No. _____
COA No. 57360-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLES J. DENHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge
Cause No. 20-1-00502-34

PETITION FOR REVIEW

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A. INTRODUCTON

Overwhelming evidence supported the jury's finding that Nicholes Denham murdered Charlene Van Auken and her four-year-old daughter. The Court of Appeals reversed those convictions and remanded the matter for a new trial based solely on the prosecutor's exercise of a peremptory challenge on Juror 27. The decision of the Court of Appeals relied on incomplete statements from other jurors in reaching its conclusion and failed to comprehensively consider the totality of the circumstances in conducting its review of the peremptory challenge. This Court should accept review under RAP 13.4(b)(2) and (4) because the analysis of the Court of Appeals is factually inaccurate and in conflict with other published decisions of the Court of Appeals, and because substantial public interest dictates that this Court provide further guidance on the standard of review pursuant to GR 37 and the proper application of those standards.

B. ISSUES PERTAINING TO REVIEW

1. Whether review is appropriate under RAP 13.4(b)(4) for this Court to clarify the standard of review for GR 37 issues.

2. Whether review is appropriate under RAP 13(4)(b)(2) where the Court of Appeals failed to comprehensively review the totality of the circumstances in its review of a GR 37 objection, contrary to published decisions in State v. Matamua, State v. Hale, and State v. Booth.

3. Whether review is appropriate under RAP 13.4(b)(4) where the Court of Appeals failed to comprehensively review the totality of the circumstances in its review of a GR 37 objection demonstrating that guidance is needed from this Court regarding the proper application of standards for reviewing GR 37.

C. STATEMENT OF THE CASE

Nicholes J. Denham was convicted of shooting Charlene Van Auken and her four-year-old daughter Z.P. with a .40 caliber Smith & Wesson inside Van Auken's black Chevy HHR. RP 904, 1018, 1029-30, 1443-44, 1456, 1459, 1462-1463, 3121-3122, RP 3488-3491, CP 156-176. Van Auken "was seated in the front driver's side seat and wearing a seat belt when she was shot." RP 1456-1457. Van Auken died from a "contact" gunshot wound to the right forehead. RP 1018. Z.P. "was seated face forward in a child's car seat in the rear driver's side of the vehicle when she was shot." RP 1462-1463. Z.P. died from an intermediate range gunshot to the face, with wounds to her arms consistent with raising them defensively. RP 1029-1030. Forensic scientist Stephen Greenwood, who processed the vehicle, "concluded that the shooter was likely in the front passenger's side of the vehicle when firing the shots." 1386, 1390, 1463.

Van Auken and Z.P.'s bodies were then dragged into the blackberry bushes in the 5700 block of Puget Beach Road Northwest. RP 758, 796. Mary Gibbons and her husband were walking their dogs on March 10, 2020, when they located the bodies. RP 725, 730-731, 733, 736. Deputy Joseph Hiles responded and observed an adult female laying in a contorted fashion, somewhat on her side or her back. RP 754. She was wearing a shirt and only underwear and was obviously deceased with severe head trauma. RP 754. About a foot away from the adult's head a female child was lying face down fully clothed, with her buttocks area soiled in blood. RP 754-755. Lacey Fire Department confirmed that the two were deceased. Detective Brian Goheen of the Thurston County Sheriff's Office noted that the bodies appeared to have been dragged from a pull-out area on the roadway. RP 802, 806.

Denham had been in a previous dating relationship with Melanie Newcomb, who worked at the Cedar Inn Bar.

RP 1903,1982. Melanie testified that she had three firearms, a .45 caliber Springfield XD-S, a .40 caliber Smith & Wesson, and a .22 caliber revolver. RP 1911-1913. All three firearms were operable. RP 1914. During a New Year's Eve party, Newcomb heard somebody jumping over her fence. RP 1962-1963. In February of 2020, Newcomb noticed that her firearms were missing. RP 1966-1967. She reported them stolen on February 5, 2020 and provided serial numbers for the .45 and the .40 to law enforcement. RP 1958-1969, 1976.

Lacey Police Department officers responded to a weapons violation that occurred on the night of February 29, 2020, into March 1, 2020, at Cedar Inn, after a neighbor reported hearing two gunshots. RP 2097. Newcomb was scheduled to work that day but did not. RP 1982. The owner, Sunny Lee, found a bullet hole in one of the windows. RP 2099, 2321, 2328.

The Washington State Patrol (WSP) crime lab tested the bullets and shell casings and determined that the bullet found in the Van Auken's Chevy HHR and the bullet recovered from the Cedar Inn were "fired from the same firearm." RP 3120. Both bullets came from a .40 caliber Smith and Wesson. RP 3121-22. The shell casing found outside the Cedar Inn, the casing found in the HHR, and the 43 shell casings provided by Melanie Newcomb "were all fired from the same firearm." RP 3118-3119.

Denham was found guilty of two counts of aggravated first-degree murder while armed with a firearm, five counts of unlawful possession of a firearm in the first degree, three counts of theft of a firearm, one count of burglary in the first degree, while armed with a firearm, and one count of unlawful discharge of a firearm. RP 3488-3491, CP 156-176. He was sentenced to life without parole for the two counts of aggravated murder. RP 3539, CP 245-255.

