SUPREME COURT NO. _____

NO. 56625-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBBRIE THOMPSON,

Petitioner.

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

The Honorable James Orlando, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Robbrie Thompson asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Thompson, No. 56625-7-II, (June 4, 2024) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate to clarify the standard of review for GR 37 challenges and because the Court of Appeals opinion conflicts with precedent from this Court and the Court of Appeals?

2. Is review appropriate because whether defense counsel was constitutionally ineffective for failing to object to inflammatory and irrelevant evidence concerning Thompson's arrest is a significant question of law under the state and federal constitutions?

3. Is review appropriate because whether the exclusion of defense evidence violated Thompson's right to present a

defense is a significant question of law under the state and federal constitutions?

4. Is review appropriate because whether the prosecutor committed misconduct by invoking witnesses' races and ethnicities, and whether defense counsel was ineffective in failing to object, are significant questions of law under the state and federal constitutions?

C. STATEMENT OF THE CASE

Thompson was 15 years old when he met Franklin Thou. 2RP 844, 1934-35; 3RP 58, 93. On April 27, 2019, Thou picked up Thompson from his house. 2RP 1927-28, 1936-37, 1941. Thou drove a gold-colored Nissan Sentra. 2RP 782-83; 3RP 75-77, 99-102, 114. Thou told Thompson he wanted help robbing a store and showed him a picture of a convenience store. 2RP 1937-40, 2001. Thompson was indecisive and Thou drove around while trying to convince him. 2RP 1944, 1995.

Surveillance video near the Handy Corner Food Store in Puyallup showed the Sentra traveling back forth. 2RP 4RP 487-

89, 493-96, 499-500; 4RP 308-10. The person driving was wearing a blue sweatshirt. 2RP 768, 771; 3RP 74; 4RP 11-12, 30-33, 501.

Eventually Thompson agreed. 2RP 1941-42, 1945, 1989-91, 1995-96, 2015. Thou recorded a Snapchat video showing him and Thompson inside the car holding guns. 2RP 786-87, 789, 792, 809-12, 1388-89, 1942-44. The video showed Thou in the driver's seat and Thompson in the front passenger seat. 2RP 791-92, 794, 796, 823-25. Thompson had a Glock .357 and Thou a Taurus .380. 2RP 1759-60, 1943.

The men were carrying the same guns when they entered the store. 2RP 1945-47, 1991. Thou entered first. 2RP 1947, 2075. Thompson's gun was not loaded, and the clip fell out when he pulled the gun from his pocket. 2RP 1947-49, 2075. Thompson did not see anyone else in the store and did not point his gun at anyone. 2RP 1949, 2075-76.

Thompson told Thou they should leave and headed for the door. 2RP 1949-51. Thou remained inside the store.

Thompson drove away before realizing he did not know where he was, so he returned to the store. 2RP 1951-52.

When Andrew Mantonya arrived at the store, he saw a black man wearing a blue sweatshirt and mask walk out. 2RP 997-98, 1275-76; 4RP 80, 82, 110, 130, 132. The man walked to the driver's side of the Nissan but did not enter the car. 2RP 997, 1277; 4RP 80, 83, 130, 143-44.

Mantonya entered the store and saw the owner, Joseph Nam, with a "deer in the headlights look" and a black man with his hand in the cash register. 2RP 998; 4RP 83-86, 90, 123, 133. The man was wearing a dark hooded sweatshirt and sweatpants. 2RP 998, 1276; 4RP 85-87, 110. Mantonya yelled at the man, but Nam responded that the man had a gun. 4RP 90-91. The man pulled a gun from his sweatshirt, chambered a round, and pointed it at Mantonya. 4RP 91-93, 119-20, 122, 133, 139, 143. Mantonya put his hands up and the man left the store. 4RP 94. Mantonya watched the man entered the passenger side of the Nissan. 4RP 135, 138, 143-44.

Nam's wife, Soon Ja Nam[1], was on the ground but Mantonya saw no blood. 4RP 94-95, 97-101, 109, 138. Mantonya never saw any guns fired and never saw any guns pointed at Nam. 4RP 109, 139, 147-48. Mantonya called 911 and noticed a shell casing on the ground. 4RP 102, 104, 107-11, 113, 141, 145.

