IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

ARBIN UPRETI,

Petitioner

vs.

STATE OF WASHINGTON,

Respondent,

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS

#57496-9-II

PETITION FOR REVIEW

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WSB # 17283

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Table of Contents

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

I. IDENTITY OF PETITIONER

Arbin Upreti, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 57496-9-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Arbin Upreti respectfully requests that this Court review the Court of Appeals decision, affirming the trial court's decision in this case. The Court of Appeals erroneously determined that the trial court did not err by removing Juror No. 4 from continuing to sit on the jury throughout the case.

A copy of the decision from the Court of Appeals, Division II, terminating review, which was filed on May 7, 2024, is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision removing Juror No. 4 when no showing was made that any type of bias existed that warranted the Juror's removal.

IV. STATEMENT OF THE CASE

A. *Procedural History*

On March 11, 2020, the State filed one count of Rape in the Second Degree against Arbin Upreti for an event that occurred on or between December 28, 2019, and December 29, 2019. CP 1. Between July 11, 2022, and July 21, 2022, Mr. Upreti went to trial, and on July 21, 2022, the jury found Mr. Upreti guilty of Rape in the Third Degree. RP 532:3-13. On September 23, 2022, the Court sentenced Mr. Upreti to 12 months in custody. CP 37-51. Mr. Upreti's appeal was filed on October 21, 2022. CP 52-69. The appellate court affirmed his conviction in an unpublished decision. This petition for review follows.

B. *Facts*

After the testimony of the State's medical witness, Nurse Bakari, the Court addressed a concern regarding Juror No. 4 potentially sleeping. RP 63:2-4. The judge noted that she had been watching Juror No. 4 during the opening statements, although not consistently. RP 63:7-9. The judge noted that it

appeared that Juror No. 4 was listening to the evidence. The judge reviewed the transcript to see if Juror No. 4 had disclosed any hearing issues during voir dire, but she did not make such reference. RP 63:12-15. The judge noted that "I am concerned by the body language that I am observing, and I will continue to observe juror number four, and I ask counsel to do so as well." RP 63:21-24.

The State did not have any comments and counsel for appellant stated that "[s]he's taking notes as the testimony's going so best I could tell she's paying attention, but she does have some mannerisms." RP 64:4-7. The prosecutor then stated that she "believe[s] she had her eyes closed for some of Mr. Purtzer's [opening] as well." RP 64:19-20. The other prosecutor, Ms. Zhou, made comparable comments stating that "during Mr. Purtzer's opening statement she had the same mannerisms, and then I think halfway through his opening statement she opened her eyes a little and then closed them again." RP 65:15-18.

After the testimony of the State's second witness, Julie Mullin, a City of Lacey police detective, the Court readdressed

the issue with Juror No. 4. The Court was initially concerned that Juror No. 4 was focused on the lectern or on defense counsel's trial notes. RP 119:5-9. Defense counsel assured the judge that his notes were such that they could not be read, but in order to avoid any potential issues, agreed to move them. RP 119:9-11. The State then raised a concern about Juror No. 4's mannerisms and suggested she might be napping. Defense counsel indicated that if, in fact, she was napping, that could be a problem and that the juror should be questioned. RP 119:14-120:24. The Court, however, took a much more serious approach:

> THE COURT: I think we may have a more insidious problem. I have been observing juror number four carefully. She is directing her attention at the lectern consistently. She did that throughout the testimony of Ms. Bakari. She did that throughout the time that Ms. Shen was questioning both Ms. Bakari and Detective Mullen. She is, however, shifting her focus to Mr. Purtzer when he is speaking and she is shifting her focus to Detective Mullen when she is speaking. So my concern is increasing that – both for Mr. Upreti and for the minorities here, is I'm not certain that this is something she is aware of, and I'm not certain that it is simply her posture. I don't have a concern that she's sleeping, but her body language when a minority person is testifying or directing the questions or even when the court is instructing is very different. In

> contrast, the entire panel appears to be making eye contact with the different speakers or not making eye contact with anyone. At times the panel turns its direction and attention to me, and number four has not ever done that, has not made eye contact with me, and generally when I am speaking closes her eyes. So I am concerned about a more insidious issue which may actually impact Mr. Upreti as well. It's not clear to me of course because we haven't had any minority male witnesses, but the – the body language, the slumping, the closing the eyes and the contrast. And again, the testimony of Detective Mullen has been brief, but I just wanted to note the contrast.

RP 120:25-122:1. After both the State and defense commented on the Judge's concerns, the Judge stated as follows:

> THE COURT: At the moment it's very clear that juror number four is not focused on the evidence and does not wish to be here. Her body language rises to that level. I don't like to make suppositions, but the contrast with the way that she is observing you, Mr. Purtzer, which I know that is hard for you to focus on that when you're the one asking the questions and the witness that is Caucasian as opposed to the witness we've had that was a minority and her clear nonverbal body language directed at both the court and counsel, I think at this point it is best to excuse juror number four and have alternate number one replace juror number four.

RP 122:24-123:10.

Defense counsel objected to the Court's decision to excuse the juror. RP 124:22-125:4.

The Court of Appeals affirmed the trial court's decision to excuse Juror No. 4 and denied Mr. Upreti's claim of a due process violation. Respectively, Mr. Upreti urges that the Appellate Court erred because the right to trial by jury, and the violation of this right is clearly a due process violation. Accordingly, Mr. Upreti urges this court to grant his petition for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Arbin Upreti respectfully requests that this Court accept review of this case as it involves a significant question of law under the Constitution of the State of Washington and the United States as it addresses the right of a criminal defendant to be tried by a jury of his peers, which constitutional right the trial court violated. RAP 13.4 (b)(3).