During jury selection, Individual questioning was done in increments. RP 55. During his individual questions of panel 2, defense counsel started his questioning by asking the panel about their initial reaction when they heard the trial court say that the charges included aggravated murder. RP 315. Juror 27 responded "I guess my initial thought that there is a lot of responsibility behind being a juror in this case," and later stated, "Well, we have the responsibility to decide somebody's fate." RP 319. Counsel asked, "Do you think a case like this impacts more than just Mr. Denham?" and Juror 27 responded, "Yes." RP 319. When counsel asked, "All right. It impacts a whole bunch of people, right?" Juror 27 responded "Right." RP 319. Defense counsel then stated, "in your mind, is it a big deal to everybody? Mr. Denham specifically? Maybe the State? Tell me kind of what your thought is about the impact and who it would impact on a case like this," to which Juror 27 responded, "I suppose my initial was the

accused, Mr. Denham." RP 320. Juror 27 then stated, "Because our decision … I guess it affects multiple people, not just him. Yeah, it would affect the victims' family and … But then also his future as well." RP 320.

At the time for peremptory challenges, the prosecutor indicated that the State would seek to exercise a peremptory challenge on Juror 27, stating,

> The exercise of this challenge would be based on some specific responses to questions in which he indicated a concern that the decision here in this case would decide the fate of the defendant and expressed a lot of concern about the impact that that would have on him. And it was the State's interpretation of that that that could be a - - it could be an implicit bias. I'm not accusing the juror of being biased, but an implicit bias towards defense.

RP 650. Defense counsel objected under GR 37. The trial court then asked for a response from the State as required by GR 37. RP 651, GR 37. The prosecutor indicated that he had already given the justification and added,

> But that is the response of the State is that this peremptory is not being exercised based on

> any type of indication about race but is very specific to this juror and specific to a specific answer given to a specific question the stakes (sic) concern about a possible underlying bias towards defense from that answer.

RP 651-652.

The trial court ruled,

> So the Court makes a determination, as I refenced, and considers circumstances including the number and types of questions posed to the prospective juror and whether the party exercising the peremptory challenge asked significantly more questions or different questions to the prospective juror and whether there were other similar answers. There's other factors that the Court considers.
>
> Based upon the question referenced and the answers from number 27, the Court is finding that the exercise of the peremptory will be allowed, that an objective observer - - I don't believe an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. So it's not denied.

RP 652.

Denham appealed his convictions assigning error only to the allowance of a peremptory challenge of Juror 27. The Court of Appeals reversed and remanded for a

new trial, finding that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge of Juror 27. The Court of Appeals denied the State's Motion for Reconsideration on May 21, 2024. The State respectfully seeks review of the decision of the Court of Appeals.

D. ARGUMENT

1. This Court should accept review to clarify the standard of review for GR 37 decisions.

Appellate courts review the trial court's application of GR 37 de novo. State v. Omar, 12 Wn. App. 2d 747, 751, 460 P.3d 225 (2020), *review denied*, 196 Wn.2d 1016 (2020). However, the application of de novo review to GR 37 decisions departs from other, similar standards of review. *See*, Uttecht v. Brown, 551 U.S. 1, 9-10, 127 S. Ct. 2218, 167 L.Ed.2d 1014 (2007) (appellate courts owe deference to a trial court's determination of a juror's demeanor); State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d

190 (1991) (denial of a challenge for cause is reviewed for manifest abuse of discretion, since the trial court is in the best position to observe the juror's demeanor and responses).

In State v. Tesfasilasye, 200 Wn.2d 345, 355-356, 518 P.3d 193 (2022), this Court was asked to discuss the standard of review for GR 37 and stated, "Here, there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility. However, we leave further refinement of the standard of review open for a case that squarely presents the question on a well-developed record," when it applied a de novo review.

The Court of Appeals applied a de novo standard of review and declined the State's request to give deference to the trial court's observations. State v. Denham, No. 57360-1-II, (Unpublished Opinion) at 5-6. The decision of the Court of Appeals illustrates why a reviewing Court

should give some deference to the findings of the trial court. The Court of Appeals noted, "The State did not ask any follow-up questions regarding their answer of who may be affected, and its limited interaction with juror 27 failed to reveal whether they truly stood out from the other jurors in terms of their response." Id. at 14. The prosecutor noted that Juror 27's response stood out and gave the prosecutor the impression of an implied bias against the State. RP 650. The trial court, which also observed the statements of Juror 27 in real time, did not disagree. RP 652. In discussing its impression of Juror 27's answer to the specific question noted, the trial court stated, "Based upon the question referenced and the answers from number 27, the Court is finding that the exercise of the peremptory will be allowed, that an objective observer - - I don't believe an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." RP 652.

The mannerism, tone, and other non-verbal cues of the juror when speaking in the courtroom are not observed by a reviewer reading a cold transcript. The trial court is in the best position to observe the venire and understand the totality of the circumstances, in the courtroom, at the time of the challenge. In this case, the prosecutor's peremptory challenge was based on a specific answer to a question that defense counsel asked to numerous jurors. The trial court, as an objective observer in the courtroom, was in the best position to fully observe nonverbal ques that went with that response and differences between responses of other jurors.

Pure de novo review is not possible because the Court of Appeals was not in the courtroom and did not have the ability to see the venire or Juror Number 27, did not have the ability to hear and see the tone and demeanor of particular responses of the jurors or attorneys, and was not

in position to view the totality of the circumstances which would be seen by an objective observer in the courtroom.

This Court should accept review to clarify that in conducting a de novo review of the legal application of GR 37, a reviewing court should give deference to the observations of the trial court. In this case, the trial court clearly found the prosecutor's statement, that Juror 27's answer to the specific question regarding their reaction to the charges was impactful and gave an impression of implied bias, credible. That observation should be given some deference by a reviewing court. The standard for review of GR 37 is an issue that trial court's require guidance on. This Court should accept review pursuant to RAP 13.4(b)(4) because this is an issue of substantial public interest that this Court should clarify.

