Supreme Court No. 103077-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Petitioner
v.
Shawn Lamar Bell, Respondent

Pierce County Superior Court

Cause No. 19-1-00973-1

The Honorable Judge Stanley J. Rumbaugh

Respondent's Answer to Petition for Review

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS ..... **i**

TABLE OF AUTHORITIES ..... **ii**

INTRODUCTION AND SUMMARY OF ARGUMENT **1**

STATEMENT OF THE CASE **1**

ARGUMENT WHY REVIEW SHOULD BE DENIED **3**

I. THERE IS NO BASIS FOR REVIEW UNDER RAP 13.4(B). **3**

A. The Court of Appeals properly applied GR 37 and reversed Mr. Bell's conviction. 4

B. Violations of GR 37 are not merely "procedural." 7

II. THE SUPREME COURT SHOULD DECLINE TO REVIEW ISSUES THAT WERE NOT PROPERLY RAISED IN THE COURT OF APPEALS. **15**

CONCLUSION **21**

TABLE OF AUTHORITIES

FEDERAL CASES

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 17

Strauder v. State of W. Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879) 14

Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) 14

WASHINGTON STATE CASES

Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd., 182 Wn.2d 342, 340 P.3d 849 (2015) 10

City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) 13

Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998) 20

King Cnty. v. Friends of Sammamish Valley, 26 Wn. App. 2d 906, 530 P.3d 1023 (2023) 16

State v. Booth, 22 Wn. App. 2d 565, 510 P.3d 1025 (2022) 18

State v. Hale, 28 Wn. App. 2d 619, 537 P.3d 707 (2023), *review denied*, 544 P.3d 31 (2024) 18

State v. Lahman, 17 Wn. App. 2d 925, 488 P.3d 881 (2021) .. 16

State v. McNeair, 88 Wn. App. 331, 944 P.2d 1099 (1997) 10

State v. Orozco, 19 Wn. App. 2d 367, 496 P.3d 1215 (2021) . 16

State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326, 335 (2013) . 13

State v. Tesfasilasye, 200 Wn.2d 345, 518 P.3d 193 (2022)..... 4, 13, 15, 16, 17

OTHER AUTHORITIES

GR 37...1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

RAP 13.4 3

RAP 18.17 21

INTRODUCTION AND SUMMARY OF ARGUMENT

At Shawn Bell's trial, the prosecuting attorney struck the only male juror of color who had any chance of serving on the jury. An objective observer could view race or ethnicity as a factor in the removal of the juror. There is no basis to review the appellate court's decision reversing Mr. Bell's convictions. The Supreme Court should deny the State's Petition.

STATEMENT OF THE CASE

At Shawn Bell's criminal trial, the prosecuting attorney used a peremptory challenge to remove the only male person of color who had a chance of sitting on the jury. RP (3/10/22) 631; CP 91, 104-109. Defense counsel objected under GR 37. RP (3/10/22) 625.

The prosecutor claimed the challenge was based on the juror's admission (on the third day of jury selection) that he "lost track" of an earlier question to a different prospective juror because he "wasn't paying attention." RP (3/10/22) 617,

626. The judge added that "[m]y observations of him… is his mind was drifting throughout the questioning… I did notice that he was potentially staring off and not completely tracking the proceedings." RP (3/10/22) 632.

Defense counsel pointed out that these descriptions applied to other prospective jurors as well. RP (3/10/22) 627. The court overruled the GR 37 objection and allowed the State to strike the juror. RP (3/10/22) 632.

As a result, Mr. Bell was "the only black man in [the] courtroom." RP (3/23/22) 918. Following conviction, he appealed. CP 62. The Court of Appeals reversed, finding a violation of GR 37.[1]

The appellate court outlined the test under GR 37: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge must be denied, and the trial court

[1] The court did not reach other issues raised by Mr. Bell. Opinion, pp. 15-16.

should explain its ruling on the record." Opinion, p. 5 (citing GR 37(e). The opinion goes on to say that "[t]he remedy for a GR 37 violation in a criminal case is reversal of the conviction." Opinion, p. 5.