VI. ARGUMENT

The State of Washington and federal constitution guarantee a criminal defendant the right to a fair and impartial

jury. U.S. CONST. AMEND. VI; WASH. CONST. art. I,§ 22. Prospective jurors themselves have the constitutional right not to be excluded from serving on a jury due to discrimination. *Powers v. Ohio*, 499 U.S. 400,409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The Constitution forbids striking even a single prospective juror for a discriminatory purpose. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

With these constitutional provisions in mind, the trial court erred by removing Juror No. 4 without showing that she was biased or not paying attention. Simply stated, the trial court failed to undertake any type of investigation to develop its belief of bias.

A trial court's decision to excuse a juror is reviewed for abuse of discretion. *State v. Jorden*, 103 Wn.App. 221, 226, 11 P.3d 866, 869 (2000). Under RCW 2.36.110, the judge 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, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW

2.36.110. "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror." *Jorden,* 103 Wn.App. at 227.

In *Jorden*, the trial court removed a juror after the sixth day of testimony. The State moved to disqualify the juror previously due to the juror's apparent sleeping. On the sixth day of testimony, the court learned that the juror's mother had been in the hospital, possibly needing life support. *Jorden*, 103 Wn.App. at 221.

Outside the presence of the other jurors, the juror stated that her mother's health did not prevent her from serving as a juror. *Jorden*, 103 Wn.App. at 221. After the State rested that day, the court held a hearing and excused the juror after hearing testimony from the bailiff who testified that the juror was inattentive on the first day, as well as from the detective who sat at counsel's table who stated the juror appeared to be sleeping in the afternoon of the first day. *Id.* The court decided not to question the juror, but stated the court observed the juror during the testimony of various witnesses "yawning, dozing and

sitting with her eyes closed." *Id.* at 226. The court referenced that this juror was the "most inattentive juror I've seen in six and a half years of doing trials." *Id.* The court then excused her. *Id.*

Here, the trial court did not conduct a hearing into Juror No. 4's behavior before dismissing her nor did the Judge have much, if any, chance to observe the Juror before dismissing her as only two witnesses had testified. When defense counsel suggested interviewing the Juror, the judge had already made up her mind that the juror would be dismissed for a biased reason. RP 122:24-123:18. The court assumed that there was an insidious reason why the juror was behaving in the fashion she was and unceremoniously dismissed her. Given that there was insufficient information about this juror, the court simply removing her was improper.

Simply assuming that a Juror, who is elderly and white, was biased against all minorities based upon her mannerisms, stereotypes the idea of racial bias. Such conduct does not enhance the idea of juror individualism.

Here, the trial court highjacked both the state and the federal constitutions by unilaterally making a determination regarding a Juror's fitness to serve based upon implied bias. This is the first case that counsel is aware of where such a determination has been made absent any type of questioning of the juror. Under said circumstances, respectively, the Judge's conduct amounts to error and that error denied Mr. Upreti a right to a jury of his peers. Significantly, this error entitles Mr. Upreti to a new trial.

VII. CONCLUSION

Areas of bias, and more importantly, implied bias, one becoming more significant for all trial courts to address. When a trial court, unilaterally, excludes a Juror for "implied bias" it is extremely difficult to establish that the trial court made a mistake. Although we grant trial courts a tremendous amount of discretion in their decisions, they are not omniscient, and this court should not grant them such status.

The right to a jury trial is held inviolate by both our state and federal constitutions. When that right is violated, then there

must be a showing to support that removal of that juror was appropriate. Here, that cannot be established and the failure to establish implied bias, as the reason for the disqualifications, was erroneous.

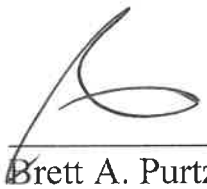
Accordingly, based on the arguments, records and files contained herein, Mr. Upreti respectfully requests that this Court accept review of this matter.

VIII. CERTIFICATE OF COMPLIANCE

This document contains 2274 words.

Respectfully submitted this 7th day of June, 2024.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner Arbin Upreti

By: 

Brett A. Purtzer
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

Counsel for Respondent Olivia Zhou Deputy Prosecuting Attorney 2000 Lakeridge Dr. SW, Bldg. #2 Olympia, WA 98502	☐U.S. Mail ☐Hand Delivery ☐ABC-Legal Messengers ☒Email
Appellant Arbin Upreti 33255 Kona St. NE Lacey, WA 98516	☒U.S. Mail ☐Hand Delivery ☐ABC-Legal Messengers ☐Email

Signed at Tacoma, Washington this 7th day of June, 2024.

Lisa Griffin

Filed
Washington State
Court of Appeals
Division Two

May 7, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ARBIN UPRETI, Appellant.	No. 57496-9-II UNPUBLISHED OPINION

CHE, J. — Arbin Upreti appeals his conviction for third degree rape of LB. At trial, after the first witness testified, the trial court raised concerns about juror 4 being inattentive. After considering the matter further, the trial court observed that juror 4 paid less attention to the minority women in the courtroom and instructed the parties to observe the juror. The State observed additional inattentiveness. And the trial court made oral findings that juror 4 paid less attention to the minorities than Caucasians. The State echoed the court's concern for the minority attorneys, the judicial officer, the victim, and the defendant. The court declined to question the juror individually as individuals are unaware of their implicit biases. Finally, the court added that "at a minimum juror number four is not paying attention to the evidence so not doing her job" and excused the juror over Upreti's objection. 1 Rep. of Proc. (RP) at 125.