2. <u>This Court should accept review because the Court of Appeals' application of GR 37 conflicts with several published cases in the Court of Appeals because the Court of Appeals failed to comprehensively consider</u>

the totality of the circumstances in its review of GR 37.

The Court of Appeals application of GR 37 in this case conflicts with the published opinions of the Court of Appeals in State v. Booth, 22 Wn.App.2d 565, 510 P.3d 1025 (2022); State v. Matamua, 28 Wn.App.2d 859, 539 P.3d 28 (2023); and State v. Hale, 28 Wn.App.2d 619, 537 P.3d 707 (2023). In each of those cases, the Court of Appeals applied GR 37 to denied peremptory challenges which the defense sought to exercise and found that the trial courts erred by denying the peremptory challenges.

In Booth, the defendant in a driving under the influence case attempted to exercise a peremptory challenge of a juror who was in a cognizable racial minority. Booth, 22 Wn.App.2d at 567-568. During questioning of the venire, the juror stated that he would be comfortable with a law that completely prohibited drinking and driving and indicated that a person should probably consent to a

field sobriety test and follow a law enforcement officer's instruction. Id. at 570. In response to a GR 37 objection, the defense attorney argued that those responses indicated to defense counsel that the juror harbored positions about drinking and driving that were inconsistent with being able to balance the issues. Id. at 575-576.

The Court of Appeals noted, "we review a GR 37 decision objectively and comprehensively, not superficially and narrowly," and found that the totality of the circumstances "would not lead an objective observer to conclude race could have been a factor in defense counsel's decision to exercise a peremptory challenge." Id. at 579-580. Importantly, the Court of Appeals looked at the totality of the circumstances in addition to the considerations of GR 37(g), finding that defense counsel made a strategic decision to not strike a different juror who gave a similar response. Id. at 578.

In this case, the Court of Appeals narrowly applied the factors in GR 37(g). The Court of Appeals indicated that Jurors 4 and 32 provided similar answers and were not subject to peremptory challenges. Unpublished Opinion, at 12. The Court of Appeals failed to recognize that statements made by Juror 4 were in response to a distinctly different line of questioning. Defense counsel was inquiring about the jurors' understanding of the burden of proof in a civil case versus the burden of proof in a criminal case. RP 152. Juror 4 responded, "I think the stakes are higher for what the outcome is." RP 153. Juror 4's responses, taken in totality, were an acknowledgment that the stakes are higher, "for both" sides in a criminal case. RP 153-154.

Juror 32 was asked about prior service on a jury. RP 322. Juror 32 then answered defense counsel's question about what went through their mind when the trial court read the charges and responded,

> I have done it. I guess basically we're going to be looking at his side, we're going to be looking at their side, we're going to be taking notes, trying to get facts. And then the impacts, like she said, our decision will impact him. But it just doesn't impact him. It's going to impact everybody in the case.

RP 323. This response was not similar to Juror 27's response, and it specifically distinguished itself from Juror 27's response. Juror 27 spoke about the impact on Mr. Denham shortly before the question was posed to Juror 32. RP 319-321.[1] The decision of the Court of Appeals omits the fact that Juror 32 distinguished their response from Juror 27's. Unpublished Opinion, at 3. Juror 32's comments support the conclusion that other jurors, like the prosecutor, noticed that Juror 27 emphasized the impact on Mr. Denham in a noticeable and appreciable way. Rather than acknowledge that, the unpublished opinion of

[1] While the transcript indicates the prosecutor stated "he" during the discussion of Juror 27 and GR 37, that appears to have been in error as the record indicates that Juror 27 was female. CP 267-274, RP 650.

the Court of Appeals takes Juror 32's comment entirely out of context and states "Juror 32 also noted in his initial response that the jury's decision would impact Denham." Unpublished Opinion, at 12.

Unlike the Court in Booth, the decision of the Court of Appeals in this case does not consider the totality of the circumstances, including reasons why the prosecutor did not exercise peremptory challenges against certain other jurors. Instead, the decision takes statements of other jurors out of context in an effort to demonstrate that race could have been a factor under GR 37(g)(iii). To the contrary, no juror provided a similar answer to the specific question that the prosecutor relied upon for its reason to exercise a peremptory challenge against Juror 27. GR 37(g)(iii) should weigh against a finding that an objective observer could have found that race or ethnicity played a part in the exercise of the peremptory challenge.

In State v. Hale, the Court of Appeals indicated "whether a juror would be subject to a for cause challenge – which actual bias would support – cannot be the test," for GR 37. Hale, 28 Wn.App.2d at 636-637. In that case, the Court of Appeals found that the trial court erred by not allowing the defense to exercise a peremptory challenge against a juror who expressed that they had experience with child protective serves, implying that their personal or professional experiences may impact them. Id. at 639.

In State v. Matamua, the Court of Appeals found error in the denial of a defense peremptory challenge based on concerns expressed by defense counsel regarding the juror's expectations of the evidence. Matamua, 28 Wn.App.2d at 874-875. The Court of Appeals noted, "A party could have reason for seeking to strike a juror that falls short of the grounds for removal for cause but nevertheless would not be viewed by an

objective observer as having been motivated by racial or ethnic bias." Id. at 875.

Here, the prosecutor's reason for exercising a peremptory challenge on Juror 27 was racially neutral. RP 650-652. Juror 27's initial reaction to the case was concern regarding the fate of Mr. Denham. RP 319. Generally, punishment is irrelevant to the jury's task. State v. Murphy, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997), *review denied*, 134 Wn.2d 1002, 953 P.2d 95 (1998). The prosecutor's concern that Juror 27's response was perhaps overly focused on punishment and the fate of Mr. Denham was justified. As in Booth, where the juror's comments did not amount to actual bias, Juror 27's response legitimately caused concern that Juror 27 was exhibiting an implied bias toward the defense.

