## A. INTRODUCTION

Sergey Kovalenko is a Russian immigrant who faced serious allegations that he abused his children. Yet the trial court refused to remove a juror who expressed an inability to be fair given the nature of the charges and Mr. Kovalenko's failure to become more American. It also commented on the evidence by instructing jurors the alleged victims' testimony shall not require corroboration. And it failed to provide Mr. Kovalenko with word for word translation of all trial testimony.

The published Court of Appeals decision contains multiple significant flaws. It creates a new rule regarding preservation of for-cause challenges, disregarding this Court's cases holding that exhaustion of peremptory challenges preserves an objection to a biased juror who serves in the case. The Court of Appeals added a further requirement that if it was possible for the person to use a peremptory challenge against the juror, the failure to do so waives the error.

The Court of Appeals also refused to address a court instruction that commented on the evidence by telling jurors they "shall not" require evidence corroborating the complaining witnesses' allegations. This controversial instruction has been repeatedly called into question by the Court of Appeals but it insists only this Court has the authority to deem the instruction erroneous.

These issues and others addressed below involve matters of substantial public interest in a published decision. Review should be granted.

## B. IDENTITY OF PETITIONER AND DECISION BELOW

Sergey Kovalenko, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals published decision terminating review dated April 15, 2024, *State v. Kovalenko*, __ Wn. App. 2d __, 546 P.3d 514 (2024). RAP 13.4(b)(1)-(4).

## C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals invented a new requirement to preserve a challenge to a biased juror, insisting a challenge is waived if the person could have exercised a peremptory to excuse the biased juror, even if the court erroneously denied a cause challenge and the party exhausted their limited peremptory strikes. This decision is contrary to this Court's precedent. It creates unnecessary impediments to ensuring fair, impartial jurors. This Court should accept review to address this significant constitutional question involving substantial public interests and to reverse the opinion that conflicts with cases from this Court and the Court of Appeals.

2. The right to an impartial jury require courts to dismiss biased jurors even in the absence of a for-cause challenge. Courts must be especially vigilant in questioning and removing jurors who express race, ethnic, or nationality-based biases. In addition to erroneously denying Mr. Kovalenko's motion to strike Juror 9 based on her inability to be fair and impartial, the

trial court ignored Juror 9's disparaging comments about Mr. Kovalenko's foreign upbringing and need for an interpreter. The court's seating of Juror 9 without investigating her negative comments about Mr. Kovalenko's nationality and use of an interpreter deprived him of an impartial jury free from racial, ethnic, and nationality bias, contrary to this Court's efforts to eradicate these biases from our legal system.

3. In 1949, this Court approved of an instruction telling jurors the State is not required to corroborate an alleged victim's testimony in a sexual assault case.[1] Many Court of Appeals decisions have expressed doubt about *Clayton* but said they are bound by it. A number of other states have rejected similar no-corroboration instructions. This Court should grant review of the published Court of Appeals decision because the Court of Appeals cannot overrule *Clayton*, *Clayton* is based on outmoded perceptions, and it is improper for trial courts to

[1] *State v. Clayton*, 32 Wn.2d 571, 577-78, 202 P.2d 922 (1949).

comment on the evidence by signaling out the complaining witness's testimony as subject to less rigorous scrutiny.

4. Prosecutor's questions and arguments based on racial, ethnic, or religious stereotypes are antithetical to a fair and impartial trial. Here, the prosecution improperly attacked Mr. Kovalenko's religion in its witness examinations and closing arguments, inflaming the passions of the jury. By portraying Mr. Kovalenko as a religious radical and arguing law enforcement saved his children, whereas God did not protect them, the prosecution engaged in religious-based misconduct.

5. Mr. Kovalenko, a Russian speaker, requested "word for word" interpretation at his trial and never waived that request. Despite this, he did not receive interpretation of key testimony that was read into the record, including a pretrial hearing of the alleged victim's testimony and a reenactment of Mr. Kovalenko's direct examination. The failure to simultaneously interpret these crucial parts of the trial violated

Mr. Kovalenko's rights to testify, to confrontation, to participate, and to an interpreter.

**D. STATEMENT OF THE CASE**

Sergey Kovalenko and his family immigrated to the United States from Russia after Mr. Kovalenko was persecuted for his Christian faith. CP 126; RP 839. Mr. Kovalenko and his wife have 17 children together. RP 826. They raised their children according to their strict religious faith. RP 833-34.

The State charged Mr. Kovalenko with 11 counts alleging sexual acts with three of his daughters. CP 53-56. Mr. Kovalenko primarily speaks Russian and needed an interpreter to understand and participate in the criminal proceedings against him. RP 4-6, 18.

During jury selection, the court denied Mr. Kovalenko's for-cause challenge to Juror 9, who explained she did not think she could be fair and impartial because of the nature and number of charges. RP 298-99, 310-12, 410-13. The trial court also did not question Juror 9 when she suggested she would be

biased against immigrants who had not learned to speak English after spending many years in the United States. RP 352. Mr. Kovalenko exhausted his peremptory challenges, and Juror 9 sat on his jury. RP 428-32.

Throughout the trial, the State focused on Mr. Kovalenko's Christian faith and beliefs and highlighted the Kovalenko children's strict upbringing because of their religion. RP 464, 476-88. The State also attacked Mr. Kovalenko and his wife for their religious beliefs and portrayed Mr. Kovalenko as a religious radical. RP 592-94, 907, 926-28, 934-35. Finally, the State invoked religion during closing argument and contrasted God's inability to protect the children with law enforcement's role in saving the children. RP 996-97, 1017.

Mr. Kovalenko testified in his own defense and unequivocally denied the allegations. RP 835-36. Mr. Kovalenko objected to the court's instruction that it "shall not be necessary" for the prosecution to corroborate the alleged

victims' testimony to convict him. CP 83 (No. 25); RP 956. The jury convicted Mr. Kovalenko on all counts. CP 99-109.

## E. ARGUMENT

### 1. The Court of Appeals' newly invented additional requirement to preserve a challenge to a biased juror defeats the constitutional right to an impartial jury.

The trial court incorrectly denied Mr. Kovalenko's cause challenge to Juror 9, Mr. Kovalenko exhausted his peremptory challenges, and the biased juror sat. The Court of Appeals invented a new, additional requirement for preservation by holding Mr. Kovalenko waived his challenge because he could have removed the juror with a peremptory challenge before he exhausted them. This Court should accept review of this significant constitutional issue of substantial public interest and reverse this opinion that conflicts with opinions of this Court and the Court of Appeals.

a. This Court's precedent does not support the new requirement the Court of Appeals created to preserve a challenge to a biased juror.

*State v. Talbott* held a person must exhaust their peremptory challenges to appeal a court's erroneous denial of a motion to strike a biased juror for cause. 200 Wn.2d 731, 733, 521 P.3d 948 (2022). *Talbott* resolved a conflicting line of cases about the need for exhaustion and narrowly limited its holding to the facts of the case. *Id.*

In a misguided and unwarranted deviation from *Talbott*, the Court of Appeals created a new rule that not only requires people to exhaust their peremptory challenges but also forces them to exercise peremptory challenges in a particular way at a particular time. *Kovalenko*, 546 P.3d at 518-20. The court ruled if a person has any opportunity to use one of their limited peremptory challenges to remove the biased juror, they waive their challenge to the juror by failing to strike the juror. *Id.* at 520.

This has never been the rule in Washington. Mr. Kovalenko moved to strike Juror 9 for cause and exhausted his peremptory challenges. RP 411-13. But because Mr. Kovalenko had a peremptory challenge when the court sat Juror 9, the Court of Appeals ruled he waived his right to challenge the court's wrongful denial of his motion to strike her for cause. *Kovalenko*, 546 P.3d at 518-20.

The Court of Appeals' invention of a new, additional requirement for exhaustion is inconsistent with this Court's requirements in *Talbott* and the cases on which *Talbott* relied. In *Talbott*, the defendant did not exhaust his peremptory challenges following the court's denial of his motion to strike the juror in question. 200 Wn.2d at 733. Therefore, this Court held he waived the challenge. *Id.* Conversely, Mr. Kovalenko moved to strike Juror 9 and exhausted his peremptories. RP 411-13, 428-32.

The opinion's new requirement upends this Court's well-settled law that where a juror demonstrates a probability of bias,

trial courts must grant motions to strike them for cause, and that a person preserves the challenge by exhausting their peremptory challenges. *Talbott*, 200 Wn.2d at 733; *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 807-09, 425 P.3d 807 (2018); *State v. Noltie*, 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991).

b. The Court of Appeals opinion affirming Mr. Kovalenko's convictions even though he demonstrated Juror 9 was probably biased conflicts with *Noltie* and *Sassen Van Elsloo* and violates Mr. Kovalenko's right to an impartial jury.