Bradly Nielsen entered the store while Mantonya was on the phone with 911. 2RP 855-59, 893-94. He saw someone walk out of the store, but it did not appear the person was in a hurry. 2RP 855. Nielsen saw Soon Ja lying on the ground and believed something was wrong based on Nam's facial expressions and body language. 2RP 855-56, 860-64, 895-96, 900-03. He saw a shell casing on the floor. 2RP 863, 896-99. Nam recounted the men had come into the store with a gun and wanted money. 2RP 904-06, 990. Nam was going to give them money when Soon Ja ran into the back, and he heard a loud

[1] To avoid confusion, Joseph Nam is referred to as "Nam" and Soon Ja Nam as "Soon Ja".

sound. 2RP 905-06, 990. Three or four hundred dollars had been taken. 2RP 992.

Jose Trujillo also arrived at the store around this time. Two cars were parked outside. 2RP 1826-27, 1832. One of them was a tan colored sedan. 2RP 1839-41, 1897, 1900. He did not see anyone inside the car. 2RP 1912.

When he entered the store, Trujillo saw two black men. 2RP 1844-45. A man in a blue sweatshirt was loading a gun and Trujillo heard him cock it. 2RP 1835, 1851, 1873-74, 1877-79, 1889, 1892, 1903, 1906, 1914 1919. He did not see the man point the gun at anyone. 2RP 1910.

Trujillo panicked and left the store. 2RP 1828, 1833-35, 1871-74, 1877-79, 1889, 1892, 1903, 1906, 1910, 1914 1919. He saw a man in a black sweatshirt also exit the store and get into the driver's seat of the parked car. 2RP 1834-36, 1842, 1849, 1853-56, 1861, 1864, 1870, 1873, 1879, 1902. He did not see the man with a gun. 2RP 1857.

The man inside the car was jittery and looking back toward the store. 2RP 1859-60, 1863, 1879. Trujillo assumed the man had left the other man behind. 2RP 1848, 1880-81. The car drove away before Trujillo saw it return and saw the second man get into the passenger seat. 2RP 1848-51, 1881.

When Thompson returned to the store, Thou entered the passenger seat. 2RP 1952-53. Thou did not say what had happened inside the store. 2RP 1953. After parking the car near Thou's house, however, Thou told Thompson he shot Soon Ja. Thou then pulled out a stack of money and split it with Thompson. 2RP 1955-56.

A bullet wound was observed on Soon Ja's back when she was moved by first responders. 2RP 875-78, 880-81, 957-59, 987-88, 1031-32. Soon Ja died on the way to the hospital. 2RP 954-56, 1013-17, 1032-36, 1040.

An autopsy confirmed a bullet was in Soon Ja's chest. 2RP 1296-1300, 1303, 1309. The entrance wound was in the center of her back. 2RP 1304, 1306-07. The bullet severed the

spinal cord and caused the right lung to collapse, which led to internal bleeding. 2RP 1304-07, 1312-14, 1346, 1340.

The shell casing was recovered from the floor of the store. 2RP 884, 887, 986, 926-28, 963-64. Police also collected a Glock pistol magazine from the floor. 2RP 929-31. Subsequent DNA testing showed a mixture of at least five people. None of the DNA contributors could be identified. 4RP 340-43. No identifiable fingerprints were found inside the store. 2RP920, 924-25, 964-65.

Meanwhile, police issued a bulletin for the car seen at the store. 2RP 1053-54. A short time later, police received a 911 call about a car fitting the description in Federal Way. 2RP 1054-58, 1068-69; 4RP 60, 67, 311-13. Although not registered to Thou, police learned that he was stopped the previous month while driving the car. 2RP 1059-60. Thou also lived a few hundred feet from where the car was parked. 2RP 1060; 4RP 67-68, 72.

Surveillance video showed two men at the car on April 27. 2RP 1078-79. Video showed the car returning to the area of Thou's house shortly after 6:00 p.m. Thou left the car with a blue sweatshirt. 2RP 1563-64.