Upreti appeals, arguing that (1) the trial court abused its discretion by not conducting further inquiry before excusing juror 4, and (2) there is insufficient evidence to support the third degree rape conviction. Upreti's arguments fail and we affirm.

FACTS

The State charged Upreti with the second degree rape of LB or, in the alternative, third degree rape.

I. TRIAL EVIDENCE

In December 2019, LB saw Upreti at the gym on a military base, and they exchanged cell phone numbers. LB and Upreti ultimately agreed to meet at LB's apartment. After a couple of drinks, the two began making out. Upreti performed oral sex on LB. They ended up in LB's bedroom.

When Upreti attempted sexual intercourse, LB told Upreti "'no'" and to "get protection." 2 RP at 195. LB continued to move her hips side to side to prevent Upreti from vaginally penetrating her as she told him no and to get protection. LB could feel Upreti continuing to try to penetrate her. The two grappled while Upreti tried to subdue and penetrate LB. Throughout the grappling, LB told Upreti to stop and get protection. During this grappling, Upreti asked if he could perform oral sex again, and LB explicitly said no. Upreti ignored LB's unwillingness and performed oral sex and anally penetrated LB with his finger.

Eventually, Upreti was on top of LB and employed a leg lock maneuver. LB tried to push Upreti backwards, moved her hips in an evasive manner, shook her head no, and continued repeating, "'No. You need to go get protection.'" 2 RP at 213.

Upreti performed a different maneuver and ultimately vaginally penetrated LB. After Upretri released LB's arms, she fell backwards. Upreti attempted to penetrate her again; LB resisted and continued to tell him to stop and get protection. Upreti again grappled LB into a

new position and vaginally penetrated her. LB told Upreti no, "no less than ten times." 2 RP at 225.

Subsequently, Upreti went to the bathroom, returned, and appeared to fall asleep. LB also went to the bathroom and then laid back in the bed. LB testified that she was in shock. About 15 minutes later, Upreti attempted to vaginally penetrate LB again. LB moved her hips evasively, used her hand to push Upreti away, and told him, "'No. You need to stop.'" 2 RP at 232. Upreti gave up and fell asleep.

LB texted her friend to call her and pretend that one of LB's soldiers needed to be picked up. Her friend did not call. About ten minutes later, LB pretended someone called her telling her to pick up one of her soldiers. LB and Upreti discussed the call. Upreti attempted to give LB a hug and left. LB proceeded to the hospital on the military base.

A nurse, Khadijah Bakari, conducted a sexual assault examination on LB. LB initially chose to file a restricted report. Restricted reports are not sent to military command. LB told the nurse that she had been sexually assaulted. The nurse found erythema, or redness, on the top of LB's cervix. And that redness is consistent both with consensual and nonconsensual intercourse. The nurse said LB reported pain and some soreness in the area, but no pain elsewhere.

LB reported the sexual assault to law enforcement when she got home. Detective Julie Mullen met with LB several days later. LB recounted the details of the rape to the detective.

Upreti testified that LB asked him if he had protection, which he denied having. Upreti maintained that LB never told him that he needed to get protection. Upreti's defense was that the entire sexual encounter was consensual and LB did not ask him to stop, nor did he employ any

force to control LB. Upreti agreed that he attempted to have sex with LB again after they got back in the bed, but he stopped when LB moved his hand away.

The jury convicted Upreti of third degree rape.

II. JUROR FITNESS

After nurse Bakari—the first witness—testified, the trial court recounted a sidebar conversation regarding juror 4 possibly sleeping during the proceeding. The court stated juror 4 closed her eyes during the court's opening instruction, but she did not appear to be sleeping. The court further noted that juror 4 appeared to listen to the evidence at times, but she "turn[ed] her chair completely away from the witness." 1 RP at 63. But the court could not see juror 4 for much of the opening arguments. Due to the court's concerns about juror 4's body language, the court asked the three attorneys to particularly observe juror 4 going forward and noted that it would continue observing juror 4 as well.

Defense counsel Purtzer generally thought juror 4 was paying attention as she was taking notes. Counsel Shen for the State observed that juror 4 closed her eyes during "a lot of my opening statement" and some of defense counsel's opening statement. 1 RP at 64. Counsel Zhou, also for the State, observed that juror 4 closed her eyes and remained still during the court's opening instructions. Counsel Zhou also observed that juror 4 adjusted herself when counsel Shen gave her opening statement, closed her eyes again, moved her head, and appeared to be "nodding off." 1 RP at 65. Then, juror 4 maintained those mannerisms through defense counsel's opening, opened her eyes once about halfway through, and closed them again.

After considering the matter overnight, the court was concerned that juror 4's "body language was much more attentive to Mr. Purtzer as opposed to myself, Ms. Shen or the witness

[Bakari], and we are all minority women." 1 RP at 69. During a recess, counsel Zhou observed that juror 4 appeared to rest her head on her hand with her eyes closed at points during the morning proceedings. Counsel Zhou thought juror 4 was napping, but also noted that the juror was attentive at times to the witness—Detective Mullen. Defense counsel requested that the court bring in juror 4 to ask her about the nodding off.