Juror 9 said she would not be a good fit as a juror because she would view Mr. Kovalenko's case in the context of "protecting my own child." RP 311-12; *see also* RP 298-99. She expressed concerns she could not be fair because of the number of alleged victims making accusations. RP 410 ("The problem that I have is there is so many of the victims, there is just so many for me that just makes it very real and very, um, well convicted."). She admitted she was not sure she "could make a fair assessment" because "it seems already the evidence is already so piled up … with so many it just seems. It's

already out there." RP 411. When asked if she was willing to be a juror, she agreed she was willing but again expressed concern about her ability to be fair and impartial. "I can't erase my thoughts already." RP at 412-13.

Mr. Kovalenko moved to strike Juror 9 for cause. RP 411-13. The court denied the motion. RP 413.

When a potential juror "has formed a biased opinion and, as a result, cannot try the case impartially," the court must dismiss the juror. *Sassen Van Elsloo*, 191 Wn.2d at 808. A person need only prove the juror has "a probability of actual bias." *Id.* at 809 (quoting *Noltie*, 116 Wn.2d at 838-39). A probability of actual bias exists when a juror consistently makes statements of partiality or bias and does not disavow those statements. *See id.* at 808-10; RCW 4.44.170(2); RCW 4.44.190.

A juror's statement "she did not think she could be fair" is an "unqualified statement" of actual bias requiring dismissal. *State v. Irby*, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015).

Juror 9's statements showed she probably could not be fair, demonstrating a probability of bias. The trial court violated Mr. Kovalenko's right to an impartial jury when it denied his motion to strike and empaneled Juror 9. The Court of Appeals' refusal to reverse Mr. Kovalenko's convictions in the face of the violation of his right to an impartial jury merits this Court's review.

**2. The Court of Appeals opinion conflicts with this Court's precedent because it failed to apply the objective observer test when it reviewed the trial court's error in not questioning or removing a juror who expressed bias against Mr. Kovalenko's national origin and need for an interpreter.**

a. <u>The trial court failed in its independent duty to address juror bias based on national origin.</u>

A trial judge "has an independent obligation to protect" the accused's right to remove a biased juror, "regardless of inaction by counsel or the defendant." *Irby*, 187 Wn. App. at 193; *see Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017) ("unaddressed" racial bias displayed by jurors "risk[s] systemic injury to the

administration of justice"). Thus, courts must excuse biased jurors even in the absence of a motion to strike. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020); RCW 2.36.110. A juror who cannot try the issue impartially and without prejudice to the substantial rights of a party is actually biased, and the court must remove them. *Irby*, 187 Wn. App. at 194; *see* CrR 6.4(c). This is especially true of jurors demonstrating bias based on factors such as a person's race, ethnicity, or national origin. *State v. Berhe*, 193 Wn.2d 647, 667, 444 P.3d 1172 (2019).

A juror's "bias based on race and ethnicity may be explicit or implicit," and "evidence of actual racial and ethnic bias can be subtle." *State v. Gutierrez*, 22 Wn. App. 2d 815, 820-21, 513 P.3d 812 (2022). Courts must be alert to answers reflecting such biases.

In *Gutierrez*, a juror's made comments demonstrating they believed the defendant's immigration status was connected to the determination of guilt. *Id.* at 818. The Court of Appeals

held the juror's comments required the trial court to inquire about the juror's potential bias. *Id.* at 82-24. The court's failure to do so required reversal. *Id.* at 826. A court's duty to ensure the impartiality of jurors is heightened in such instances because of the importance of "eradication of racial and ethnic bias in the justice system, even when this requires more proactive measures." *Id.* at 823.

b. The Court of Appeals disregarded this Court's cases requiring application of the objective observer test.

"Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice. If racial bias is a factor in the decision of a judge or jury, that decision does not achieve substantial justice, and it must be reversed." *Henderson v. Thompson*, 200 Wn.2d 417, 421-22, 518 P.3d 1011 (2022), *cert. denied*, 143 S. Ct. 2412 (2023); *Peña-Rodriguez*, 580 U.S. at 222-23; U.S. Const. amend. XIV.

The pervasive evil of bias based on race, ethnicity, or nationality, and its difficulty to detect, requires courts to assess the impact of such apparent biases under an objective observer

test. *State v. Bagby*, 200 Wn.2d 777, 793-94, 522 P.3d 982 (2023); *State v. Zamora*, 199 Wn.2d 698, 718, 512 P.3d 512 (2022); *Berhe*, 193 Wn.2d at 665. Courts must ask whether an objective observer could conclude the juror harbored racial or ethnic biases, including nationality-rooted prejudices that may impact their decision-making. *Berhe*, 193 Wn.2d at 665. An objective observer is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination. *Zamora*, 199 Wn.2d at 718; *Berhe*, 193 Wn.2d at 665.

When a fact-finder invokes and demeans another based on their nationality as "other" than American, the jurors' behavior presents a risk of activating biases against people who appear to not be sufficiently American, which is often a code word for being not white. *Bagby*, 200 Wn.2d at 794-95.

The Court of Appeals did not apply the controlling test. Several jurors expressed biases against Mr. Kovalenko for

moving to the United States and not fully assimilating by learning English. RP 351-55. When asked what they thought about Mr. Kovalenko using an interpreter, Juror 21 responded "I have lived in other countries and learned their language, and, um, I feel more respect towards someone who makes an effort. It sounds like he has been here a long time." RP 352. Juror 21 admitted the need for an interpreter would be "a little thumb [on the scale] against" Mr. Kovalenko. RP 352. Juror 9 agreed with Juror 21 and said, "I thought the same thing, how long, how long do you have to be here before you learn the general language to just live the life here pretty much." RP at 352.

The court asked no follow-up questions.

Juror 21 was ultimately excused, but Juror 9 sat on Mr. Kovalenko's jury. RP 428-31. Mr. Kovalenko challenged the court's failure to remove Juror 9 on appeal, both because of her inability to be fair and because of her bias against Mr. Kovalenko based on his foreign birth and failure to adopt traditional American norms. *Kovalenko,* 546 P.3d at 518-21.

In considering Mr. Kovalenko's challenge to Juror 9's comments against Mr. Kovalenko's national origin and need for interpreter, the Court of Appeals did not apply the controlling objective observer test. *Id.* at 520-21. Instead, the court found Juror 9 demonstrated only "a mere possibility of prejudice" and excused the trial court's failure to inquire further or remove the juror. *Id.* at 521.

At the least, the trial court was obligated to inquire of Juror 9 and address the comments against Mr. Kovalenko's national origin and need for an interpreter. *Gutierrez*, 22 Wn. App. 2d at 822-26. By ignoring the issue and seating Juror 9, the trial court likely reinforced her biases. *See Henderson*, 200 Wn.2d at 432. And the Court of Appeals decision sidestepped the substantial concern raised about jurors who expressed nationality-based hostility by choosing a favorable, non-biased interpretation of Juror 9's comments. *Kovalenko*, 546 P.3d at 521. It also concluded Juror 9's answers "demonstrated a mere possibility of prejudice" but did not apply the objective

observer standard, which would have required it to analyze whether an objective observer could have viewed Juror 9's comments as a proxy for racial discrimination. *Id.*

The Court of Appeals conducted the wrong analysis. Because Juror 9's comments evidenced a bias based on Mr. Kovalenko's race and need for an interpreter, this Court's cases required it to apply an objective observer standard. The opinion failing to do so conflicts with opinions of this Court and the Court of Appeals.

Finally, this Court should reject any argument that Mr. Kovalenko waived this challenge, either by not objecting on this particular ground or by not exercising a peremptory challenge against Juror 9, because Juror 9's bias is not subject to waiver. A person does not waive their challenge to bias based on race, ethnicity, or nationality by their attorney's failure to object. *Talbott*, 200 Wn.2d at 747 (applying *Zamora*, 199 Wn.2d 698). Courts must address claims involving certain

kinds of bias in order to confront the discriminatory animus in our legal system. *Id.*

The court did not ensure that only impartial jurors served in Mr. Kovalenko's case. This Court should grant review because the Court of Appeals decision is contrary to this Court's precedent, and there is an untenable risk of bias by a juror who served in the case. *Henderson*, 200 Wn.2d at 421-22; *Berhe*, 193 Wn.2d at 663-65.

**3. This Court should grant review because the Court of Appeals has repeatedly ruled it lacks authority to address the impropriety of the no-corroboration instruction because it is bound by this Court's 1949 decision in *Clayton*.**

a. The no-corroboration instruction improperly signals the jurors should give less scrutiny to the alleged victim's testimony and comments on the evidence.

Because jurors are likely to be searching for and affected by signals from judges, Washington has an especially restrictive rule barring the court from conveying its impressions of witness testimony or evidence in a criminal case. *State v. Vaughn*, 167 Wash. 420, 425-26, 9 P.2d 355 (1932).