Two gun magazines were found in the car's center console. 2RP 1100, 1110, 1113. A glove and knitted cap were in the trunk. Cash was found underneath the dashboard. Glasses were found on the passenger side of the car. 2RP 1100-02, 1111, 1115-16. Two fingerprints matched Thou. 2RP 1107-08, 1143. None of Thompson's fingerprints were found inside the car. 2RP 1145.

Police went to Thou's house and contacted his family but not Thou himself. 2RP 1075-76. A pair of gray sweatpants were found in a bedroom closet. 2RP 1153-55, 1261-63, 1271; 3RP 108-09. Surveillance video showed Thou leaving the house on April 27 wearing a blue sweatshirt and black stocking cap. 2RP 1541-42.

Thou, meanwhile, contacted Thompson and told him the police were at his house. 2RP 1962-63, 2011-12. Thompson, unaware that police had already found the car, told Thou to get rid of it. 2RP 1963, 2013-14. Thou also sent Thompson news reports about the robbery. 2RP 1958. Thompson knew Thou wanted to leave the area but not whether he planned to speak with police. 2RP 1963, 2013-14.

Thompson's girlfriend, Brianna Bennett, believed Thompson was scared Thou was going to talk with police. 4RP 403-04, 411-12, 415, 418, 426, 431, 466. Thompson told Bennett he and Thou drove to the store in Thou's car. 4RP 412. Thompson explained he was already back in the car when Thou shot Soon Ja. 4RP 411-13, 434. Thompson spoke with Bennett about the possibility that Thou would be killed. 2RP 1963-64; 4RP 425-27. Thompson however, never told Bennett he was going to kill Thou. 2RP 1965, 2077; 4RP 427-28.

Thompson left Bennett's house on the evening of April 28. 2RP 1966. He and Thou were picked up and sat in the back

passenger seats as they were driven to Chinook Landing Marina. 2RP 1966-68, 2087. Thompson and Thou smoked on the beach before walking back toward the car. 2RP 1969-70, 2015. Thou was behind Thompson when he was shot. Thompson did not shoot Thou. 2RP 1970, 2015-16, 2018-19, 2075.

Thompson later told Bennett about what happened when Thou was killed. 2RP 1977-78, 2081, 2086. Thompson omitted the names of other people present at the marina. 2RP 1978, 2086; 4RP 440, 444, 451-52, 472. Thompson told Bennet he shot Thou in the back of the head. 4RP 425-27, 439-41, 444, 447-48, 474. Thompson, however, denied telling Bennett he was going to kill Thou, or that he was the person who shot him. 2RP 1965, 1978, 2077-80, 2086.

Thou's body was found the next day. 2RP 1080-81, 1159-61, 1240; 4RP 319-23. Thou's body was missing shoes. 2RP 1620. A bullet wound in the back of Thou's head was the cause of death. 2RP 1164, 1171-72, 1178-79, 1318-20, 1323,

1328-29, 1341, 1351. No evidence was found at the scene 2RP 1171-72, 1179-80, 1202-09, 1213-14, 1218-23, 1226-27, 1242; 4RP 504-05, 508-09.

Police identified Thou and Thompson in the Snapchat video. 2RP 807-08, 829-35, 840-42, 1535-40, 1581, 1583-84; 4RP 322-24. Thompson was arrested while on his way to school on May 1. 2RP 1082-83, 1354-60, 1365-66. Police seized a backpack, cellphone, blue sweatshirt, and $217 from Thompson during the arrest. 2RP 1372-72, 1391-92, 1399-1400; 4RP 200-06, 209-10, 212. Thompson was interviewed by police and acknowledged the Snapchat video depicted him. 2RP 1388-89; 4RP 328, 515-17.