The court responded:

> I think we may have a more insidious problem. I have been observing juror number four carefully. She is directing her attention at the lectern consistently. She did that throughout the testimony of Ms. Bakari. She did that throughout the time that Ms. Shen was questioning both Ms. Bakari and Detective Mullen. She is, however, shifting her focus to Mr. Purtzer when he is speaking and she is shifting her focus to Detective Mullen when she is speaking. So my concern is increasing that—both for Mr. Upreti and for the minorities here, is I'm not certain that this is something she is aware of, and I'm not certain that it is simply her posture. I don't have a concern that she's sleeping, but her body language when a minority person is testifying or directing the questions or even when the court is instructing is very different. In contrast, the entire panel appears to be making eye contact with the different speakers or not making eye contact with anyone. At times the panel turns its direction and attention to me, and number four has not ever done that, has not made eye contact with me, and generally when I am speaking closes her eyes. So I am concerned about a more insidious issue which may actually impact Mr. Upreti as well.

1 RP at 120-21. The State echoed the court's concern for minority attorneys, the judicial officer, Upreti, and LB—as a minority woman. The State also observed that juror 4's eyes were open the entire time defense counsel engaged in cross-examination. Defense counsel admitted he was "not as attuned to those problems" and deferred to the court when asked about his opinion on juror 4. 1 RP at 122.

The court said it would dismiss juror 4 citing concerns about the differences between the juror's observation style toward Caucasians and other minority groups along with the clear body

language that juror 4 was not focused on the evidence and did not wish to be there. And the court decided not to question juror 4 individually reasoning that individuals are unaware of their implicit biases. Defense counsel objected. The court overruled the objection, adding that "at a minimum juror number four is not paying attention to the evidence so not doing her job." 1 RP at 125.

Upreti appeals.

ANALYSIS

I. JUROR FITNESS

A. *Inattention and Bias*

Upreti argues that the trial court abused its discretion by excusing juror 4 without conducting additional investigation and because there was insufficient evidence of bias. We disagree.[1]

"We review a trial court's decision to excuse a juror for abuse of discretion." *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). The judge has the obligation "to excuse

[1] Upreti also generally argues that excusing juror 4 violated his due process right to have a jury of his peers and violated his due process rights because the judge made the decision to dismiss the juror too early without sufficient information of bias. Upreti does not develop either of his general contentions and he cites only to the general right to a trial by jury and the right for the jury to be unprejudiced and free from misconduct. RAP 10.3(a)(6) requires "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Similarly, "Where a petitioner makes a due process challenge, '[n]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.'" *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) (internal quotation marks omitted) (quoting *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997)). His passing argument based on general due process concerns is insufficient to merit our consideration. Also notable, there is "no right to be tried by a jury that includes a particular juror." *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

from further jury service any juror, who *in the opinion of the judge*, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110 (emphasis added). Juror bias issues generally relate to an event or the relationship between a juror and a party.[2] *State v. Elmore*, 155 Wn.2d 758, 769, 123 P.3d 72 (2005).

Under CrR 6.5, the trial court may replace a juror found unfit with an alternate juror before the case is submitted to the jury. "CrR 6.5 does not explicitly require a hearing even after the case has been given to the jury." *Jorden*, 103 Wn. App. at 227. Under RCW 2.36.110,

> [t]he test is whether the record establishes that the juror engaged in misconduct. We are unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.

Id. at 229. When the trial court exercises its fact-finding discretion to this end, we defer to its factual determinations. *Id.*

"[T]he rights implicated by the erroneous dismissal of an impaneled juror lie between the rights implicated by the erroneous dismissal of a potential juror and the erroneous dismissal of a deliberating juror." *Sassen Van Elsloo*, 191 Wn.2d at 814. "[R]acial bias is a common and

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[2] In his reply brief, Upreti argues that the trial court erred by not applying the test for actual bias for impaneled jurors in *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 815-16, 425 P.3d 807 (2018) (holding that the voir dire actual bias test—"the challenging party must prove (1) that the impaneled juror has formed or expressed a biased opinion and (2) that 'from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially'"—applies to impaneled jurors). Reply Br. of Appellant at 5. As stated in the body, actual bias challenges focus on the relationship between a juror and a party, which is not at issue here. We determine that the actual bias test is the improper test to analyze dismissal of an impaneled juror for implicit racial bias.

pervasive evil that causes systemic harm to the administration of justice." *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019). "[I]mplicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias." *Id.* at 663 (quoting *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)). "Implicit racial bias . . . primarily exists at an unconscious level, such that the biased person is unlikely to be aware that it even exists." *State v. Gutierrez*, 22 Wn. App. 2d 815, 820, 513 P.3d 812 (2022).

In the context of a motion for a new trial based in part on implicit racial bias, our Supreme Court examined whether the trial court failed to conduct a sufficient inquiry before denying the motion. *Berhe*, 193 Wn.2d at 656. When implicit racial bias is alleged to be a factor in the jury verdict, our Supreme Court held:

> The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.

Id. at 665.