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. This prohibits a judge from commenting on "matters of fact" to a jury or "conveying to the jury his or her personal attitudes toward the merits of the case." *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A comment on the evidence may occur through mere implication. *Id*. at 744.

In *Clayton*, this Court ruled that an instruction which said the defendant "may be convicted upon the uncorroborated testimony of the prosecutrix alone," was not a comment on the evidence. 32 Wn.2d at 577-78.

In the case at bar, the trial court used more mandatory language, telling jurors that "to convict" the defendant, "it shall not be necessary that the testimony of the alleged victims be corroborated." *Kovalenko*, 546 P.3d at 523. Yet the Court of

Appeals insisted it was bound by *Clayton* and could not find the instruction erroneous. *Id.*

Since *Clayton*, the Washington Pattern Jury Instruction Committee has specifically disapproved of such an instruction. WPIC 45.02 Rape—No Corroboration Necessary, 11 Wash. Prac., Pattern Jury Instr. Crim. 45.02 (5th ed. Jan. 2024 update). WPIC 45.02 explains that "corroboration is really a matter of sufficiency of the evidence," which is a factual issue for jurors, not a legal issue for instruction. *Id*.

The Court of Appeals has also expressed concern about *Clayton*'s viability. In *State v. Rohleder,* __ Wn. App. 2d __, __ P.3d __, No. 57369-5-II, 1 (June 25, 2024), the Court of Appeals agreed "Rohleder's argument that the no corroboration instruction constitutes a comment on the evidence has merit and the better practice is not to give the instruction." But it also said "we are constrained by the Supreme Court's opinion in" *Clayton "*to conclude that giving such an instruction was not a comment on the evidence." *Id*.; *see also State v. Johnson*, 152

Wn. App. 924, 937, 219 P.3d 958 (2009) (ruling instruction "may be an impermissible comment on the alleged victim's credibility"); *State v. Chenoweth,* 188 Wn. App. 521, 537, 354 P.3d 13 (2015) (expressing "concern" about instruction); *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005) (noting "misgivings" about instruction); *see also Chenoweth,* 188 Wn. App. at 538 (Becker, J. concurring) ("If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction.").

As this case shows, trial courts continue to give non-corroboration instructions over defense objection, despite WPIC 45.02, and even though repeated Court of Appeals decisions warn trial courts against it. *See* CP 83; RP 956.

Even a legally correct statement of the law may impermissibly comment on the evidence. *City of Kirkland v. O'Connor*, 40 Wn. App. 521, 523, 698 P.2d 1128 (1985) (instructing jurors not to consider lack of breathalyzer was

comment on evidence); *see also State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980) (legally correct instruction defining great bodily harm was a comment on the evidence because, under the facts of the case, it "clearly indicated to the jury that the evidence presented at trial was insufficient to support the theory of self-defense").

Jurors may understand an instruction stating that no other evidence is necessary to convict as telling them not to consider the lack of evidence. *O'Connor*, 40 Wn. App. at 523-24. They may believe the court wants jurors to give the prosecution "the benefit of the doubt" about the lack evidence. *Id*. at 524. An instruction telling jurors not to be concerned about the lack of evidence material to the case is "a comment upon the evidence" requiring reversal. *Id*. at 523-24.

Courts comment on the evidence if they "buttress" one party's theory of the case over another. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969). Courts

may not tell jurors to give evidence "great weight." *In re Det. of R.W.*, 98 Wn. App. 140, 144-45, 988 P.2d 1034 (1999).

Telling jurors that they "shall not" require corroboration of the complainant's testimony to convict the defendant is a comment from the court that the complainant's testimony suffices. It signals the court's belief that jurors should give the benefit of the doubt to the prosecution regarding the lack of corroboration. It does not also explain that no witness's testimony needs corroboration, including the defendant's testimony.

This Court should grant review to address the propriety of this no-corroboration instruction in light of the many Court of Appeals decisions questioning its validity but believing they are bound by *Clayton*.

b. Many other states reject this type of instruction due to its impermissible impact on jurors.

As Mr. Kovalenko informed the Court of Appeals in his opening brief, many jurisdictions have rejected no-corroboration instructions similar to the one issued in this case.

In *Gutierrez v. State*, 177 So.3d 226, 230 (Fla. 2015), the court stated that a "special 'no corroboration' instruction has a high likelihood of confusing and misleading the jury regarding its duty to consider the weight and credibility of the testifying victim of a sexual battery." It has the "deleterious effect of singling out the testimony of one witness and providing a different test for evaluating that testimony than would be applied to all other witnesses." *Id.; see also State v. Kraai*, 969 N.W.2d 487, 491-94 (Iowa 2022); *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003); *Burke v. State*, 624 P.2d 1240, 1257 (Alaska 1980); *State v. Williams*, 363 N.W.2d 911, 914 (Minn. Ct. App. 1985); *State v. Stukes*, 416 S.C. 493, 499-500 (2016); *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008); *Garza v. State*, 231 P.3d 884, 890-91 (Wyo. 2010).

These cases demonstrate the risk posed by this no-corroboration instruction, which this Court has not considered since *Clayton*.

c. <u>This Court should grant review of the published Court of Appeals decision on this disputed issue.</u>

Several years ago, this Court granted review of the constitutionality of this no-corroboration instruction in *State v. Svaleson*, 195 Wn.2d 1008, 458 P.3d 790 (2020). But the petitioner died while the case was pending and this Court never reached its merits. The same reasons this Court granted review in *Svaleson* still apply.

As the Court of Appeals said in the case at bar

> While we agree with *Zimmerman* that a better practice would be to not use a no-corroboration instruction, we are still bound by *Clayton* to hold that this no-corroboration instruction is constitutional.

*Kovalenko*, 546 P.3d at 523.

And as Division Two recently ruled in *Rohleder*

> Like our colleagues in the earlier cases discussed above, we have strong concerns about the giving of the no corroboration instruction. We

> emphasize that there is no need for a no corroboration instruction, and the better practice is for trial courts not to give one. …
>
> Until the Supreme Court addresses this issue, we are constrained by *Clayton* to conclude that giving a no corroboration instruction is not a comment on the evidence.

COA 57369-5, at 8.

*Clayton* was decided over 70 years ago, when societal attitudes toward sexual assault were far different. *See, e.g.*, *State v. Crossguns*, 199 Wn.2d 282, 293, 505 P.3d 529 (2022) (recognizing that past court decisions in sexual assault cases have been based on "outdated, sexist assumptions and expectations"). No corroboration of a complainant's testimony has been required for over 100 years. RCW 9A.44.020(1).

Perhaps historically, it was appropriate to make clear that an alleged victim's testimony is entitled to the *same* consideration as that of other witnesses. But at present, this instruction implies such testimony is entitled to *special* consideration, thereby violating article IV, section 16. Review should be granted.

**4. Like prosecutorial misconduct based on race, ethnic, or national origin biases, misconduct based on religious beliefs deserves heightened protection.**

A prosecutor's questions and arguments based on racial, ethnic, or religious stereotypes are antithetical to a fair and impartial trial. Here, the prosecution improperly attacked Mr. Kovalenko's religion in its witness examinations and closing argument. By portraying Mr. Kovalenko as a religious radical who restricted the rights of women and arguing law enforcement was the savior of the children instead of God, the prosecution violated Mr. Kovalenko's right to religious freedom, an impartial jury, and due process. Const. art. I, §§ 3, 11, 22; U.S. Const. amends. I, VI, XIV.

The prosecution inflamed the passions of the jury by asking "irrelevant and unnecessary" questions about Mr. Kovalenko's religion during witness examination. *Kovalenko*, 546 P.3d at 524; RP 464, 476-88, 592-94, 907, 926-28, 934-35. It also made gratuitous arguments creating a divide between Christianity and law enforcement. RP 996-97, 1017. The

State improperly aligned itself with the divine by asserting that the State was there to step in to ensure justice was done where God could not help the Kovalenko children. RP 996-97, 1017. *See Sandoval v. Calderon*, 241 F.3d 765, 780 (9th Cir. 2000) (reversing for prosecutor's appeal to religious authority).

The Court of Appeals recognized the prosecution's "irrelevant and unnecessary" questions about religion were misconduct. *Kovalenko*, 546 P.3d at 524. But it found no misconduct in the prosecution's arguments that Mr. Kovalenko used his religion to isolate his children and that his children were "not being protected by God" so they found protection with law enforcement by "last resort." *Id.* at 525 (quoting RP 996-97). The opinion excused these arguments as "a direct response to Kovalenko's own testimony." *Id.* But the State is not permitted to explain the evidence with improper argument. "A defendant has no power to 'open the door' to prosecutorial misconduct" or "invite" improper argument. *State v. Jones*, 144 Wn. App. 284, 295, 298-99, 183 P.3d 307 (2008).