The State sought reconsideration. For the first time in its reconsideration motion, it asked the court to apply harmless error analysis to a GR 37 violation. *See* Motion for Reconsideration, filed 2/26/24. The appellate court denied the reconsideration motion, and the State petitioned for review.

ARGUMENT WHY REVIEW SHOULD BE DENIED

I. THERE IS NO BASIS FOR REVIEW UNDER RAP 13.4(B).

The Court of Appeals properly applied GR 37 and Supreme Court precedent. None of the criteria outlined in RAP 13.4(b) apply. The Supreme Court should deny the State's Petition for Review.

The Supreme Court adopted GR 37 to deal with discrimination in jury selection. *State v. Tesfasilasye*, 200

Wn.2d 345, 356-357, 518 P.3d 193 (2022). Under the rule, the question to be answered is whether an objective observer "could view race or ethnicity as a factor in the use of [a] peremptory challenge." GR 37(e). In this case, the record is clear: an objective observer could view race or ethnicity as a factor in the removal of Juror 39.

A. The Court of Appeals properly applied GR 37 and reversed Mr. Bell's conviction.

Application of GR 37(e). In this case, the State struck the only male person of color from the group of prospective jurors who could have been seated. RP (3/10/22) 625-633. An objective observer—one who is aware that bias and discrimination have led to "the unfair exclusion of potential jurors"— could view race as a factor in the prosecutor's peremptory challenge. GR 37(f).

The State's ostensible reason for striking the juror rested on one moment of acknowledged inattention on the third day of jury selection. RP (3/10/22) 617, 625-633; CP 91, 104-109.

Prospective Juror 39 admitted that he'd "lost track" of an earlier question that had been *posed to a different juror*. RP (3/10/22) 617. This brief and understandable lapse of attention did not create a nondiscriminatory reason for removal.

Furthermore, in overruling the GR 37 objection, the judge compounded the problem. He claimed that Juror 39 had seemed confused or inattentive, that his "mind was drifting," and that "he was potentially staring off and not completely tracking the proceedings." RP (3/10/22) 632. These remarks resemble "reasons for peremptory challenges [that] have historically been associated with improper discrimination in jury selection in Washington State." GR 37(i).

An objective observer "could view race… as a factor" in the exclusion of Juror 39. This ends the inquiry. GR 37(e).

Application of GR 37(g). Although it is unnecessary to delve further, other parts of GR 37 supported the Court of Appeals' decision. For example, the rule lists specific

circumstances the court should consider when ruling on a GR 37 objection. Several of them apply.

First, the prosecutor "failed to Question the prospective juror about the alleged concern." GR 37(g)(i).

Second, the prosecutor questioned Juror 39 twice, but left others on the jury without *any* questioning. *See* GR 37(g)(ii).

Third, at least four other people also showed evidence of inattention but went unchallenged and were seated on the jury. *See* GR 37(g)(iii); RP (3/9/22) 369, 371, 411, 455, 594.

Fourth, the reason given by the prosecutor – inattention – "might be disproportionately associated with a race or ethnicity." GR 37 (g)(iv). Allegations of inattentiveness have "historically been associated with improper discrimination in jury selection." GR 37(i).

Likewise, the judge's reasons for dismissing the juror closely track those historically problematic reasons. GR 37(i). The rule lists claims that a juror is "inattentive," "staring," or has a "problematic" demeanor, or provided "confused

answers." GR 37(i). The judge's remarks mirror this list. RP (3/10/22) 632. Thus, even if the prosecutor's actions did not implicate GR 37, the judge's comments in removing the juror would require reversal.

B. Violations of GR 37 are not merely "procedural."

Petitioner apparently believes that GR 37(i) supplants the objective observer standard for assessing a peremptory challenge. Petitioner repeatedly mischaracterizes the violation here as a mere "procedural" violation of GR 37(i). *See* Petition, pp. 2, 4, 9, 11, 13, 14, 18, 19, 20.