We examined in *Jorden*, whether the trial court abused its discretion by excusing an impaneled juror for inattentiveness without individually questioning the juror. 103 Wn. App. at 224. The State moved to disqualify a juror on the first day of trial because the State maintained that the juror was sleeping. *Id.* The trial court instructed the bailiff to observe the juror. *Id.*

The State moved to disqualify the juror again the next day, "inform[ing] the court that the bailiff had twice given the juror water in an attempt to wake her up." *Id.* Recognizing that "the juror was not 'as attentive as the other jurors,'" the court denied the motion but moved the juror to the front of the jury box. *Id.* at 225. "On the sixth day of trial, the court learned that the

juror's mother was in the hospital, possibly in need of life support." *Id.* But the juror told the court that this did not prevent her from serving. *Id.*

That day, the trial court heard argument and witness testimony from the State about excusing the juror. *Id.* Jorden requested a hearing to question the juror. *Id.* at 226. The court declined the request and gave its observations that the juror "was yawning, dozing, and sitting with her eyes closed." *Id.* We determined that the trial court did not abuse its discretion in excusing the juror—noting that the juror's unfitness was supported by the trial court's own observations, the testimony of the bailiff and the detective, and the fact that the challenged conduct spanned several days. *Id.* at 230.

i. *Additional Investigation Was Not Required under These Circumstances*

Further investigation, like an evidentiary hearing, was not required under the circumstances because the judge gave the parties notice of its concerns with juror 4, an opportunity to observe the juror over two days, and the court and the attorneys corroborated the underlying observations and concerns.

In the context of a pre-deliberation challenge to a juror for inattention, we have previously held that there was no "mandatory format" the trial court had to engage in to establish sufficient evidence of inattention. *Jorden*, 103 Wn. App. at 229. There is no comparable authority for the pre-deliberation challenge to a juror for implicit racial bias. While *Berhe*—pertaining to a challenge to a juror for implicit racial bias raised postverdict—is instructive, it is not controlling as the challenge in that case was raised postverdict. *Berhe* involves facts that could not be observed by the trial court as the challenged conduct occurred during the deliberations, so the court had to consider affidavits as the basis for determining whether a prima

facie showing of racial bias influencing the verdict had been made. 193 Wn.2d at 654. If the prima facie showing was made, the court would then have to hold an evidentiary hearing. *Id.*

Here, the judge and all the interested parties directly observed the conduct by juror 4 over two days. Two attorneys corroborated the court's observations and concerns. The defense attorney, while ultimately objecting to the court's decision not to inquire further of juror 4, for the most part, did not disagree with the observations about juror 4, and defense counsel acknowledged that he was "not as attuned to those problems." 1 RP at 122. Additional concerns or questions, if any, could be made known to the judge and by the three attorney observers during the observation period.[3] Even if the trial court held a hearing to investigate the allegation and required juror 4 to testify, such testimony would likely be unhelpful due to the unconscious nature of implicit racial bias. 193 Wn.2d at 657. So, the juror's own insight into whether their bias affected their behavior is likely not going to be instructive in this situation. Further, these types of questions would potentially bias the juror against one side or the other.

We hold that further investigation, like an evidentiary hearing, was not required under the circumstances because the judge gave the parties notice of its concerns with juror 4, an opportunity to observe the juror over two days, and the court and the attorneys corroborated the observations and concerns—as explored more below.

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[3] "Upon admission to practice, an attorney takes an oath to abide by the laws of the State of Washington and in their professional conduct employ those means consistent with truth and honor." *In re Disciplinary Proc. Against Cramer*, 168 Wn.2d 220, 232, 225 P.3d 881 (2010).

ii. *There Was Sufficient Evidence of Inattentiveness and Implicit Bias*

The next question before us is whether the record establishes that juror 4 was unfit under RCW 2.36.110. There are two bases upon which the trial court appeared to rely on to find the juror unfit—implicit racial bias and inattention.

We first address implicit racial bias. While implicit racial bias is not an explicit category under RCW 2.36.110, the judge has the obligation "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror . . . by reason of conduct or practices incompatible with proper and efficient jury service." Implicit racial bias is incompatible with proper and efficient jury service.

The trial court found—after the first day of trial—that juror 4's "body language was much more attentive to Mr. Purtzer as opposed to myself, Ms. Shen or the witness, and we are all minority women." 1 RP at 69. The following day, the court again found that juror 4 was paying less attention to the racial minorities—nurse Bakari, counsel Shen, and the judge. The trial court contrasted juror 4's habit of shifting her focus away from minority speakers and her inattentive body language towards minority speakers with the habits of other jurors. Counsel Shen and Zhou provided corroborating observations regarding juror 4's body language.

We defer to the trial court's factual determinations, and here, those factual determinations support the conclusion that juror 4 was unfit to serve on Upreti's jury by reason of implicit racial bias.

As to inattention, after the first day, the trial court observed juror 4 closed her eyes during the court's opening instruction, but she did not appear to be sleeping. The trial court further

noted that juror 4 appeared to listen to the evidence at times, but she "turn[ed] her chair completely away from the witness." 1 RP at 63.

While defense counsel thought juror 4 was paying attention as she was taking notes, the State observed that juror 4 closed her eyes during "a lot of my opening statement," some of defense counsel's opening statement, generally remained still, and appeared to be "nodding off." 1 RP at 64-65. The next day, the State observed that juror 4 appeared to rest her head on her hand with her eyes closed at points during the morning proceedings. The State thought juror 4 was napping, but also noted that the juror was attentive at times to Detective Mullen.

While the trial court was not concerned that juror 4 was sleeping, the trial court observed that juror 4 shifted her focus away from certain witnesses, failed to make eye contact, and closed her eyes when the trial court judge was speaking. The trial court concluded "at a minimum juror number four is not paying attention to the evidence." 1 RP at 125.