Moreover, the Courts of Appeals applied the wrong prejudice analysis. The court held the questioning and arguments were not flagrant and ill-intentioned and therefore did not prejudice Mr. Kovalenko. *Kovalenko*, 546 P.3d at 525-26. But the misconduct here involved an impermissible appeal to bias based on Mr. Kovalenko's religion.

Like misconduct based on racial, national, and ethnic discrimination, a heightened standard should govern religious-based misconduct. *See Bagby*, 200 Wn.2d at 790-91; *State v. Monday*, 171 Wn.2d 667, 679-80, 257 P.3d 551 (2011). Religion is a protected status and is often a proxy for race or ethnicity. *See Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014). That is especially so here where Mr. Kovalenko's religious practices were perceived as a Russian variation of Christianity that was intertwined with their ethnic heritage. RP 892.

Because an objective observer could view the prosecution's questions and arguments as an appeal to the

jurors "potential prejudice, bias, or stereotypes in a manner that undermined the defendant's credibility or the presumption of innocence," prejudice is presumed and reversal is required. *Bagby*, 200 Wn.2d at 792-93.

This Court should grant review to clarify the objective observer standard controls the analysis of prosecutorial misconduct based on inappropriate appeals to religious bias.

**5. The Court of Appeals conducted the wrong analysis in addressing Mr. Kovalenko's challenges to the failure to interpret critical portions of his trial.**

Mr. Kovalenko, a Russian speaker, requested "word for word" interpretation at his trial and never waived that request. RP 4-6, 17-19. Despite this, he did not receive interpretation of key testimony that was read into the record, including a pretrial hearing of the complaining witness's testimony and a reenactment of Mr. Kovalenko's direct examination. The failure to simultaneously interpret these crucial parts of the trial violated Mr. Kovalenko's rights to testify, to confrontation, to participate, and to an interpreter.

The parties agreed to present taped testimony of one of the alleged victims in lieu of live testimony. RP 576-77. When the jury had trouble hearing the audio, the parties agreed to have her testimony reread to the jury. RP 730-33. But the portions of the trial when the video testimony was played and reread were not interpreted for Mr. Kovalenko. RP 576-77, 730-33. The jury also had difficulty hearing Mr. Kovalenko's live testimony, and that parties agreed to have his testimony reread by an actor. RP 863-65. This also was not interpreted for Mr. Kovalenko. RP 875.

Mr. Kovalenko requested "word for word" interpretation and never knowingly, intelligently, and voluntarily waived his right to an interpreter. The Court of Appeals nevertheless rejected his challenges, finding he waived them by not objecting below. *Kovalenko*, 546 P.3d at 521-22.

The opinion fails to recognize that an attorney cannot waive their client's right to an interpreter. *See In re Pers. Restraint of Khan*, 184 Wn.2d 679, 690 n.4, 363 P.3d 577

(2015). Instead, only the "non-English speaking person" can waive their right to an interpreter, and only where a court determines "on the record that the waiver has been made knowingly, voluntarily, and intelligently." RCW 2.43.060. When a court is on notice that an interpreter is needed, the interpreter cannot be withdrawn absent a knowing, intelligent, and voluntary waiver by the defendant, and a written waiver is necessary. *See State v. Gonzales-Morales*, 138 Wn.2d 374, 381-82, 979 P.2d 826 (1999); *State v. Woo Won Choi*, 55 Wn. App. 895, 901-02, 781 P.2d 505 (1989).

The Court of Appeals ignored these requirements that help safeguard the rights to participation, confrontation, and access to court proceedings for non-English speaking defendants. This Court should accept review to address this issue of substantial public interest and address the Court of Appeals' misapplication of law.

## F. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 5,562 words.

DATED this 27th day of June, 2024.

Respectfully submitted,

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# APPENDIX A

April 15, 2024, Published Opinion

546 P.3d 514
Court of Appeals of Washington, Division 1,
DIVISION ONE.

STATE of Washington, Respondent,
v.
Sergey Andreevich KOVALENKO, Appellant.

No. 84404-1-I
|
Filed April 15, 2024

**Synopsis**

**Background:** Defendant was convicted in the Superior Court, Whatcom County, Robert E. Olson, J., of multiple counts of child molestation and rape of a child. Defendant appealed.

**Holdings:** The Court of Appeals, Mann, J., held that:

[1] defendant's failure to use peremptory challenge to remove juror after motion to excuse juror for cause was denied waived his right to appeal the denial of the motion;

[2] trial court did not abuse its discretion by failing to sua sponte dismiss prospective juror;

[3] jury instruction that testimony of alleged victims need not be corroborated was accurate statement of law;

[4] prosecutor's improper inquiry into family's religion was not so flagrant and ill-intentioned that it could not have been neutralized by timely objection and curative jury instruction; and

[5] any prejudice arising from prosecutor's comments during closing argument could have been neutralized by timely objection and curative jury instruction.

Affirmed.

**Procedural Posture(s):** Appellate Review; Jury Selection Challenge or Motion.

West Headnotes (25)

[1] **Criminal Law** Objections and exceptions

The burden of preventing trial errors rests squarely upon counsel for both sides in a criminal case.

[2] **Criminal Law** Presentation of questions in general

Even defense counsel in a criminal case must attempt to correct errors at trial, rather than saving them for appeal in case the verdict goes against them.

[3] **Criminal Law** Overruling challenges to jurors

Defendant's failure to use peremptory challenge to remove prospective juror after his motion to excuse the juror for cause was denied waived his right to appeal the trial court's denial of the motion, in prosecution for child molestation and rape of a child; though defendant exhausted his six peremptory challenges, he did not exhaust them before he had a chance to strike the juror in question, defendant only had two for-cause challenges denied, and defendant used all of his peremptory challenges on jurors that he did not challenge for cause.

[4] **Criminal Law** Overruling challenges to jurors

A party that unsuccessfully challenges a potential juror for cause, and then does not use any of their peremptory challenges to remove the challenged juror, and instead accepts the jury panel with the challenged juror, waives the right to have the for-cause challenge considered on appeal.

[5] **Jury** Bias and Prejudice

**Jury** Rejection on court's own motion

  

Trial court did not abuse its discretion by failing to sua sponte dismiss prospective juror based on her expressed opinion about individuals who did not speak English and lived in the United States, in response to defense counsel's group questioning of prospective jurors as to whether they had thoughts or feelings about the use of interpreters, in prosecution for child molestation and rape of a child; at most, juror's comments demonstrated the mere possibility of prejudice, but she did not ask about or express an opinion on defendant's nationality or immigration status.

[6] **Jury** Rejection on court's own motion

Even when a party does not move to strike prospective juror, a trial court must do so on its own motion where grounds for a challenge for cause are apparent in the record.

[7] **Jury** Discretion of court

A trial court should exercise caution before injecting itself into the jury selection process.

[8] **Criminal Law** Selection and impaneling

Court of Appeals reviews a trial judge's failure to inquire further or excuse a prospective juror sua sponte for abuse of discretion.

[9] **Criminal Law** Reception of evidence

Defendant waived his confrontation clause claim on appeal that he had a right to have all proceedings interpreting live by failing to raise such a claim in trial court, in prosecution for child molestation and rape of a child; defendant was provided with two interpreters, two reenactments of testimony occurred, before each reenactment either defense counsel or trial court told jury the testimony had already been translated so it would not be translated again, and such statements were interpreted for defendant who did not object, ask to confer with counsel, or in any way notify court that he wanted those portions reinterpreted. U.S. Const. Amend. 6.

[10] **Criminal Law** Appointment and services of interpreter

**Criminal Law** Conduct of trial

The right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial. U.S. Const. Amend. 6.

[11] **Criminal Law** Appointment and services of interpreter

As long as the defendant's ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the trial court.

[12] **Criminal Law** Reception of evidence

For a confrontation clause challenge, a defendant must raise an objection at trial or waive the right of confrontation. U.S. Const. Amend. 6.

[13] **Criminal Law** Comments on facts or evidence in general

**Infants** Molestation and exploitation in general; indecent liberties

**Infants** Carnal knowledge; rape and sodomy

**Sex Offenses** Corroboration of victim

Jury instruction in prosecution for child molestation and rape of a child that the testimony of the alleged victims need not be corroborated was an accurate statement of law and, thus, not a constitutionally impermissible comment on the evidence. Wash. Const. art. 4, § 16; Wash. Rev. Code Ann. § 9A.44.020(1).

[14] **Criminal Law** Comments on Evidence or Witnesses

  

**Criminal Law** Instructions Invading Province of Jury

Washington Constitution prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law. Wash. Const. art. 4, § 16.

[15] **Criminal Law** Comments on Evidence or Witnesses

**Criminal Law** Conduct of trial in general

Court of Appeals applies a two-step analysis to determine whether a judicial comment requires reversal of a conviction: first, it examines the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence within meaning of state constitutional prohibition on judicial comments on the evidence; if it concludes the court made an improper comment on the evidence, Court of Appeals presumes the comment is prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Wash. Const. art. 4, § 16.