Thompson's cellphone contained videos depicting Glock and Taurus .380 pistols. 2RP 1499-1500, 1515-16, 1531. Messages exchanged between the phone and Bennett on April 27 indicated he was going to Puyallup and included a request for guns for his birthday. 2RP 1533-35, 1549. The phone did not transmit any data between 4:02 p.m. and 5:22 p.m. on April

27, suggesting it was turned off. 2RP 1552-55, 1561-62. A text exchange from the phone at 6:07 p.m. stated the "craziest shit just happened" but that "can't text it." 2RP 1566. A text exchange with Bennett at 6:21 p.m. indicated a desire to speak in person rather than over the phone "because it's some real shit." 2RP 1567. A search from the phone for a Puyallup shooting and corresponding news articles was made around 10:30 p.m. 2RP 1570-74, 1593. Screenshots were also taken of a Crime Stoppers bulletin and an article that referenced the shooting suspects and car descriptions. 2RP 1574-75, 1577. The phone was used to search for pistol magazines and ammo on the Dicks Sporting Goods website. 2RP 1571-73, 1983.

Police also searched Bennett's phone. 2RP 1520-21. A text from Bennett's phone to Thompson's phone on April 28 said, "don't do anything stupid." Thompson's phone responded, "Bro, I love you. Real shit. You just gotta look at it from my side." 2RP 1600-02; 4RP 425-29, 469-70.

A search from Thompson's phone on April 28 inquired "where is the best place to shoot someone?" 2RP 1603. The phone did not transmit any data for about two hours beginning shortly before 10:00 p.m. 2RP 1604-05. The next day a search was made from the phone, "teen deed, Federal Way" 2RP 1609. The next morning Bennett messaged Thompson's phone asking how he did it. Thompson's phone responded, "did what" before telling Bennett to keep what he told her to herself. 2RP 1613-16.

Thompson's phone contained a video depicting shoes similar to those worn by Thou that was made around 10:40 p.m. on April 30. 2RP 1610-12, 1617. That same day Thompson's phone received a Snapchat message, stating "talking about it class, everyone ha ha, but we good. No one give a fuck about him I guess. And no one snitchi'n. How much kush would you trade from the .380?" 2RP 1619.

A search of Thompson's room revealed several pairs of athletic shoes and black sweatshirts and sweatpants. 4RP 233-

34, 237-40, 243, 264, 267, 282-84. A Glock .357 was found underneath clothing on a bedroom shelf. 2RP 2058-60, 2072, 2082, 2086; 4RP 245-51, 261, 272-73, 346-48. A magazine, holster, and laser sight were also found. 4RP 245, 250, 252-54, 262-64.

The gun magazine found in the store fit a .357 Glock 32 model pistol. 2RP 1740-44, 1772, 1981-82. The fatal bullets were both fired from the same .380 auto caliber but could not have been fired from a .357. 2RP 1748, 1754-56, 1763, 1771-72. No .380 pistol was submitted for testing. 2RP 1762.

Thompson acknowledged having both the Glock .357 and Taurus .380 in his possession at one point. 2RP 1983-85, 2059-60, 2062-63, 2067. He also attempted to sell both guns before the robbery. 2RP 2072. While he owned the Glock, the .380 belonged to Thou. 2RP 2058-59, 2071-72, 2082, 2086. He acknowledged messaging someone about selling the .380 for $245 or marijuana. 2RP 2028-29, 2068-71.

Thompson acknowledged turning his phone off around 4:00 p.m. on April 27. 2RP 2005-06. He denied however, using his phone to search for a good place to shoot someone. 2RP 1964, 2007, 2014. As he explained, the phone was charging in the front of the car in which he was a backseat passenger, and therefore accessible by other people. 2RP 1964-65, 2007-09, 2074.

Thompson was uncertain what happened to Thou's phone, glasses, and backpack after his death. 2RP 1992, 2073-74, 2083-84, 2087. Thompson took Thou's shoes and made a video about them as an advertisement for a potential buyer. 2RP 1971-74, 2022-26, 2085.

Thompson was charged and convicted of eight felony counts, including conspiracy to commit first degree robbery, first degree robbery, second degree unlawful possession of a firearm, and two counts of second degree assault against Nam and Mantonya. CP 40-45, 114-21; 2RP 2220-23. Thompson was also charged and convicted of two counts of premeditated

first degree murder for the deaths of Soon Ja and Thou. Thompson was also charged with first degree murder, predicated on first degree robbery for the death of Soon Ja. Id.