Under the circumstances, the record also establishes that juror 4 was unfit by reason of inattention under RCW 2.36.110. In sum, when making determinations regarding juror fitness, it is the judge who has the obligation "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, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110 (emphasis added). The judge is in the best position to observe the jurors, and they have wide discretion under RCW 2.36.110. Here, the record supports that juror 4 was unfit to serve on this trial and the court did not abuse its discretion by excusing the juror without an evidentiary hearing or further investigation given the circumstances.

II. SUFFICIENCY OF THE EVIDENCE

Upreti argues that there is insufficient evidence to support the third degree rape conviction because it was "based on nothing more than Ms. [LB]'s . . . statements." Br. of Appellant at 24. We disagree.

We review whether there is sufficient evidence to support a conviction de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). If the evidence viewed in the light most favorable to the State allows any rational trier of fact to find the defendant guilty beyond a reasonable doubt, sufficient evidence supports that conviction. *State v. Mares*, 190 Wn. App. 343, 355-56, 361 P.3d 158 (2015). "On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant." *Id.* at 356. We defer to the jury regarding issues of conflicting testimony. *Id.*

Third degree rape occurs where a "person engages in sexual intercourse with another person: (a) Where the victim did not consent as defined in *RCW 9A.44.010(7), to sexual intercourse with the perpetrator." RCW 9A.44.060(1)(a). And "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." Former RCW 9A.44.010(7) (2007). And "sexual intercourse" means,

> (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
>
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

Former RCW 9A.44.010(1) (2007). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." Former RCW 9A.44.010(2) (2007).

Viewing the evidence in the light most favorable to the State, there is clearly sufficient evidence to support Upreti's third degree rape conviction. LB repeatedly told Upreti to stop and get protection before intercourse. LB repeatedly moved her hips to avoid vaginal penetration and used her hands to prevent Upreti from vaginally penetrating her. These words and the aforementioned conduct demonstrate that LB no longer consented to have sexual intercourse. LB consistently testified to this end. And Upreti vaginally penetrated her anyway. LB relayed these events to a nurse and a detective.

Additionally, Upreti later performed oral sex and anally penetrated LB with his finger without consent, and each of those acts constitute sexual intercourse under former RCW 9A.44.010(2). Thus, those two acts independently meet the basis for the third degree rape conviction. There was more than enough evidence from which the jury could find LB did not consent to any further sexual intercourse as clearly expressed by her words and conduct.

Upreti argues there is insufficient evidence because the conviction is based on LB's unsupported assertions about the rape and because LB's testimony is diametrically opposed to Upreti's. But LB's testimony does not have to be corroborated. *See* RCW 9A.44.020(1). LB and Upreti are the only direct witnesses. While we recognize their testimony is diametrically opposed, we defer to the jury who found LB more credible. *Mares*, 190 Wn. App. at 356.

Upreti also seems to argue that the jury could not have found that Upreti engaged in unlawful conduct because LB's actions afterward may have been inconsistent with having been raped. But the question before the jury was whether the sex was consensual. The State presented abundant direct testimony from LB that after the first consensual act, the remaining sexual encounter was not consensual. The rationality of LB's actions after the fact does not make the evidence constitutionally insufficient. We hold that sufficient evidence supports the third degree rape conviction.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, J.

Veljacic, A.C.J.

RP at 167-78 (emphasis added).

The United States and federal constitutions guarantee a criminal defendant the right to a fair and impartial jury. U.S. CONST. AMEND. VI; WASH. CONST. art. I, § 22. Prospective jurors themselves have the constitutional right not to be excluded from serving on a jury due to discrimination. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The Constitution forbids striking even a single prospective juror for a discriminatory purpose. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

During jury selection, a party exercises peremptory challenges, striking jurors for no stated reason, to winnow jurors believed best for his or her case. *State v. Lahman*, 17 Wn. App. 2d 925, 930-32, 488 P.3d 881 (2021). The law affords a party peremptory challenges as a privilege, not a right. *State v. Lahman*, 17 Wn. App. 2d 925, 938 (2021). Not surprisingly, reliance on instincts to render judgment about other people's thought processes and beliefs has historically opened the door to implicit and explicit bias in jury selection. *State v. Orozco*, 19 Wn. App. 2d 367, 373, 496 P.3d 1215 (2021). The law assigns a judge an important role in precluding use of peremptory challenges in a discriminatory manner. *Snyder v. Louisiana*, 552 U.S. 472, 486, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court developed a three-part test for assessing whether a peremptory challenge was based on improper discrimination and violative of the

constitution. First, the party objecting to the peremptory challenge must establish a prima facie case giving rise to an inference of discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986). If the objector meets this initial burden, the test shifts the burden to the party asserting the challenge to provide a neutral explanation. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). If the proponent of exclusion accomplishes this goal, the judge must decide whether the objecting party established purposeful discrimination. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

A party faces significant obstacles to proving a discriminatory purpose. The peremptory challenger may mask the challenge's true purpose by identifying innocuous reasons for the challenge. Thus, the *Batson* test did little to end discrimination and, in particular, hidden discrimination. Most Americans condemn overt acts of racism, yet the plague of racism persists through negative stereotypes and assumptions that operate on a subconscious level and lead people to make discriminatory decisions without any sort of purposeful plan or deliberation. *State v. Saintcalle*, 178 Wn.2d 34, 53, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

To end implicit bias in jury selection, the Washington Supreme Court, in 2018, adopted General Rule (GR) 37. *State v. Tesfasilasye*, 200 Wn.2d 345, 347, 518 P.3d 193 (2022). The rule declares in pertinent part:

> (a) Policy and Purpose. *The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.*
>
> . . . .