[16] **Criminal Law** Comments on facts or evidence in general

A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute a constitutionally impermissible comment on the evidence by the trial judge. Wash. Const. art. 4, § 16.

[17] **Criminal Law** Duties and Obligations of Prosecuting Attorneys

**Criminal Law** Prejudice resulting from improper conduct; unfairness or miscarriage of justice

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.

[18] **Criminal Law** Arguments and conduct of counsel

In a claim of prosecutorial misconduct, any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.

[19] **Criminal Law** Arguments and conduct in general

When there is a failure to object to improper prosecutorial statements, it constitutes a waiver unless the statement is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.

[20] **Criminal Law** Requests for correction by court

If the prejudice arising from a prosecutor's improper statement could have been cured by a jury instruction, but the defense did not request one, reversal is not required.

[21] **Constitutional Law** Particular Issues and Applications

**Constitutional Law** Jury

Washington Constitution's guarantee that no person shall be incompetent as a witness or juror based on opinion on matters of religion, nor be questioned in any court of justice teaching his religious belief to affect the weight of his testimony does not prohibit all questions pertaining to one's religion. Wash. Const. art. 1, § 11.

[22] **Criminal Law** Particular statements, arguments, and comments

  

Prosecutor's improper inquiry into family's religion during direct examination of defendant's wife was not so flagrant and ill-intentioned that it could not have been neutralized by timely objection and curative jury instruction and, thus, did not constitute prosecutorial misconduct that warranted reversal of convictions for child molestation and rape of a child; while State conceded that religious inquiry was not necessary to support its argument that family's strict and isolating lifestyle explained why defendant's daughters did not expose his abuse earlier, defense's theory was that daughters fabricated the claims because of defendant's strict rules, which defendant testified were based on Bible teachings. Wash. Const. art. 1, § 11.

[23] **Criminal Law** Particular statements, arguments, and comments

Any prejudice arising from prosecutor's comments during closing argument that case was about isolation, that victims were taught "to talk to only their parents or to God," that victim "was not getting help from God" so she looked for outside help, and that help came in the form of detectives from sheriff's office could have been neutralized by timely objection and curative jury instruction and, thus, did not constitute prosecutorial misconduct that warranted reversal of convictions for child molestation and rape of a child; argument was in response to defendant's testimony that victim told him help would come from "the other side," "somewhere else," and "not from God." Wash. Const. art. 1, § 11.

[24] **Criminal Law** Statements as to Facts and Arguments

**Criminal Law** Inferences from and Effect of Evidence

In closing argument, counsel are permitted latitude to argue the facts in evidence and reasonable inferences.

[25] **Criminal Law** Matters Not Sustained by Evidence

In closing argument, counsel may not make prejudicial statements that are not sustained by the record.

***516** Appeal from Whatcom County Superior Court, Docket No: 16-1-00835-9, Honorable Robert E. Olson, Judge

**Attorneys and Law Firms**

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PUBLISHED OPINION

Mann, J.

¶1 Sergey Kovalenko was convicted by a jury of multiple counts of child molestation and rape of a child. Kovalenko appeals his ***517** conviction and argues that (1) the trial court abused its discretion in failing to dismiss a juror for cause and not sua sponte dismissing a juror who expressed actual bias, (2) the court erred when portions of the trial were not interpreted for Kovalenko, (3) the court violated the Washington Constitution when it gave the jury a no-corroboration instruction, and (4) the prosecutor committed misconduct. We affirm.

I

A

¶2 Kovalenko was born in the USSR and immigrated to the United States with his wife in 1987. Kovalenko has 17 children, 12 sons and 5 daughters. The family built and lived in a home on five acres in Whatcom County.

  

¶3 The children's daily lives included going to school, doing chores, and attending church twice per week. The older children often helped take care of the younger children. The girls were responsible for chores inside the home, including cleaning, laundry, and preparing food. The boys were responsible for projects outside the home including tending to animals.

¶4 While they attended public school, the girls felt that they stood out because of the clothing they wore and because their family did different things from other families. The children were expected to speak only Russian at home. The transition to speaking and learning English in school was challenging for them. The children were not involved in after school events provided at the school. The children's friends were rarely allowed to come to the house and the girls were not allowed to go to friends' houses or attend sleepovers.

¶5 The girls were taught that pants were for boys, not girls, and that it was not Christian for girls to wear pants. The girls were not allowed to cut their hair or wear makeup. To move out of the home, the girls had to get married. They were not allowed to tell their father "no."

¶6 The oldest daughter, L.K., moved out of the family home after she got married at nineteen. L.K. later disclosed to her husband that Kovalenko had abused her during her childhood. L.K. presumed that she had been the only daughter Kovalenko abused. But when L.K. received a call from her sister K.K., who was crying and very upset, L.K. became concerned for her sisters. L.K. confronted Kovalenko in front of her mother and asked if he was touching her sisters, Kovalenko denied it. L.K. told Kovalenko that if she found out he was abusing her sisters, she would go to law enforcement.

¶7 L.K. then spoke with her aunts about the abuse she experienced and one aunt reported it to the Whatcom County Sheriff's Office. L.K. spoke with Detective Kevin Bowhay and gave a written statement about Kovalenko's abuse.

¶8 Detective Bowhay began an investigation and spoke with daughters C.K., E.K., and K.K. at the family home. Both C.K. and E.K. disclosed that Kovalenko had molested them repeatedly for several years.

¶9 Kovalenko was charged with multiple counts of child molestation and rape of a child.

B

¶10 Three of Kovalenko's daughters testified against him at trial: L.K., C.K., and E.K. Because of health issues, the parties agreed to take E.K.'s testimony by video deposition. They also agreed that the testimony would be played and admissible at trial.

¶11 After E.K.'s recorded testimony was played for the jury, jurors reported trouble hearing it. The agreed upon solution was to prepare a transcript of the testimony and reenact it with an "actor" reading E.K.'s responses.

¶12 Following Kovalenko's direct testimony, jurors reported issues hearing the testimony. Defense counsel suggested the same remedy as with E.K.'s testimony: providing a transcript and reading it. The parties agreed to reenact Kovalenko's direct testimony with an "actor" the next morning before his cross-examination.

¶13 The jury found Kovalenko guilty of rape of a child in the first degree, two counts ***518** of child molestation in the first degree, five counts of child molestation in the second degree, and three counts of child molestation in the third degree. Kovalenko was sentenced to standard range indeterminate sentences for the rape and child molestation in the first degree counts, and standard range sentences for the remaining counts.

¶14 Kovalenko appeals.

II

**[1]** **[2]** ¶15 Kovalenko contends that juror 9 was biased and the trial court erred in allowing juror 9 to sit on the jury panel. The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution both guarantee criminal defendants the right to trial by an impartial jury. U.S. CONST. amend VI; WASH. CONST. art., I § 22. But "the burden of preventing trial errors rests squarely upon counsel for both sides." State v. Farley, 48 Wash.2d 11, 15, 290 P.2d 987 (1955). Even defense counsel in a criminal case must attempt to correct errors at trial, rather than saving them for appeal "in case the verdict goes against [them]." Farley, 48 Wash.2d at 15, 290 P.2d 987.

  

A

**[3]** ¶16 Kovalenko first argues that the trial court erred by denying his motion to strike juror 9 for cause. Because Kovalenko could have removed juror 9 using one of his peremptory challenges, but did not, we conclude that Kovalenko waived his right to appeal the trial court's decision denying his motion to excuse juror 9 for cause.

¶17 In State v. Talbott, 200 Wash.2d 731, 521 P.3d 948 (2022), our Supreme Court considered whether a party who declines to remove a prospective juror with an available peremptory challenge has the right to appeal the seating of that juror. [1] The trial court denied Talbott's motion to excuse a prospective juror for cause and Talbott failed to remove the juror with a peremptory challenge, affirmatively accepting the jury panel with at least two peremptory challenges still available to him. Talbott, 200 Wash.2d at 732, 521 P.3d 948. Talbott appealed the judge's decision denying his motion to excuse the juror. Talbott, 200 Wash.2d at 732, 521 P.3d 948.

¶18 To determine whether Talbott's challenge was proper on appeal, the Talbott court clarified the distinction between two lines of cases: those based on State v. Clark, 143 Wash.2d 731, 24 P.3d 1006 (2001) and those based on State v. Fire, 145 Wash.2d 152, 34 P.3d 1218 (2001). Talbott, 200 Wash.2d at 732, 521 P.3d 948.