The facts of this case are not distinguishable from Booth, Hale, or Matamua in that no objective observer could view race or ethnicity as a factor in the exercise of

the peremptory challenge of Juror 27. Other than the prosecutor identifying Juror 27 as a person who may be of a cognizably recognizable minority, nothing in the record suggest that race or ethnicity could have been a factor in the exercise of the peremptory challenge. The Court of Appeals failed to objectively and comprehensively consider the actual statements of the jurors and the complete totality of the circumstances, consistent with the decisions in Booth, Hale and Matamua. This Court should accept review pursuant to RAP 13.4(b)(2).

3. This Court should accept review because the Court of Appeals failed too inclusively consider the totality of the circumstances in this case, which clearly support the trial court's finding that no objective observer could find that race or ethnicity played a role in the peremptory challenge of Juror 27. The standards for what should be included in a GR 37 analysis are of substantial public interest and should be decided by this Court.

While the Court of Appeals stated that it was considering the totality of the circumstances for GR 37, the

opinion focused only on two factors of GR 37. Unpublished Opinion, at 11. The prosecutor's basis for utilizing a peremptory challenge for Juror 27 was based on Juror 27's unique answer to defense counsel's question regarding their initial reaction to the charges. The same question was asked to numerous jurors and the record shows that Juror 27 was the only Juror whose initial reaction was concern for the impact that the charge had on the defendant. RP 319. Juror 27 was also the only Juror who referred to Denham by name in answering the question regarding their initial reaction to the charges. RP 319. It was only with additional questioning that Juror 27 acknowledged that others would be impacted by the case as well. Additional questioning about this concern from the prosecutor would not have been likely to cure the State's concerns. GR 37(g)(i). Juror 27's response was notably different than other jurors' responses to the same question.

The Court of Appeals' analysis of GR 37(g)(iii) was factually incorrect, as noted in the previous section. No other juror gave a similar answer to the specific question that Juror 27 answered. Even Juror 32's response illustrated that the Juror 27's response was memorable and stood out not only to the prosecutor but to other jurors. RP 323. Rather than considering the totality of the circumstances, the Court of Appeals engaged in an incomplete analysis.

Applying all of the factors of GR 37, it is clear that no objective observer could view the exercise of the peremptory challenge as influenced by race or ethnicity. GR 37(g) provides a non-exclusive list of factors for the trial court to consider when reviewing a GR 37 objection. As the trial court acknowledged, the first consideration involves the number of questions posed to the prospective juror and types of questions asked about it. GR 37(g)(i). The record in this case demonstrates that defense counsel

asked the same question of numerous jurors. Juror 27 was not singled out by the prosecution and nothing about the questioning of Juror 27 would give any indication that race, or ethnicity was a factor in the use of a peremptory challenge.

The prosecution did not ask significantly more questions of Juror 27 than other members of the venire and did not ask different questions of Juror 27 than the rest of the venire. GR 37(g)(ii). As noted, Juror 27's response to the question was unique compared to other jurors. Juror 1 answered the same question by saying that the charge took them back to their childhood when they lost their dad at age 6. RP 200. The prosecutor also exercised a peremptory challenge on Juror 1. CP 267.

Juror 43 answered the question expressing concern about the number of charges and indicated that they may be distracted by emotions in the courtroom. RP 330-331. The prosecutor also utilized a peremptory challenge on

Juror 43. CP 269. Juror 44 questioned whether they could give 100 percent of their time to the case. RP 334. In response to a different question Juror 44 arguably indicated that the resources were biased against the defense stating, “the defense doesn’t have the same resources that the prosecution has.” RP 370. The prosecutor also utilized a peremptory challenge on Juror 44. CP 269.

The prosecutor also struck Juror 61, but Jury 61 expressed that their reaction was emotionally overwhelming. RP 538. Juror 72 also expressed that they had “anxiety” and indicated concern about how hearing the evidence would affect them. RP 546-547. The prosecutor also exercised a peremptory challenge on Juror 72. CP 272. The prosecutor’s use of peremptory challenges on other jurors supported the trial court’s conclusion that an objective observer could not view race or ethnicity as a

factor in the peremptory challenge of Juror 27. GR 37(g)(iii).

The reason given by the prosecutor was not disproportionately associated with race or ethnicity. GR 37(g)(iv). As the prosecutor noted, the reason was an indication of potential bias against the State from the specific answer to the question regarding the juror's initial reaction to the charges. Additionally, the use of peremptory challenges in this case does not support a conclusion that they were used disproportionately against a given race or ethnicity. GR 37(g)(v).

During trial, the parties and trial court identified Jurors 13, 14, 16, 20, 27, 48, 58, 61, and 74, 85, 86, 91, and 93, as jurors for whom a GR 37 objection might be offered, thirteen out of 98 total jurors summoned for the venire (approx. 13.3%). RP 215-216, 387, 447, 562, CP 267-274. Jurors 13, 20, 58, 86, 91, and 93 were removed for hardship or cause. CP 267-274. The defense

exercised peremptory challenges on Jurors 16 and 74. RP 653-654, CP 267-274. 39 jurors remained when the parties exercised peremptory challenges, seven of whom were identified as Jurors for whom a GR 37 objection might be appropriate (Approx. 17.9%)

The trial court selected 12 jurors and three alternates to sit through trial. Juror 14 served on the jury as Juror 4, Juror 48 served on the jury as Juror 9 and Jury 85 served as Alternate Juror 2. CP 267-274. Based on that, three out of fifteen of the jurors who served had been identified by the parties as jurors for which a GR 37 might be appropriate, or 20%. Statistically, there is no basis for an objective observer to conclude that the use of peremptory challenges was disproportionately against a particular race or ethnicity. GR 37(g)(v).