(e) Determination. *The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge.* The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) *Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:*

(i) *having prior contact with law enforcement officers;*

(ii) *expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;*

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(Emphasis added.)

GR 37 restricts a party's ability to remove prospective jurors from a jury panel without cause. *State v. Lahman*, 17 Wn. App. 2d 925, 928 (2021). The rule seeks to reduce racial discrimination in jury selection by focusing on the danger of implicit bias. *State v. Lahman*, 17 Wn. App. 2d 925, 928 (2021). Under GR 37, a judge must deny a party's attempt to remove a juror without cause, known as a peremptory challenge, if an objective observer *could* view race or ethnicity as *a* factor in the attempted removal. *State v. Lahman*, 17 Wn. App. 2d 925, 928 (2021). Under the terms of the rule, an objective observer must be deemed aware of implicit, institutional, and unconscious bias, in addition to purposeful discrimination. *State v. Lahman*, 17 Wn. App. 2d 925, 928 (2021).

GR 37 concerns itself with possibilities, not actualities, of discrimination. *State v. Lahman*, 17 Wn. App. 2d 925, 938 (2021). This standard of "could view" of course leads to the denial of more peremptory challenges than a standard of "would view." *State v. Tesfasilasye*, 200 Wn.2d 345, 357 (2022).

GR 37 recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent. *State v. Lahman*, 17 Wn. App. 2d 925, 938 (2021). GR 37 teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution. *State v. Lahman*, 17 Wn. App. 2d 925, 938 (2021).

GR 37 furnishes a guided process for assessing the issue of bias within peremptory challenges. *State v. Lahman*, 17 Wn. App. 2d 925, 934 (2021). The rule lists five nonexclusive circumstances relevant to assessing the nature of a peremptory challenge. GR 37(g); *State v. Lahman*, 17 Wn. App. 2d 925, 934 (2021). The rule also specifies seven presumptively invalid justifications for peremptory challenges. GR 37(h); *State v. Lahman*, 17 Wn. App. 2d 925, 934 (2021). These justifications are disproportionately associated with race or ethnicity. GR 37(g)(iv); *State v. Lahman*, 17 Wn. App. 2d 925, 936 (2021). The State may not combine a race-neutral explanation with a presumptively invalid rationalization to remove a juror. *State v. Orozco*, 19 Wn. App.2d 367 (2021).

I now review Washington decisions applying GR 37 in the context of the State's exercise of a peremptory challenge. In *State v. Lahman*, 17 Wn. App. 2d 925, 936 (2021), the State prosecuted Travis Lehman for kidnapping and assault of his girlfriend. The State exercised a peremptory challenge on an Asian venireman and justified the exclusion on the lack of experience of the young man. This court held the exercise of the peremptory challenge to violate GR 37. Research shows that a common stereotype of Asian Americans is that they are strong in academics, to the detriment of interpersonal skills. The State did little to explain why the juror's age prevented him from service and instead opened the possibility that the prosecution implicitly and unsuitably relied on a stereotype that an Asian American lacked the frame of mind to side with the State. We did not conclude that the prosecutor's decision to strike the juror resulted from purposeful, let alone improper, discrimination. We emphasized that the Supreme Court

wrote GR 37 in terms of possibilities, not actualities. The rule recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent.

We compare and contrast *State v. Lahman* to Jose Hernandez's appeal. Travis Lahman's jury, like Hernandez's jury, contained other minorities. The State, however, in Hernandez's prosecution, asked juror 11 many relevant questions, probably a factor in favor of the State. The prosecutor of Lahman asked the challenged juror few questions.

In *State v. Orozco*, 19 Wn. App.2d 367 (2021), this court reversed a conviction for murder, among other convictions. We held that the State's peremptory challenge not only violated GR 37 but the narrower rule emanating from United States Supreme Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Juror 25, removed by a peremptory challenge, was the only African-American in the jury pool. Juror 25 indicated she could be fair to both sides. The State did not ask any questions of her. After a defense challenge to the removal of juror 25, the State justified the removal because its counsel had prosecuted her in the past and she appeared in police reports as associating with others engaged in crimes.

On review, this court recognized that the prosecutor having prosecuted the juror constituted a racially neutral reason. But the State added the invalid justifications of juror 25 having earlier police contact and appearing in police reports as associating with criminals. The latter two motivations fell on the list of reasons historically associated with racial discrimination. This court resolved that combining a race-neutral explanation

with a presumptively invalid rationalization crossed the line into forbidden territory. An objective observer could view race as a factor in the use of the peremptory strike.

State v. Orozco possesses important differences from the prosecution of Jose Hernandez. The prosecution in *Orozco* did not ask juror 25 questions, whereas the State, in Hernandez's prosecution, asked juror 11 similar questions to other venire people. Juror 25 averred that she could be impartial to both sides. Juror 11 equivocally declared impartiality. Still, the trial court, in response to the challenge for cause, found Hernandez's juror 11 acceptably impartial. More importantly, the State employed only presumptively invalid reasons when justifying juror 11's preemption.