¶19 The Clark line of cases addressed parties who did not try to use their peremptory challenges to cure an alleged jury-selection error. "Cases in the Clark line hold that if a party 'accepted the jury as ultimately empaneled and did not exercise all of [their] peremptory challenges,' then they do not have the right to appeal 'based on the jury's composition.' " Talbott, 200 Wash.2d at 738, 521 P.3d 948 (quoting Clark, 143 Wash.2d at 762, 24 P.3d 1006). This line of cases "thus encourages parties to cure jury-selection errors with their peremptory challenges." Talbott, 200 Wash.2d at 738, 521 P.3d 948. "This ensures that peremptory challenges are properly used to promote a defendant's right to 'an impartial jury and a fair trial' in the first instance." Talbott, 200 Wash.2d at 738, 521 P.3d 948 (quoting State v. Lupastean, 200 Wash.2d 26, 48, 513 P.3d 781 (2022), and Georgia v. McCollum, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

¶20 In contrast, the Fire line of cases "addresses parties who did use their peremptory challenges to cure jury-selection errors and subsequently exhausted their peremptory challenges." Talbott, 200 Wash.2d at 739, 521 P.3d 948. Fire held that a " 'defendant's rights [are] not violated simply because [they] had to use peremptory challenges to achieve an impartial jury.' " Talbott, 200 Wash.2d at 739, 521 P.3d 948 (quoting Fire, 145 Wash.2d at 165, 34 P.3d 1218). "Thus, unlike Clark, Fire did not ask whether a party must use their peremptory challenges ***519** to cure an alleged jury-selection error. Instead, Fire asked whether a party who does curatively use their peremptory challenges is entitled to reversal on appeal." Talbott, 200 Wash.2d at 739, 521 P.3d 948.

¶21 In reaching its decision, the Talbott court rejected as dicta language in Fire that suggested that if a defendant believed a juror should have been excused for cause, the defendant could elect not to use a peremptory challenge, allow the jury to be seated with the objected to juror, and then win reversal on appeal if they showed the trial court abused its discretion in not dismissing the juror for cause. Talbott, 200 Wash.2d at 739, 521 P.3d 948. In doing so, the court explained, "there are good reasons to require parties to use their available peremptory challenges to cure jury-selection errors. Doing so promotes a defendant's right to receive a fair trial in the first instance and prevents unnecessary retrials." Talbott, 200 Wash.2d at 746, 521 P.3d 948 (citing Ross v. Oklahoma, 487 U.S. 81, 90, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)). "This helps to ensure that peremptory challenges are used to 'promote, rather than inhibit, the exercise of fundamental constitutional rights.' " Talbott, 200 Wash.2d at 746, 521 P.3d 948 (quoting Lupastean, 200 Wash.2d at 52, 513 P.3d 781). The court also explained, that allowing defendants not to use available peremptory challenges, "could improperly discourage counsel from curing potential jury-selection errors with peremptory challenges in order to obtain reversal on appeal." Talbott, 200 Wash.2d at 746-47, 521 P.3d 948.

¶22 The Talbott court concluded that "if a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause." 200 Wash.2d at 747-48, 521 P.3d 948. Because Talbott did not seek to strike the contested juror with an available peremptory challenge, did not exhaust his peremptory challenges on other jurors, and accepted the

  

jury panel as presented—including the challenged juror—he was not entitled to have his for-cause challenge considered on appeal. Talbott, 200 Wash.2d at 747-48, 521 P.3d 948.

¶23 Kovalenko correctly asserts that his case is unlike Talbott because he exhausted his peremptory challenges.[2] But Kovalenko did not exhaust his peremptory challenges before he had a chance to strike juror 9. Kovalenko had only two for-cause challenges denied by the trial court: his challenges to jurors 9 and 52. Kovalenko had six peremptory challenges available to him.[3] After his for-cause challenge to juror 9 was denied, it was clear that Kovalenko would have to use a peremptory challenge to strike juror 9 based on the juror's low juror number in the jury venire. While Kovalenko had six opportunities to do so, he instead exhausted his peremptory challenges on jurors 34, 21, 13, 25, 22, and 1—none of whom he challenged for cause.[4] Juror 52 was excused with all the remaining jurors who were not seated.

¶24 Kovalenko argues that if we were to expand Talbott to apply to this situation, "such a rule would usurp counsel's autonomy to exercise peremptory challenges in a way that counsel believes would be most conducive to seating a fair and impartial jury." But counsel had only two for-cause challenges denied by the trial court and if counsel had been concerned that the seating of juror 9 would not result in a fair and impartial jury, counsel had six opportunities to strike juror 9. Instead, counsel did not strike juror 9 and accepted the jury panel. As in Talbott, Kovalenko's approach could improperly discourage counsel from curing potential jury-selection errors with peremptory challenges in order to obtain reversal on appeal. 200 Wash.2d at 746-47, 521 P.3d 948. Such an approach fails to ensure peremptory challenges are properly used to promote a defendant's right to an impartial jury and a fair trial. ***520** Talbott, 200 Wash.2d at 738, 521 P.3d 948 (citing Lupastean, 200 Wash.2d. at 48, 513 P.3d 781).[5]

¶25 This reasoning tracks Division Three's decision in State v. Munzanreder, 199 Wash. App. 162, 398 P.3d 1160 (2017). In Munzanreder, the defendant had six peremptory challenges and there were only two venire jurors that he had unsuccessfully challenged for cause that could have been seated. While Munzanreder used all six peremptory challenges, he did not use them on the jurors he challenged for cause. Division Three of this court held that Munzanreder waived any error as to the jurors unsuccessfully challenged for cause.

> Here, Munzanreder used one challenge to remove venire juror 49, but elected not to use any of his several other peremptory challenges to remove venire juror 51. He also elected not to request additional peremptory challenges. If the trial court erred in denying Munzanreder's for cause challenge of venire juror 51 with his allotted peremptory challenges or by requesting additional challenges, Munzanreder waived that error.

Munzanreder, 199 Wash. App. at 179-180, 398 P.3d 1160.

**[4]** ¶26 We hold, consistent with Munzanreder, and the policy outlined in Talbott, that a party that unsuccessfully challenges a potential juror for cause, and then does not use any of their peremptory challenges to remove the challenged juror, and instead accepts the jury panel with the challenged juror, waives the right to have the for-cause challenge considered on appeal.

¶27 Kovalenko therefore waived the right to challenge the trial court's decision denying his motion to excuse juror 9 for cause.

B

**[5]** ¶28 Kovalenko next argues that the trial court erred when it failed to sua sponte dismiss juror 9 after juror 9 expressed actual bias in relation to Kovalenko's national origin and use of an interpreter. We disagree.

**[6]** **[7]** **[8]** ¶29 Even when a party does not move to strike a juror, "a trial court must do so on its own motion where grounds for a challenge for cause are apparent in the record." State v. Gutierrez, 22 Wash. App. 2d 815, 820, 513 P.3d 812 (2022). Under RCW 2.36.110, the trial court has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias [or] prejudice." Gutierrez, 22 Wash. App. 2d at 820, 513 P.3d 812. But a trial court should exercise caution

  

before injecting itself into the jury selection process. State v. Lawler, 194 Wash. App. 275, 284, 374 P.3d 278 (2016). "Trial counsel may have legitimate, tactical reasons not to challenge a juror who may have given responses that suggest some bias." Lawler, 194 Wash. App. at 285, 374 P.3d 278. We review a trial judge's failure "to inquire further or excuse [a] juror sua sponte" for abuse of discretion. Gutierrez, 22 Wash. App. 2d at 822, 513 P.3d 812.

¶30 In Gutierrez, a potential juror stated several times he was concerned that Hispanic and Latinx defendants were not asked if they were U.S. citizens. 22 Wash. App. 2d at 818, 513 P.3d 812. The juror later expressly asked if the defendant was a U.S. citizen. Gutierrez, 22 Wash. App. 2d at 818, 513 P.3d 812. When asked if not knowing citizenship status would impact his ability to be fair to the defendant, the juror responded, "[i]f he's not a U.S. citizen he's already guilty. He shouldn't be here." Gutierrez, 22 Wash. App. 2d at 818, 513 P.3d 812. Defense counsel did not move to strike the juror for cause or exercise a peremptory challenge to remove the juror and he was seated on the jury. Gutierrez, 22 Wash. App. 2d at 818, 513 P.3d 812. On appeal, the appellate court held that these comments expressed actual bias by presuming that Hispanic or Latinx defendants were not citizens and were most likely committing an immigration crime and the trial court abused its discretion by failing to inquire ***521** more. Gutierrez, 22 Wash. App. 2d at 818-19, 513 P.3d 812.

¶31 During group questioning, Kovalenko's defense counsel asked if any of the jurors had thoughts or feelings about the use of interpreters. Juror 21 responded, "I have lived in other countries and learned their language, and, ... I feel more respect towards someone who makes an effort. It sounds like he has been here a long time." Juror 9 raised her hand in response and said, "I thought the same thing, how long, how long do you have to be here before you learn the general language to just live the life here pretty much."