The state further alleged aggravating circumstances for both premeditated first degree murder counts, including that Soon Ja and Thou were killed to conceal the commission of a crime or to protect the identity of the person committing a crime and that the victims were prospective witnesses in an adjudicative proceeding. CP 40-45. The jury returned special verdicts, concluding Thompson was armed with a firearm during commission of seven of the offenses and guilty of each alleged premeditated murder aggravating factors. CP 122-31.

Thompson raised several arguments on appeal, including those below. The Court of Appeals affirmed. Thompson now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review is warranted to clarify the proper standard of review when an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge.

Those charged with a crime are guaranteed trial by a fair and impartial jury. U.S. Const. amend. IV; Wash Const. art. 1, § 22. In addition to the parties, "the jurors themselves have the right to a trial process free from discrimination." State v. Lahman, 17 Wn. App. 2d 925, 932, 488 P.3d 881 (2021) (citing Powers v. Ohio, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Peremptory challenges may not be used to thwart this right. Id. at 932-933 (citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

To "eliminate unfair exclusion of potential jurors based on race or ethnicity," this Court adopted GR 37. GR 37(a); State v. Jefferson, 192 Wn.2d 225, 242, 429 P.3d 467 (2018). Under GR 37(c) "A party may object to the use of a peremptory challenge to raise the issue of improper bias." "Upon objection

... the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised." GR 37(d). The court then evaluates those reasons considering the totality of circumstances. GR 37(e). "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." Id. (emphasis added). "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." GR 37(f).

GR 37 lists five non-exclusive circumstances for assessing an objection, seven presumptively invalid reasons historically associated with improper discrimination, *(e.g.*, distrust in law enforcement, close relationship with someone that has been stopped, arrested, or convicted of a crime), and several types of conduct also historically associated with

attempts to justify discrimination (*e.g.* inattentiveness, lack of eye contact). GR 37(g)-(i).

Here, the prosecutor exercised a peremptory challenge to Juror 35 over Thompson's objection. The prosecutor first questioned Juror 35 about memory:

> MS. LUND: If you hear different witnesses talk about the same or similar events, particularly in this case several years later, would you find it surprising if their testimony was slightly different or different from other witnesses, or maybe even different slightly from what they may have said earlier? Would that surprise you?
> JUROR NO. 35: Yeah, kind of.
> MS. LUND: Okay. If I might just continue to kind of ask you some questions. If you were asked about something that happened two plus years ago, do you feel like you would feel just as comfortable now being able to ask you to completely and accurately talk about it and give the details as you would have two years ago?
> JUROR NO. 35: Yes.
> MS. LUND: Can you think of other individuals that might have a challenge being able to remember precisely the same events two years later?
> JUROR NO. 35: No.

2RP 600-01. Other jurors were asked similar questions. Several responded that memory was unpredictable and could be

influenced by various factors. 2RP 601-04. The prosecutor returned to questioning Juror 35 about perspectives, using cars as an example. Juror 35 liked Subarus and disliked Volkswagens but maintained she could describe each type with the same level of detail. 2RP 605-07. Juror 43 was asked a similar question and confirmed they could distinguish among different generations of Corvettes. 2RP 609. Juror 43 acknowledged others who lacked a similar interest in cars might not be able to distinguish such details. 2RP 610.

When questioned by defense counsel, Juror 35 denied the specific charges would cause her any difficulty or emotional reaction. 2RP 622. Despite her questionnaire answer that she rarely changed her mind, Juror 35 confirmed that in deliberations she would "go with what I know, and the evidence that I have heard" instead of the opinions of others. She confirmed she would be able to change her opinion. 2RP 666-68.

Defense counsel lodged a GR 37 objection to the prosecutor's peremptory challenge against Juror 35, a person of color. 2RP 690, 693-94. The prosecutor expressed concerns about the effect of Juror 35's youth on her perception of time, explaining her inability to "appreciate the difference between why someone's memory may be different two years later, how someone may perceive something, whether that there would be any difference as to how one person would perceive something differently than another, depending on the background, depending on their prior experience, or any particular unique interest or expertise they may have." 2RP 691-93.