The prosecutor's reason for exercising a peremptory challenge was neither vague nor based on a ground prohibited by GR 37. As noted, the Court of Appeals did

not look at the totality of the circumstances in this case. Objectively, there is no basis to conclude that race or ethnicity could have been a factor in the State's use of a peremptory challenge. The lens with which Courts should review a GR 37 objection is an issue of substantial public interest and importance. This Court should accept review pursuant to RAP 13.4(b)(4).

E. CONCLUSION

The opinion of the Court of Appeals is factually inaccurate and in conflict with other published decisions of the Court of Appeals. Substantial public interest dictates that this Court provide further guidance on the standard of review pursuant to GR 37 and the proper application of those standards. The facts and circumstances of this case are serious for the defendant, the victim's family, and the community. A decision on this case should not rely on incorrect or incomplete statements of the facts or an incorrect application of GR 37. The State respectfully

requests that this Court accept review pursuant to RAP 13.4(b)(2) and (4).

I certify that this document contains 4,710 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 11th day of June 2024.

Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 11th day of June 2024.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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Filing Petition for Review

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December 5, 2023

IN THE COURT OF A PPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICHOLES JOSEPH DENHAM, Appellant.	No. 57360-1-II UNPUBLISHED OPINION

VELJACIC, J. — Nicholes Denham appeals his convictions of murder in the first degree of his former girlfriend Charlene Van Auken and her four-year-old daughter. Denham argues that the trial court erred in overruling his GR 37 objection to the State's preemptory challenge against juror 27 because the trial court failed to adequately apply and analyze the correct legal standard under GR 37.

We hold on de novo review that the trial court erred; an objective observer could have viewed race as a factor in the State's use of a peremptory challenge against juror 27. Accordingly, we reverse and remand this case to the trial court for a new trial.

FACTS

I. BACKGROUND

In March 2020, the State charged Denham with two counts of aggravated murder in the first degree following the discovery of the bodies of Van Auken, Denham's former girlfriend, and her four-year-old daughter beside a pedestrian trail.

Two months later, the State amended the charges adding three counts of unlawful possession of a firearm in the first degree, burglary in the first degree, three counts of theft of a firearm, and aiming and discharging a firearm to the charges. The case proceeded to jury trial.

II. JURY SELECTION/PEREMPTORY CHALLENGE ON JUROR 27

During voir dire, defense counsel questioned prospective jurors. The specific questions varied, but generally included asking how the jurors felt or what their reactions were upon hearing the charges. As a response, several jurors, including jurors 4, 27, 30, 32, 41, 49, 68, and 69 gave answers noting the trial as affecting not only Denham but a lot of other people. Juror 27 responded and the following exchange then took place:

> PROSPECTIVE JUROR NO. 27: I guess my initial thought that there is a lot of responsibility behind being a juror in this case.
>
> [DEFENSE COUNSEL]: What do you mean by that, "a lot of responsibility"? I agree. But that can mean something different to you than me or juror 26.
>
> PROSPECTIVE JUROR NO. 27: Well, we have the responsibility to decide somebody's fate.
>
> [DEFENSE COUNSEL]: Do you think a case like this impacts more than just Mr. Denham?
>
> PROSPECTIVE JUROR NO. 27: Yes.
>
> [DEFENSE COUNSEL]: All right. It impacts a whole bunch of people, right?
>
> PROSPECTIVE JUROR NO. 27: Right.
>
> [DEFENSE COUNSEL]: So when I hear you saying that this is a big deal,—
>
> PROSPECTIVE JUROR NO. 27: Mm-hmm.
>
> [DEFENSE COUNSEL]: — in your mind, is it a big deal to everybody? Mr. Denham specifically? Maybe the State? Tell me kind of what your thought is about the impact and who it would impact on a case like this.
>
> PROSPECTIVE JUROR NO. 27: I suppose my initial was the accused, Mr. Denham.
>
> [DEFENSE COUNSEL]: Why? Tell me why.
>
> PROSPECTIVE JUROR NO. 27: Because our decision. . . . I guess it affects multiple people, not just him. Yeah, it would affect the victims' family and. . . . But then also his future as well.
>
> [DEFENSE COUNSEL]: So for juror 27, I hear you saying the gravity of this is significant for a lot of people and that was your first thought was this is a big deal.
>
> PROSPECTIVE JUROR NO. 27: Correct.

4 Rep. of Proc. (RP) at 319-20.

Juror 4 discussed the importance of criminal cases, stating, "I just think the stakes are higher for what the outcome is." 3 RP at 153. The following exchange took place:

> [DEFENSE COUNSEL]: The stakes, right? What do you mean by that? Explain.
>
> . . . .
>
> PROSPECTIVE JUROR NO. 4: . . . [I]n a criminal case, you're looking at, you know, prison time or that sort of thing that has more of an effect on the person's life.
>
> . . . .
>
> [DEFENSE COUNSEL]: So juror 4 says the stakes are higher here. I think you are talking about for a defendant; is that right?
>
> PROSPECTIVE JUROR NO. 4: Yes.