¶32 Juror 22 responded, "I think regardless of how well he speaks English, if it's not his first language he has a right to an interpreter if he thinks he will understand the proceedings better with an interpreter." Defense counsel responded "[so] you all can't see yourselves but I'm getting nods on the 21 and 9, you should learn the language you have been here, and I'm getting also nods on 16 and 22 from different parts of the room." Several other jurors responded. Defense counsel then asked if the jurors had feelings about Kovalenko specifically requiring Russian language interpretation. One prospective juror responded, "I don't have any feelings. I just think if somebody is in a country they should know the language." Defense counsel did not move to strike either juror 21 or 9 and switched to a separate topic afterward. [6]

¶33 While the juror in Gutierrez expressed actual bias against the defendant based on presumptions about nationality and citizenship status, juror 9 did not. Juror 9 did not ask about or express an opinion on Kovalenko's nationality or immigration status. And she did not presume that Kovalenko was committing an immigration crime. Juror 9 did, however, express an opinion about individuals who do not speak English and live in the United States. At most, juror 9 demonstrated a mere possibility of prejudice. State v. Noltie, 116 Wash.2d 831, 840, 809 P.2d 190 (1991).

¶34 We conclude that the trial court did not abuse its discretion in failing to sua sponte dismiss juror 9.

## III

**[9]** ¶35 Kovalenko argues that the trial court violated his right to confront witnesses and participate in his own trial under the Sixth Amendment, his right to testify under the Fifth Amendment, and his statutory right to an interpreter when portions of the trial were not interpreted. We disagree.

**[10]** ¶36 In Washington, " 'the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial.' " State v. Ramirez-Dominguez, 140 Wash. App. 233, 243, 165 P.3d 391 (2007) (quoting State v. Gonzales-Morales, 138 Wash.2d 374, 379, 979 P.2d 826 (1999)). The legislature has also recognized this right and declared it to be a public policy "to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them." RCW 2.43.010.

**[11]** ¶37 As " 'long as the defendant's ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the [trial] court.' " Gonzales-Morales, 138 Wash.2d at 382, 979 P.2d 826 (quoting United States v. Lim, 794 F.2d 469 (9th Cir. 1986)).

¶38 Starting with voir dire, Kovalenko was provided with two Russian interpreters. Even so, Kovalenko challenges two reenactments of testimony that occurred: the reenactments of E.K.'s prerecorded testimony and Kovalenko's direct testimony.

¶39 Before E.K.'s testimony was played for the jury, defense counsel told the trial court, "I believe it would be appropriate for the court to let the jury know that [the testimony] ***522** was translated at real time so the translators are not going to translate it again." Based on defense counsel's request, the trial court so informed the jury. [7] And when the testimony was reenacted with an "actor" reading E.K.'s responses from the transcript, defense counsel made the same request and the trial court notified the jury. [8]

¶40 Similarly, before Kovalenko's direct testimony was reenacted, the trial court said, "the interpreters will not need to interpret this at this time since it has been interpreted once." Defense counsel did not object and the trial judge notified the jury.

¶41 Kovalenko argues that he had a right to have all the proceedings interpreted live. The State responds that Kovalenko waived these claims by failing to raise them below. We agree with the State.

**[12]** ¶42 For a confrontation clause challenge, a defendant must raise an objection at trial or waive the right of confrontation. State v. Burns, 193 Wash.2d 190, 210-11, 438 P.3d 1183 (2019). Relying on In re Personal Restraint of Khan, 184 Wash.2d 679, 690, 363 P.3d 577 (2015) (plurality opinion), Kovalenko responds that an attorney cannot waive a defendant's right to an interpreter. Kovalenko contends that the interpreter could not be withdrawn absent a knowing, intelligent, and voluntary waiver from Kovalenko on the record.

¶43 Kovalenko's reliance on Khan is misplaced. Khan was never provided an interpreter and on appeal argued that counsel was ineffective for failing to obtain an interpreter for him. Khan, 184 Wash.2d at 688, 363 P.3d 577. The Supreme Court remanded for a reference hearing on whether Khan's English fluency at the time of trial demanded an interpreter and, if so, his counsel was ineffective for failing to provide one. Khan, 184 Wash.2d at 694, 363 P.3d 577. The Khan court also concluded that the State's argument that the decision not to obtain an interpreter may have been a strategic trial tactic was unpersuasive. 184 Wash.2d at 690, 363 P.3d 577.

¶44 Kovalenko has not asserted that counsel was ineffective for failing to obtain an interpreter, and Kovalenko was provided with interpreters throughout trial. The record is clear that Kovalenko's counsel was concerned with the effect of replaying E.K.'s testimony for the jury. The agreed upon solution of having an actor read her testimony into the record absolved those concerns.

¶45 There was no reason for the trial judge to sua sponte disagree with defense counsel and insist that the reenactments be reinterpreted. See State v. Woo Won Choi, 55 Wash. App. 895, 902, 781 P.2d 505 (1989) ("we find no error in the court's relying on counsel's representation in concluding that Choi did not need an interpreter"). Further, because the interpreters were interpreting everything else that occurred during trial, defense counsel's statements to the court that the testimony did not need to be reinterpreted were interpreted for Kovalenko. Kovalenko did not object, ask to confer with counsel, or in any way notify the court that he wanted those portions reinterpreted. [9]

¶46 We conclude that Kovalenko waived any challenge to use of the interpreters at trial.

## IV

**[13]** ¶47 Kovalenko argues the trial court improperly commented on the evidence when it instructed the jury that the testimony of ***523** the alleged victims need not be corroborated. We disagree.

**[14]** ¶48 Article IV, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional provision prohibits

a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.' " State v. Levy, 156 Wash.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997)).

**[15]** ¶49 We apply a two-step analysis to determine whether a judicial comment requires reversal of a conviction. Levy, 156 Wash.2d at 723, 132 P.3d 1076. First, we examine the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence. State v. Sivins, 138 Wash. App. 52, 58, 155 P.3d 982 (2007). If we conclude the court made an improper comment on the evidence, we presume the comment is prejudicial, "and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wash.2d at 723, 132 P.3d 1076.

¶50 The trial court instructed the jury that "to convict a person of rape of a child or child molestation, it shall not be necessary that the testimony of the alleged victims be corroborated. The jury is to decide all questions of witness credibility."

**[16]** ¶51 This instruction accurately reflects Washington law, which states that "it shall not be necessary that the testimony of the alleged victim be corroborated" in order to convict a defendant of a sex offense. RCW 9A.44.020(1). A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge. State v. Brush, 183 Wash.2d 550, 557, 353 P.3d 213 (2015) (citing State v. Woods, 143 Wash.2d 561, 591, 23 P.3d 1046 (2001)).

¶52 Washington courts have repeatedly held that no-corroboration jury instructions do not constitute a comment on the evidence. Our Supreme Court addressed this issue in State v. Clayton, 32 Wash.2d 571, 202 P.2d 922 (1949). There, the court held that it was not a judicial comment on the evidence to instruct the jury that:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wash.2d at 572, 202 P.2d 922; see State v. Malone, 20 Wash. App. 712, 714-15, 582 P.2d 883 (1978) (concluding a no-corroboration instruction was not a comment on the evidence).

¶53 In State v. Zimmerman, 130 Wash. App. 170, 121 P.3d 1216 (2005), Division Two of this court addressed the same issue. The court noted that the no-corroboration instruction is not included within the Washington Pattern Criminal Jury Instructions and the Washington Supreme Court Committee on Jury Instructions recommends against using the instruction. Zimmerman, 130 Wash. App. at 182, 121 P.3d 1216. The court, though, concluded "[a]lthough we share the Committee's misgivings, we are bound by Clayton to hold that the giving of such an instruction is not reversible error." Zimmerman, 130 Wash. App. at 182-83, 121 P.3d 1216.

¶54 While we agree with Zimmerman that a better practice would be to not use a no-corroboration instruction, we are still bound by Clayton to hold that this no-corroboration instruction is constitutional.

## V

¶55 Kovalenko contends that his right to freedom of religion under article I, section 11 of our state constitution, his right to an impartial jury under article I, section 22 and ***524** the Sixth Amendment, and his right to due process under the Fourteenth Amendment were violated when the

  

prosecutor raised his religious beliefs throughout trial and closing arguments. We disagree.

**[17]** **[18]** ¶56 To prevail on a claim of prosecutorial misconduct, the defendant must establish " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " State v. Thorgerson, 172 Wash.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wash.2d 174, 191, 189 P.3d 126 (2008)). Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).