The court denied the GR 37 challenge, concluding an objective observer *would* not conclude race was a factor. 2RP 694-95. The court reasoned Juror 35 gave "immature" answers and lacked a "very good grasp of the memory-related issue and how it's possible that other people could have different versions of the same event[.]" 2RP 694-95. The court also pointed to Juror 35's age and her questionnaire responses, concluding, "I

don't think that her explanations were very convincing." 2RP 694. Finally, the court reasoned there was not a disproportionate number of questions asked of Juror 35 and no other peremptory challenges disproportionately used against a race or ethnicity. 2RP 695.

As courts and GR 37(i) recognize, both a focus on youth and "unintelligent or confused answers" are historically associated with improper discrimination in jury selection. GR 37(i); Lahman, 17 Wn. App. 2d at 937. Moreover, the proper focus is whether an objective observer "could view" rather than "would view" race or ethnicity as a factor. State v. Tesfasilasye, 200 Wn.2d 345, 357, 518 P.3d 193 (2022).

The Court of Appeals acknowledged the trial court misapplied the correct standard, but nevertheless concluded an objective observe could not view race as a factor in the peremptory challenge to Juror 35. Op. at 21-23. The Court of Appeals also distinguished Lahman, contending Juror 35 was questioned extensively, and the trial court did not imply Juror

35 was "generally intelligent." Op. at 22. In so ruling, the Court of Appeals questioned whether de novo was the appropriate standard of review on appeal. Op. at 18-19.

As this Court has made clear, appellate courts review the application of GR 37 de novo. Tesfasilasye, 200 Wn.2d at 355-56; Cf. Jefferson, 192 Wn.2d at 249-50 (de novo review when applying new *Batson* test, with objective observer standard identical to GR 37). This is "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." Tesfasilasye, 200 Wn.2d at 355-56. Indeed, any lesser standard of review would undermine the very principles underlying GR 37 and the effort to address the effects of systemic and unconscious racial bias. Id. at 357.

Review is appropriate under RAP 13.4(b)(1)-(3) to clarify the appropriate standard of review under GR 37 and

because the Court of Appeals decision conflicts with Tesfasilasye and Lahman.

2. Evidence of Thompson's arrest was inflammatory and irrelevant and there was no strategic reason not to ensure the jury did not consider this evidence.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and art. I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection would likely have been sustained; and (3) there is a reasonable probability the jury verdict would have differed with a proper objection. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); In re Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001).

Without objection, a SWAT team police officer testified that Thompson was arrested in a rideshare minivan on his way to school by a "vehicle takedown team." 2RP 1353-54, 1358. The officer testified that police cut off the minivan, pinned it between two police cars, and then broke the windows "to ensure access and an anxiety manipulation tactic[,]" including "the use of a noise-flash diversion device[.]" 2RP 1359-60. When the prosecutor asked about the tactics used, the following exchange occurred:

> Q. What was the reason for having to break the window or taking that type of protocol, if you know?
> A. One was just the threat matrix. Before we conduct any type of this operation, we're briefed on what the threat matrix is. And all the tactics are based off of the threat of the individual. We were briefed on the suspected crimes of Mr. Thompson, and that was what led down to a SWAT vehicle takedown rather than, say, a traffic stop by a marked unit.

2RP 1361. The prosecutor's direct examination ended with an explanation of how Thompson was handcuffed, arrested, and

handed over to detectives. 2RP 1362. Defense counsel did not object.

Defense counsel then elicited the following during cross examination:

> Q. And the SWAT team -- it's not uncommon for the SWAT team to assist with an arrest, is it?
> A. I guess I'm -- I would say it is fairly uncommon. There's a lot of arrests that happen, and not very many of them reach the number of points on a threat matrix to call the SWAT team and to have that happen.
> Q. On the threat matrix, is that because of the type of crimes or charges that were -- he was suspected of committing? Is that where it comes from?
> A. In this case, specifically, I believe so. Yes, ma'am. But it also takes into a suspect's past, arrest history, and past crimes. I don't know if Mr. Thompson had any past record or not.