3 RP at 153-54.

Other jurors also expressed that this trial would impact a lot of people, including Denham and the victims' families:

> . . . .
>
> PROSPECTIVE JUROR NO. 32: . . . I guess basically we're going to be looking at his side, we're going to be looking at their side . . . our decision will impact him. But it just doesn't impact him. It's going to impact everybody in the case.
>
> . . . .
>
> PROSPECTIVE JUROR NO. 41: . . . So the charges are serious and the decision that—if I am chosen to be on the jury—is also going to be serious. It's going to absolutely affect the life of your client. So these are pretty serious things. So yes, I don't know quite else how to respond. But this is a very serious thing.

4 RP at 323, 332-33.

The prosecutor had another round of voir dire, but did not ask any follow up questions to juror 27 about the comments quoted above.

After each party exercised its for cause challenges, the State exercised a peremptory challenge on juror 27, stating:

> The exercise of this challenge would be based on some specific responses to questions in which [they] indicated a concern that the decision here in this case would decide the fate of the defendant and expressed a lot of concern about the impact that that would have on [them]. And it was the State's interpretation of that that that could be a—it could be an implicit bias. I'm not accusing the juror of being biased, but an implicit bias towards defense.

5 RP at 650. Denham objected. The trial court then stated that following an objection under GR 37, it would determine "whether an objective observer *would view* race as an ethnicity as a factor" and requested a response from the State. 5 RP at 651 (emphasis added).

In response, the State stated its basis for the challenge as "a specific answer given to a specific question," which raised "concern about a possible underlying bias towards defense." 5 RP at 652.

The trial court issued its ruling:

> So the Court makes a determination, as I referenced, and considers circumstances, including the number and types of questions posed to the prospective juror and whether the party exercising the peremptory challenge asked significantly more questions or different questions to the prospective juror and whether there were other similar answers. *There's other factors that the Court considers.*

5 RP at 652 (emphasis added). Ultimately, the superior court "f[ound][] that the exercise of the peremptory [would] be allowed" as it did not think that "an objective observer *could view* race or ethnicity as a factor" in the use of the challenge. 5 RP at 652 (emphasis added). Juror 27 did not sit on the jury, but jurors 4 and 32 did.

III. VERDICT AND SENTENCE

The jury convicted Denham of two counts of aggravated murder in the first degree with firearm enhancements, five counts of unlawful possession of a firearm in the first degree, three counts of theft of a firearm, one count of burglary in the first degree while armed with a firearm, and one count of unlawful discharge of a firearm. Denham was sentenced to two consecutive life

terms without the possibility of parole on the murder convictions and standard range terms on the remaining offenses. Denham appeals his convictions.

ANALYSIS

I. PEREMPTORY CHALLENGE

Denham argues that the trial court erred by overruling his GR 37 objection to the State's peremptory challenge of juror 27. We agree.

A. Standard of Review

The parties disagree on the standard of review applicable regarding a trial court's decision under GR 37. Denham argues that the standard is de novo. In contrast, the State argues that we should give deference to the trial court:

> Pure de novo review is not possible because this Court was not in the courtroom and did not have the ability to see the venire of Juror Number 27, did not have the ability to hear and see the tone and demeanor of particular responses of the jurors or attorneys, and was not in position to view the totality of the circumstances which would be seen by an objective observer in the courtroom.

Br. of Resp't at 51. We disagree with the State.

Although GR 37 does not expressly outline the proper appellate standard of review, we uniformly have reviewed GR 37 and other court rule interpretations de novo. *State v. Harrison*, 26 Wn. App. 2d 575, 582, 528 P.3d 849 (2023); *State v. Listoe*, 15 Wn. App. 2d 308, 321, 475 P.3d 534 (2020); *State v. Omar*, 12 Wn. App. 2d 747, 750-51, 460 P.3d 225 (2020); *see also State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005) (stating we review construction of a court rule de novo because it is a question of law).

The Supreme Court has not definitively decided this issue, but in *State v. Tesfasilasye*, it stated that "most courts have effectively applied de novo review because the appellate court 'stand[s] in the same position as does the trial court' in determining whether an objective observer

could conclude that race was a factor in the peremptory strike." 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022) (quoting *State v. Jefferson*, 192 Wn.2d 225, 250, 429 P.3d 467 (2018)). In *Tesfasilasye*, the court applied a de novo standard of review because "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." 200 Wn.2d at 356. However, the court stated, it would "leave [the] further refinement of the standard of review open for a case that squarely presents the question based on a well-developed record." *Id*.

Like the Supreme Court, we decline to hold that de novo review applies in all circumstances in GR 37 cases. That said, just as in *Tesfasilasye*, this case does not squarely present the question based on a well-developed record. Rather, the trial court's GR 37 ruling here did not involve disputed factual findings or credibility issues that require any deference. In fact, the trial court engaged in a truncated analysis. Therefore, we follow the applicable authorities and apply a de novo standard of review of the trial court's GR 37 decision.

B. Legal Principles

Our constitutions require a fair and impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The parties and the jurors themselves have the right to a trial process free from discrimination. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). At the heart of it, the United States Supreme Court has recognized, "[D]iscriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals'" who are members of underrepresented populations. *Batson v. Kentucky*, 476 U.S. 79, 87 n.8, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (quoting *Akins v. Texas*, 325 U.S. 398, 408, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945) (Murphy, J., dissenting)). It more recently wrote "'[t]he Constitution forbids striking even a single prospective

juror for a discriminatory purpose.'" *City of Seattle v. Erickson*, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017) (alteration in original) (internal quotation marks omitted) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)). Simply put, jurors have a right not to be excluded from a case on account of their own race or the defendant's. *Powers*, 499 U.S. at 400, 404.