The problem here is not merely "procedural." The record shows that an objective observer could view race as a factor in the removal of Juror 39.[2] An objective observer would reach this conclusion regardless of whether the error implicates GR 37(i).

[2] Without supporting argument, Petitioner asserts that "an objective observer could not view race as a factor in the exercise of a peremptory challenge." Petition, p. 15.

Because it reversed Mr. Bell's conviction, the Court of Appeals necessarily found the objective observer standard met under GR 37(e). Although the opinion focuses on the failure to comply with GR 37(i), the court did not suggest that the violation was somehow merely procedural.

GR 37(e) ("Determination") provides the standard courts must apply when evaluating bias claims. GR 37(i) ("Reliance on Conduct") outlines additional guidance the court should consult when making its determination. Here, reversal was required under GR 37(e) because an objective observer could conclude that race was a factor in removing Juror 39.

Furthermore, as the Court of Appeals pointed out, the prosecutor and the trial judge *did* violate GR 37(i). Opinion, pp. 1, 4-7. Among other things, the rule requires a party to provide "reasonable notice" before relying on reasons historically associated with improper discrimination. GR 37(i). Petitioner "concedes it never gave notice" under GR 37(i). Opinion, p. 6 (footnote omitted).

Notice is required "so the behavior can be verified and addressed." GR 37(i). Here, the State's failure to provide reasonable notice meant that the issue was not "verified and addressed" in a timely fashion. GR 37(i).

In discussing GR 37(i), Petitioner focuses on the word "verified"—which it equates with corroboration—and ignores the word "addressed." Petition, pp. 1, 16-17. This is fatal to the State's argument.

With notice, the trial court could have "addressed" the prospective juror's statements. For example, the juror could have been questioned about the reason for his lapse of attention. The court could have asked the entire panel if anyone else had trouble focusing after three days of questioning. The court could also have taken a recess, allowed prospective jurors to stand and stretch, or reminded them of the importance of paying attention.

By focusing exclusively on verification, Petitioner overlooks one half of the reason for the notice requirement.

This should be taken as a concession. *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997).

Furthermore, Petitioner takes an overly restrictive view of the word "verified." According to Petitioner, "verified" refers only to "corroboration," a term used elsewhere in the provision. Petition, pp. 1, 14. Much of Petitioner's argument is characterized by a focus on "corroboration." Petition, pp. 10, 14, 17.

'Verified' cannot have the same meaning as 'corroborat[ed].' *Id.* Different language "should not be read to mean the same thing." *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015) (internal quotation marks and citation omitted). When different words are used, courts presume those words are intended to have different meanings. *Id.*

With adequate notice, the court could have "verified" that Juror 39 was no less attentive than his peers. The juror's

admission that he "lost track" of an earlier question (posed to a different person on the third day of jury selection) does not by itself create a nondiscriminatory basis for removal. RP (3/10/22) 617, 626.

Instead, Juror 39's candor likely revealed the entire panel's capacity to stay focused after three days of *voir dire*. The court could have "verified" the problem by questioning Juror 39 to ensure that he was just as attentive as everyone else in the room. Because the prosecutor didn't provide reasonable notice, the court could not "verif[y]" whether Juror 39 was inattentive or merely honest. GR 37(i).

GR 37 was adopted "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). The prosecutor's failure to provide notice as required by GR 37(i) is not a mere "procedural misstep" that can easily be excused. Petition, p. 2.

Rather, "reasonable notice" is the mechanism that protects against removal of jurors based on justifications that

"have historically been associated with improper discrimination in jury selection." GR 37(i). In the absence of proper notice, "[n]either Bell nor the trial court were afforded an opportunity to ask [J]uror 39 about the length, extent, or significance of any inattentiveness." Opinion, p. 7.

Instead of verifying and addressing the issue, the trial judge engaged in speculation about Juror 39's state of mind. RP (3/10/22) 627, 632. This created a pathway for unconscious bias to work its malign influence.