**[19]** **[20]** ¶57 When there is a failure to object to improper statements, it constitutes a waiver unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wash.2d at 561, 940 P.2d 546. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wash.2d 24, 85, 882 P.2d 747 (1994). [10]

**[21]** ¶58 "Our state constitution does not prohibit all questions pertaining to one's religion." In re Pers. Restraint of Lui, 188 Wash.2d 525, 563, 397 P.3d 90 (2017); see also State v. Dhaliwal, 150 Wash.2d 559, 579-80, 79 P.3d 432 (2003) (permissible for prosecutor in an assault case to question witness about the importance of respect in Sikh culture to establish a possible motive for that assault). It guarantees only that no person "shall ... be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice teaching his religious belief to affect the weight of his testimony." WASH. CONST. art. I, § 11.

A

**[22]** ¶59 Kovalenko asserts that the prosecutor committed misconduct by focusing on his religion. And that the prosecutor sought to attack Kovalenko and inflame the passions of the jury by portraying him as a religious radical. We disagree.

¶60 During direct examination of Kovalenko's wife, the prosecutor asked whether the family was religious. After Ms. Kovalenko responded that they were "believers," the prosecutor followed up by asking "what religion do you practice?" Without objection, Ms. Kovalenko responded "Pentecostal."

¶61 This prosecutor's inquiry was error; questioning the family's religion, and particularly what religion, was both irrelevant and unnecessary. The State relied on the Kovalenko's religion to support its argument that the strict and isolating lifestyle explained why the girls did not expose the abuse earlier. But the State concedes that it was unnecessary to inquire into the family's religion, explaining that its "argument would have been the same if the origin of the strict rules would not have been based on Kovalenko's religion."

¶62 The Defense's lack of objection was not surprising: Kovalenko's theory of the case was that his daughters fabricated the claims against him because of his rules and how strict he was in the home. When he testified about his rules he explained, "I didn't cho[o]se that model. And I wouldn't even call it Russian model. Because it's the ***525** Bible teaches us so. And the Bible tells us how the same should dress."

¶63 Viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions, we conclude that the inquiry, while improper, was not so flagrant and ill-intentioned that it caused "an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wash.2d at 561, 940 P.2d 546.

B

**[23]** ¶64 Kovalenko next asserts that the prosecutor appealed to divine authority and religious principles in closing argument. We disagree.

**[24]** **[25]** ¶65 In closing argument, "counsel are permitted latitude to argue the facts in evidence and reasonable inferences." State v. Smith, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985); see also State v. Harvey, 34 Wash. App. 737, 739, 664 P.2d 1281 (1983). They may not, however, make prejudicial statements that are not sustained by the record. State v. Rose, 62 Wash.2d 309, 312, 382 P.2d 513 (1963).

  

¶66 Kovalenko points to these statements the prosecutor gave in closing argument:

> This case is also about isolation. The girls were raised in a home of isolation. They were taught to talk to only their parents or to God. [L.K.] wasn't being protected by anyone that was around her and she was not being protected by God. She had to find someone outside the home to help her and her last resort was reporting to the police. This went against every rule that she was trying to follow. At this point, she was desperate. The defendant's words, [L.K.] was not getting help from God so she looked for help from the other side. These words were chilling. Chilling to hear. They were chilling because it was true. Kind of sad.

"Help will come from somewhere else. The defendant told you that [L.K.] said this when she was confronting him with abuse. Help did come from somewhere else. It was in the form of Kevin Bowhay and Ken Gates." [11]

¶67 Kovalenko asserts that no curative instruction could have remedied the statements made by the prosecutor in closing and in support cites State v. Belgarde, 110 Wash.2d 504, 755 P.2d 174 (1988). In Belgarde, our Supreme Court held that a prosecutor's comments could not have been neutralized by a curative instruction, even if there had been an objection at trial. 110 Wash.2d at 507-08, 755 P.2d 174. The prosecutor described members of the American Indian Movement as "a deadly group of madmen," "militant," and "butchers, that killed indiscriminately Whites and their own." Belgarde, 110 Wash.2d at 506-07, 755 P.2d 174.

¶68 Kovalenko also cites Sandoval v. Calderon, 241 F.3d 765, 775, 780 (9th Cir. 2000), and State v. Ceballos, 266 Conn. 364, 383, 832 A.2d 14 (2003), overruled on other grounds by State v. Douglas C., 345 Conn. 421, 285 A.3d 1067 (2022). In Sandoval, the court reversed a death sentence because the prosecutor's closing argument invoked a passage from the New Testament of the Bible, told the jury that God sanctioned the death penalty for people like Sandoval and that by sentencing Sandoval to death, the jury would be doing what God says. 241 F.3d at 779. Defense counsel objected to the argument but the objection was overruled and no curative instruction was given. Sandoval, 241 F.3d at 779. In Ceballos, the Connecticut Supreme Court reversed a conviction because the prosecutor referenced religious characters and divine punishment in their closing argument. In both cases, the prosecutors' statements invaded the province of the jury by casting doubt upon the ultimate issue before the jury: the guilt or innocence of the defendant. Ceballos, 266 Conn. at 393, 832 A.2d 14; Sandoval, 241 F.3d at 779.

¶69 The prosecutor's closing argument was a direct response to Kovalenko's own testimony. Twice during direct examination, Kovalenko described L.K. confronting him ***526** about abusing her sisters. Kovalenko testified that L.K. told him, "the help will come from the other side and she got mad and left. And approximately in three or four months I was arrested." Later, Kovalenko testified that he knew L.K. instigated the accusations against him and repeated, "[s]he said help will come from somewhere else and that's where help came from, but certainly not from God."

¶70 Defense counsel did not object during the prosecutor's closing argument. Unlike in Ceballos and Sandoval, the prosecutor's statements did not invade the province of the jury. The statements were supported by the trial testimony and within the wide latitude given to attorneys during closing arguments. Smith, 104 Wash.2d at 510, 707 P.2d 1306. The statements were nothing like the inflammatory or blatantly prejudicial statements made in Belgarde. In any event, any possibly inappropriate aspect of these comments would easily have been cured by a timely objection and curative instruction.

¶71 We conclude that the prosecutor's questioning of witnesses and closing argument do not constitute misconduct.

¶72 We affirm.

  

WE CONCUR:

Coburn, J.

Bowman, J.

**All Citations**

546 P.3d 514

## Footnotes

1 While Talbott was cited and discussed briefly in the opening brief and oral argument, because of its importance to our analysis, the parties were asked to submit supplemental briefing addressing whether Kovalenko waived his right to challenge juror 9 on appeal.

2 The Talbott court expressly declined to consider the situation before us: "Our holding is limited to the facts in this case, and we express no opinion on the analysis that applies where a party exhausts their peremptory challenge and objects to the jury panel." 200 Wash.2d at 733, 521 P.3d 948.

3 Both parties had additional peremptory challenges for the alternate jurors.

4 Kovalenko used a seventh peremptory to remove juror 39 as a potential alternate juror.

5 Kovalenko also argues that because his trial predated Talbott, his counsel did everything required to preserve the for-cause challenge under the dicta in Talbott. But Talbott not only held the statement in Fire was dicta, it also expressly overruled "opinions that have relied on Fire's dicta to hold that a party need not cure jury-selection errors with their available peremptory challenges." 200 Wash.2d at 744, 521 P.3d 948.

6 Defense later used a peremptory challenge to remove juror 21.

7 The trial court informed the jury: "I would just reflect for the jurors that during the course of this video testimony, the interpreters are not going to be continuously interpreting because when this particular hearing took place, that was already done. Obviously, they will stand ready to interpret if something happens in the course of this presentation."

8 The trial court informed the jury, "[o]ne thing I want you to know is that because this testimony has already been translated for Mr. Kovalenko once, the interpreters are not going to be translating for this particular session."

9 The record abounds in evidence that the trial judge was monitoring Kovalenko's interpretation needs. For instance, the trial judge interrupted the direct examination of Kovalenko's wife saying, "[j]ust a moment. Mr. Kovalenko is indicating—is he unable to hear?" And the trial judge repeatedly asked for parties to speak slowly and clearly to aid the interpreters.

10 Kovalenko asks this court to apply the heightened test outlined in State v. Monday, 171 Wash.2d 667, 257 P.3d 551 (2011). In Monday, the Supreme Court held that "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence," the conviction will be vacated unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. Monday, 171 Wash.2d at 680, 257 P.3d 551 (emphasis added). "[A]fter Monday, prosecutorial misconduct claims involving racial bias are controlled by the 'flagrant or apparently

  

intentional' standard.' " State v. Bagby, 200 Wash.2d 777, 789-90, 522 P.3d 982 (2023) (citing Monday, 171 Wash.2d at 680, 257 P.3d 551). Kovalenko's claim does not involve racial bias, thus, the heightened test in Monday does not apply.

11 Gates is a detective with the Whatcom County Sheriff's Office who assisted Detective Bowhay with the investigation into Kovalenko.

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Washington Appellate Project

Date: June 27, 2024

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