Voir dire examination serves to protect the parties' rights to a fair trial by exposing possible biases, both known and unknown, on the part of potential jurors. *Kuhn v. Schnall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010). During voir dire, the court and counsel "'ask the prospective jurors questions touching their qualifications to serve as jurors in the case.'" *State v. Lupastean*, 200 Wn.2d 26, 35, 513 P.3d 781 (2022) (quoting CrRLJ 6.4(b)). Voir dire is "'conducted under oath'" and "'subject to the supervision of the court as appropriate to the facts of the case.'" *Id*. (quoting CrRLJ 6.4(b)) Voir dire has two purposes: "'discovering any basis for challenge for cause' and 'gaining knowledge to enable an intelligent exercise of peremptory challenges.'" *Id*. (quoting CrRLJ 6.4(b)) As our Supreme Court emphasized in *Tesfasilasye*, "[i]f a juror can be excused for cause, they should be excused for cause. Biased jurors simply should not be seated. But GR 37 is qualitatively different and is aimed at curing a different problem. It is not an alternate way to dismiss jurors for cause." 200 Wn.2d at 359. Contrary to for cause challenges, a preemptory challenge is an objection to a juror for which no reason is given. CrR 6.4(e)(1); GR 37.

C. GR 37 Interpretation and Application

Generally, we apply canons of statutory interpretation when construing a court rule. *Robinson*, 153 Wn.2d at 692. The plain language of a court rule controls when it is unambiguous. *Id.* at 693. In determining the plain language of a court rule, we must examine the entire rule as well as any related rules. *Id*. When determining the plain meaning of a statute, we must not add

words where the legislature chose to not include them. *State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019). Because we apply principles of statutory interpretation to court rule construction, we also must not add words to court rules where the rule-drafter chose to not include them. *See Id.* at 30; *Robinson*, 153 Wn.2d at 692.

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

GR 37 was adopted to "address the shortcomings of *Batson*" in terms of combating racial discrimination during jury selection. *Tesfasilasye*, 200 Wn.2d at 356-57. The purpose of GR 37 is to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). GR 37(c) provides that parties "may object to the use of a peremptory challenge to raise the issue of improper bias." Once a party raises an objection, the party seeking to exercise a peremptory challenge must articulate its reasons for the challenge. GR 37(d).

The trial court must then evaluate the party's justification for the peremptory challenge "in light of the totality of the circumstances." GR 37(e). But "[i]f 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." GR 37(e) (emphasis added). An objective observer is one who is "aware that implicit, institutional, and unconscious biases, in addition to

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

purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f).

The court is not required to find purposeful discrimination to deny the peremptory challenge. GR 37(e). But a race neutral alternative explanation does not excuse the effect of language that appeals to racial bias. *Henderson v. Thompson*, 200 Wn.2d 417, 439, 518 P.3d 1011 (2022); *State v. Berhe*, 193 Wn.2d 647, 666, 444 P.3d 1172 (2019).

In determining whether the reason given in light of the totality of the circumstances is race-neutral, the court analyzes the circumstances outlined in subsections (g) stating:

> **(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.

GR 37(g); *Tesfasilasye*, 200 Wn.2d at 358 ("We reiterate that this is not a checklist for trial courts to cross off but, instead, factors to be considered in making a determination.").

GR 37's plain language requires courts to view peremptory challenges with an awareness of institutional biases. GR 37(e), (f). It is clear that our criminal legal system perpetuates institutional biases against jurors and defendants who are racial or ethnic minorities. *See* Letter

from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (June 4, 2020)[2] ("Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed."). With these institutional biases in mind, we hold that GR 37 requires courts to deny a peremptory challenge if an objective observer could, in light of the totality of the circumstances, view a juror's race or ethnicity as a factor in the use of that peremptory challenge. This reflects the plain language and ordinary meaning of GR 37. The remedy for a GR 37 violation is a new trial. *Listoe*, 15 Wn. App. 2d at 329.

D. An Objective Observer Could View Race as a Factor in the State's Challenge Against Juror 27.

Denham argues that the trial court erred when granting the State's peremptory challenge on juror 27 because its reasoning was invalid, and an objective observer could view race as a factor.

In response, the State argues that it exercised a peremptory challenge on juror 27 because of their specific answer to a specific question, which:

> indicated a concern that the decision here . . . would decide the fate of the defendant and expressed a lot of concern about the impact that [ ] would have on him. And it was the State's interpretation of that . . . that could be . . . an implicit bias . . . towards defense.

5 RP at 650. We agree with Denham.

Following the exercise of a peremptory challenge, Denham objected. Denham argued that it did not think the State's basis for the challenge was valid as juror 27's answer was consistent with the court's instructions. Denham added that the juror has "nothing whatsoever to do with a punishment that may follow a conviction, only so much as it should make them careful and I think that's what I took from that statement." 5 RP at 651.

[2]https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

Once Denham objected to the preemptory challenge against juror 27, the State was required to articulate the reasons for the challenge. GR 37(d). Here, the State said that it exercised the challenge because of juror 27's answer to the question regarding their initial reaction after hearing the charges. Specifically, their answers showed an "indication of potential bias against the State" and "led to a perceived lack of empathy toward persons other than the defendant who may be affected by a homicide" because "Juror 27 was [ ] the only Juror who referred to Denham by name in answering the question." Br. of Resp't at 58, 61, 66. The State's argument further noted the reasoning behind their challenge as "Juror 27's focus on the impact of the charge on the defendant, initially without thought of other parties," and created concern for the State that it "may not get a fair trial if Juror 27 served." Br. of Resp't at 64. That said, even if these were race-neutral reasons on their face, we find the State's arguments unsupported in light of the totality of the circumstances..

Our analysis begins with GR 37(g). Two of the circumstances listed therein are significant here.