In ruling on the GR 37 objection, the judge did not describe observable behavior. RP (3/10/22) 627, 632. Instead, he conveyed his subjective impression that the juror "seemed" confused or inattentive, that "his mind was drifting," and that he was "potentially staring off and not completely tracking." RP (3/10/22) 627, 632. This approach is at the very heart of the evil that GR 37—and especially subsection (i)—was designed to address.

As the Supreme Court has said, "we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them… [W]e create [bias] anew through cognitive processes that have nothing to do with racial animus." *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326, 335 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

Petitioner's approach allows these ingrained, unconscious, implicit biases to persevere. Reducing the rule's language to a "minor procedural" requirement subject to harmless error encourages the very problem GR 37 is designed to address: the "difficult[y]… [in] prov[ing] discrimination even where it almost certainly exists." *Tesfasilasye*, 200 Wn.2d at 356-357.

The mechanism in GR 37(i) (providing notice, verifying, addressing) combats the historical prevalence of exercising peremptory challenges "based largely or entirely on racial

stereotypes or generalizations." *Id.,* at 356. People of color have been excluded from juries for generations. *See, e.g,. Strauder v. State of W. Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). GR 37(i) draws attention to some of the bases that have been used to enable this exclusion.

As Petitioner notes, even with proper notice, a lack of corroboration automatically invalidates any challenge that is based on a historically discriminatory reason. Petition, p. 16; GR 37(i). This does not mean that a *failure* to provide notice can be overlooked, as Petitioner implies. Petition, pp. 16-18.

The rule is mandatory: the party "*must* provide reasonable notice." GR 37(i) (emphasis added). Notice allows courts to "verif[y] and address[]" a stated justification that has historically been used to discriminate. GR 37(i). If notice is not provided, the court cannot take action, and the rule is violated.

When a prospective juror is dismissed for reasons that "have historically been associated with improper discrimination," and the court does not verify and address the issue in a timely manner, an objective observer necessarily could view race as a factor in the juror's removal.[3] GR 37(e) and (i). That is what happened here.

II. THE SUPREME COURT SHOULD DECLINE TO REVIEW ISSUES THAT WERE NOT PROPERLY RAISED IN THE COURT OF APPEALS.

Reversible error. The Court of Appeals correctly determined that improper denial of a GR 37 objection requires reversal. Opinion, p. 5 (citing *Tesfasilasye*, 200 Wn.2d at 362). The Petitioner argues that harmless error analysis should apply to GR 37 violations. Petition, pp. 11-14.

[3] The rule's focus is not exclusively on a party's "use [of] juror conduct as a pretext" for intentional discrimination. Motion, p. 4. Unconscious bias has undoubtedly played a role in removal for historically problematic reasons, and a reasonable observer would be aware of this too.

But the State made this argument for the first time in its motion for reconsideration, and the Court of Appeals' decision does not address the issue. *See King Cnty. v. Friends of Sammamish Valley*, 26 Wn. App. 2d 906, 934, 530 P.3d 1023 (2023) (The Court of Appeals "generally does not consider arguments raised for the first time in a motion for reconsideration."). The Supreme Court should decline to grant review of the issue.

Appellate courts agree that "[t]he applicable remedy" for a violation of GR 37 "is to reverse… without prejudice and remand for a new trial." *State v. Lahman*, 17 Wn. App. 2d 925, 938, 488 P.3d 881 (2021); *Tesfasilasye*, 200 Wn.2d at 361-362; *State v. Orozco*, 19 Wn. App. 2d 367, 377, 496 P.3d 1215 (2021).

The remedy applies regardless of any "hardship to victims." *Lahman*, 17 Wn. App. 2d at 932. Petitioner's concern that victims will have to "relive their trauma and testify at yet

another trial"[4] provides an incentive for prosecutors to refrain from making questionable peremptory challenges. It also puts pressure on judges to protect the rights of jurors and defendants the first time.

GR 37 does not invite consideration of victim impact or other factors such as the strength of the State's evidence. *Id.* Where an objective observer could view race as a factor in the removal of a juror, the damage to the defendant and to the public's trust in the criminal justice system is obvious and irremediable.