In *State v. Tesfasilasye*, 200 Wn.2d 345 (2022), a jury found Amanuel Tesfasilayse, a Black Eritrean immigrant who worked as a driver for people with disabilities, guilty of sexually assaulting a visually impaired woman. In a juror questionnaire, juror 25, an Asian woman, questioned whether she could be fair. During voir dire, she revealed that she had been sexually assaulted as a child. She also disclosed that the State prosecuted her son for allegedly placing a young girl's hand on his groin. At the advice of counsel, the son pled guilty, although he was innocent according to his mother. She stated she worked in a nursing home as a sexual assault investigator and understood that allegations of sexual assault were common in caregiver settings. Finally, juror 25 indicated she would separate her personal experiences from the facts of the case, and, contrary to her questionnaire answer, she could be fair to both parties.

In *State v. Tesfasilasye*, the State exercised a peremptory challenge on juror 25. In face of a GR 37 objection from Amanuel Tesfasilayse, the State emphasized the juror's son's sexual assault conviction. The trial court permitted the peremptory challenge because the juror stated she believed her son to be treated unfairly. The trial court concluded that the juror was "not a believer in the [judicial] system." The trial court also noted that another Asian juror sat in the panel. The Washington high court reversed the conviction in light of denial of Tesfasilayse's GR 37 objection. The Supreme Court deemed juror 25 uniquely qualified to empathize with both the accused and the complaining witness. The court emphasized that, under GR 37, excusing a juror for a close relationship with someone previously arrested, charged, or convicted of a crime was presumptively invalid.

I compare Jose Hernandez's appeal with *State v. Tesfasilasye*. Juror 25, in *Tesfasilasye*, despite a contrary questionnaire answer, repeatedly claimed during voir dire the ability to be fair to both sides. Her background provided reasons to side with both the State and the accused. Jose Hernandez's juror 11 did not have this disparate background and reluctantly agreed to being unbiased. Still, in *Tesfasilasye*, the State justified removal because of the son's previous connection to the judicial system. The State impliedly accused Hernandez's juror 11 as a nonbeliever in the criminal justice system, a forbidden reason according to *Tesfasilasye*. A *Tesfasilasye* seated juror was the same race as the excluded juror.

The State faulted Jose Hernandez's juror 11 for bias because of his earlier contact with law enforcement and his distrust of law enforcement. GR 37(h) reads that removing a juror because of earlier contact with law enforcement, expressing a distrust of law enforcement, and holding a belief in racial profiling are "presumptively invalid." The court rule, however, does not explain whether a presumptively invalid reason forms a conclusive or mandatory presumption, on the one hand, or a permissive or rebuttable presumption, on the other hand. Against a mandatory presumption, no kind of testimony, however strong, will prevail, while permissive presumptions are equally conclusive until overcome by proof. *State v. Pilling*, 53 Wash. 464, 467, 102 P. 230 (1909). No Washington decision has yet to declare a presumptively invalid reason under GR 37 to be an irrebuttable presumption, although the opposite is also true. In all reported cases, wherein one of the presumptively invalid reasons came into play, the reviewing court held GR 37 to be violated. In another case involving racial prejudice infecting voir dire, the Washington Supreme Court adopted an automatic reversal standard, a standard similar to a mandatory presumption. *State v. Zamora*, 199 Wn.2d 698, 722, 512 P.3d 512 (2022).

GR 37 does not expressly read that, if a juror passes for cause, the juror, if a minority, must be seated and any peremptory challenge denied. Conversely, the rule does not expressly declare that a party may still successfully remove a minority juror who passes for cause with a preemptory challenge.

I would invalidate the State's exercise of its peremptory challenge against juror 11. Any bias levied by the State against Juror 11 solely and directly related to presumptively invalid reasons. Any bias arises from earlier contact with law enforcement, and the law recognizes that minorities face more law enforcement encounters per capita. The law directs us to use skepticism and caution at peremptory challenges.

We perform de novo review of trial court's decisions under GR 37. We need not be convinced by a probability that implicit bias occurred, only that an objective observer *could* view race or ethnicity as *a* factor in the attempted removal. Perhaps a peremptory challenge would be permissible if the challenged juror unequivocally and persistently declared he, she, or them would never believe law enforcement or would always rule for the defendant in a criminal case. Juror 11 did not so state. The court had already denied removal for cause and none of the reasons for removal changed from the State's for cause challenge to the peremptory challenge. The seating of other minority jurors on Hernandez's jury does not shield the State from the invalid reasons listed in GR 37.

Because the Constitution forbids striking even a single prospective juror for a discriminatory purpose, allowing a party to dismiss a juror for reasons of race or ethnicity requires reversal and remand for a new trial. *Snyder v. Louisiana*, 552 U.S. 472, 486, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). This remedy applies regardless of the strength of the prosecutor's case or the hardship to victims or witnesses. *State v. Lahman*, 17 Wn. App. 2d 925, 932 (2021).

Presumably we do not want a guilty party to go free because a juror was reluctant to convict based on how law enforcement treated her, a family member, or a friend in the past or because a juror belongs to a minority group subjected to discriminatory and unfair treatment throughout history. Still, the state of Washington deems imperative the excision of institutional racism prevalent in its criminal justice system. The State may avoid reversals and second trials by cautiously exercising peremptory challenges, including seating jurors that the trial court passes for cause.

I dissent:

Fearing, J.

Fearing, C.J.

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