First, GR 37(g)(i) requires us to consider "whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern." Here, after juror 27 made the comments that the State claims were the basis for the preemptory challenge, the State did not ask a single question to juror 27. Viewed objectively, this fact supports the conclusion that race could be a factor in the peremptory challenge of juror 27.

Second, GR 37(g)(iii) requires us to consider "whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party." When looking at the record, juror 27's expressions of concern about the severity of the charges and the impact of

said charges on Denham and other parties involved were *not notably different* from other juror's reactions to the same question.

Juror 27 stated "that there [was] a lot of responsibility behind being a juror in [the] case," and when asked if it would impact more than Denham, they answered "yes," but that the jury's "decision . . . affects multiple people, not just him. . . . [as] it would affect the victims' family. . . . But then also [Denham's] future as well." 4 RP at 319-20. The fact that juror 27 made a correct statement regarding the law at issue cannot be a basis to infer bias. In fact, jurors are instructed to keep in mind that just because a charge is filed against someone, it is not evidence that it is true. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (5th ed. 2021).

In comparison, other jurors also said that this trial would impact many people, including Denham and the victims' families. Specifically, jurors 4 and 32 provided similar answers to juror 27. Significantly juror 4 stated, "[I]n a criminal case, you're looking at, you know, prison time or that sort of thing that has more of an effect on the person's life." 3 RP at 154. Juror 4 stated that the "stakes are higher" in a criminal case, and confirmed that they were referring to the stakes for the defendant. 3 RP at 153. And juror 4 did not say anything about the victims' family. Yet the State did not exercise a peremptory challenge against juror 4, and juror 4 sat on the jury.

Juror 32 also noted in his initial response that the jury's decision would impact Denham. He then acknowledged that the decision would impact "everybody in the case." 4 RP at 323. The State did not exercise a peremptory challenge against juror 32, and juror 32 sat on the jury.

Viewed objectively, the fact that the State did not challenge juror 4 and juror 32 supports the conclusion that race could be a factor in the peremptory challenge of juror 27.

We also must consider whether the record supports the State's proffered reason for challenging juror 27—that his mention of how the trial would affect Denham reflected at least unconscious bias. "The trial court must sustain a GR 37 objection if the record does not support the reason given." *State v. Hale,* ___ Wn. App. 2d ___, 537 P.3d 707, 715 (2023). In *Tesfasilasye*, the Supreme Court held that the trial court should have denied the State's peremptory challenges of two jurors when the record did not support the State's reasons for the challenges. 200 Wn.2d at 359-61.

Here, the State believed that juror 27 could have implicit bias because he "indicated a concern that the decision here in this case would decide the fate of the defendant and expressed a lot of concern about the impact that that would have on him." 5 RP at 650. This was the only reason for its challenge that was expressed in the trial court.

First, the fact that juror 27 noted that the case would decide Denham's fate obviously is a true statement and is not a legitimate basis for inferring bias. Denham was in fact on trial, and the jury would in fact decide his fate.

Second, the record simply does not reflect that juror 27 expressed "a lot of concern" about the impact the trial would have on Denham. It is important to consider Juror 27's exact statements:

> [DEFENSE COUNSEL]: Do you think a case like this impacts more than just Mr. Denham?
>
> PROSPECTIVE JUROR NO. 27: Yes.
>
> [DEFENSE COUNSEL]: All right. It impacts a whole bunch of people, right?
>
> PROSPECTIVE JUROR NO. 27: Right.
>
> [DEFENSE COUNSEL]: So when I hear you saying that this is a big deal,—
>
> PROSPECTIVE JUROR NO. 27: Mm-hmm.
>
> [DEFENSE COUNSEL]: —in your mind, is it a big deal to everybody? Mr. Denham specifically? Maybe the State? Tell me kind of what your thought is about the impact and who it would impact on a case like this.
>
> PROSPECTIVE JUROR NO. 27: I suppose my initial was the accused, Mr. Denham.

> [DEFENSE COUNSEL]: Why? Tell me why.
> PROSPECTIVE JUROR NO. 27: Because our decision . . . I guess it affects multiple people, not just him. Yeah, it would affect the victims' family and. . . . But then also his future as well.
> [DEFENSE COUNSEL]: So for juror 27, I hear you saying the gravity of this is significant for a lot of people and that was your first thought was this is a big deal.
> PROSPECTIVE JUROR NO. 27: Correct.

4 RP at 319-320.

This exchange does not show that juror 27 was overly concerned about Denham. Instead, they first stated that the case would affect a lot of people, acknowledged that their first thought was about Denham, but then reemphasized that the jury's decision would affect not only Denham but multiple people.

The record does not show that juror 27 was biased, rendering the State's reason for challenging juror 27 deeply suspect and unsubstantiated. *See Omar*, 12 Wn. App. 2d at 754 ("GR 37(f) discourage[es] [the] acceptance of [ ] vague and unsubstantiated reasons on the basis that they might mask conscious or unconscious bias."). Further, the State did not ask juror 27 any follow-up questions regarding their answer of who may be affected, and its limited interaction with juror 27 failed to reveal whether they truly stood out from the other jurors in terms of their response and the impact the trial would have on Denham. GR 37(g)(iii).

We conclude, based on the totality of the circumstances, that an objective observer could view race as a factor in the State's peremptory challenge to juror 27. Therefore, the trial court erred in overruling Denham's GR 37 objection. The proper application of GR 37 leaves us no choice but to reverse the two convictions and apply the proper remedy—a new trial. *See Listoe*, 15 Wn. App. 2d at 329.

CONCLUSION

We reverse and remand for a new trial.

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.

Veljacic, J.

We concur:

Maxa, P.J.

Che, J.