Petitioner's proposal to apply harmless error would eviscerate GR 37, returning Washington to an era when discrimination claims were routinely rejected.[5] This court

---

[4] Petition, p. 2.

[5] As Petitioner points out, courts analyzed harmless error for violations under *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Petition, p. 19 n. 4. But the adoption of GR 37 was a repudiation of the *Batson* standard, which the Supreme Court found insufficiently protective. *Tesfasilasye*, 200 Wn.2d at 357.

should adhere to the objective test at the heart of the rule rather than introducing additional "wiggle room" by allowing harmless error analysis.

Petitioner seeks support from cases applying harmless error when a peremptory challenge is erroneously *denied*. Petition, pp. 18-19 (citing *State v. Hale*, 28 Wn. App. 2d 619, 537 P.3d 707 (2023), *review denied*, 544 P.3d 31 (2024) and *State v. Booth,* 22 Wn. App. 2d 565, 510 P.3d 1025 (2022)). Such cases are not analogous: denying a peremptory challenge (based on GR 37) favors nondiscrimination.

Cases such as *Hale* and *Booth* encourage courts to deny peremptory challenges under GR 37 without fear of automatic reversal. Allowing courts to err on the side of racial equity furthers the purpose of GR 37. By contrast, applying harmless error to sustain a conviction after the discriminatory removal of a juror undermines GR 37.

Petitioner also argues that "[w]hen, as here, an alleged error involves a court rule, then harmless error applies." Petition, p. 12. But GR 37 is unlike other court rules.

GR 37—including those portions Petitioner characterizes as merely procedural—is designed to ensure that potential jurors are not rejected on discriminatory grounds. It protects litigants, jurors, the justice system, and the community as a whole. Whenever a court removes a juror without following GR 37, an objective observer could view race as a factor in the decision.

Such errors should never be considered harmless. The Supreme Court should decline to review the State's argument on the subject.

Standard of review. As the Court of Appeals noted, "[n]either party asserts that we should depart from the decisional law applying de novo review." Opinion, p. 4. For the first time in its Petition, the State argues that reviewing courts

should apply something other than "strict de novo review." Petition, p. 23.

The Supreme Court does not review issues raised for the first time in a Petition for Review. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). Given the State's failure to raise the standard of review in the Court of Appeals, the Supreme Court should decline to address the issue.

In addition, however, the trial court's "finding" in this case should not be given any deference. The trial judge speculated that Juror 39's "mind was drifting," but did not list any objective evidence on the subject. RP (3/10/22) 632.

The judge also claimed that Juror 39 was "potentially staring off and not completely tracking the proceedings." RP (3/10/22) 632. Again, the judge did not provide any objective evidence grounding this speculation in anything other than prohibited claims that he was "inattentive, or staring or failing to make eye contact." GR 37(i). These are not the kind of "findings" that are entitled to deference.

The Supreme Court should decline to review the State's argument regarding the standard of review.

CONCLUSION

The Petitioner does not establish a basis for review. The State's argument regarding the application of GR 37 is an attempt to weaken the standard in GR 37. Their argument stands in the way of justice, whereas GR 37 is aiming to further it. The State's Petition must be denied.

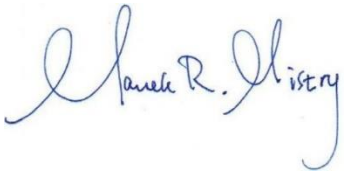
CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 3177 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted June 14, 2024.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Shawn Lamar Bell DOC# 432347
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on June 14, 2024.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

June 14, 2024 - 9:18 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,077-1
Appellate Court Case Title:	State of Washington v. Shawn Lamar Bell
Superior Court Case Number:	19-1-00973-1

The following documents have been uploaded:

- 1030771_Answer_Reply_20240614091629SC464043_6490.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 57151-0 State v Shawn Bell Respondents Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- britta.halverson@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20240614091629SC464043