2RP 1363-64.

Another police officer was called by the prosecution to testify about Thompson's arrest before the court interrupted and excused the jury. 2RP 1367. Noting the facts of Thompson's arrest seemed to have "little relevance" the court explained testimony about SWAT team participation, "threat matrix,

including prior record, prior arrests" was "very, very dangerous" territory. 2RP 1367-68, 1371. The prosecutor explained Thompson's location in relation to a backpack and cellphone found in the van would become relevant. 2RP 1368-70. The court agreed that was relevant, but the jury did not need "to hear about the arrest any longer." 2RP 1370.

Defense counsel "adopted" the court's remarks regarding "the potential errors and prejudicial nature of the evidence presented." 2RP 1370-71. The court offered to provide a curative instruction if defense counsel proposed one. 2RP 1371. Defense counsel requested time to consider a curative instruction. Defense counsel asked to strike the testimony instead. 2RP 1378-79

The court reiterated a curative instruction would be appropriate but declined to strike the testimony. 2RP 1379. The trial court reminded counsel about the curative instruction the following week. 4RP 368. Defense counsel declined to propose

one, believing "it would draw too much attention, particularly given the time that's passed since the testimony[.]" 4RP 368.

The Court of Appeals agreed the detailed testimony about the circumstances of Thompson's arrest "was irrelevant and unnecessarily emphasized Thompson's perceived dangerousness." Op. at 24. Thus, the Court of Appeals assumed defense counsel performed deficiently by failing to object. Id. Still, the Court of Appeals concluded that Thompson could not demonstrate prejudice because there was overwhelming evidence of his guilt. Op. at 25.

To establish prejudice, the accused must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The standard is lower than a preponderance standard. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." State v. Gregory, 192 Wn.2d 1, 22,

427 P.3d 621 (2018). The Court of Appeals opinion fails to appreciate that lacking confidence in the outcome does not necessarily mean a defendant would have to be acquitted.

The circumstances of Thompson's arrest conveyed to the jury that police considered him a dangerous person. The testimony made clear "[t]here's a lot of arrests that happen, and not very many of them reach the number of points on a threat matrix to call the SWAT team and to have that happen." 2RP 1363. Thompson was portrayed as someone who posed a grave danger and was perfectly capable of committing the type of violent crimes with which he was charged. In other words, such evidence inevitably shifted the jury's attention to Thompson's general propensity for violence.

The testimony also allowed the jury to speculate as to Thompson's propensity for criminality. Discussing the "threat matrix", the officer explained, "it also takes into a suspect's past, arrest history, and past crimes. I don't know if Mr. Thompson had any past record or not." 2RP 1363-64. Testimony about

Thompson's possible past history impermissibly and "inevitably shifts the jury's attention to the defendant's propensity for criminality, the forbidden inference. . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987), rev. denied, 133 Wn.2d 1019 (1997)). A juror's natural inclination is to reason that, having previously committed an offense, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020 (1991).

It would not be a great leap for jurors to assume Thompson was a violent criminal who acted in conformity with his propensities. Without a limiting instruction the jury was allowed to consider the evidence precisely for its forbidden propensity purposes.

Because the Court of Appeals decision involves a significant question of constitutional law, review is appropriate under RAP 13.4(b) (3).

3. Exclusion of cellphone data placing other people at the location and at the time of Thou's murder deprived Thompson of his constitutional right to present a defense.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. State v. Starbuck, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015); State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). A defendant's right to an opportunity to be heard in his defense includes the right to offer testimony, is basic in our system of jurisprudence. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In analyzing whether a trial court's evidentiary decision violated a defendant's Sixth Amendment right to present a defense, the court first reviews the court's evidentiary ruling for an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022); State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); State v. Markovich, 19 Wn. App. 2d 157, 167,

492 P.3d 206 (2021), rev. denied, 198 Wn.2d 1036, 501 P.3d 141 (2022). If the evidentiary ruling was not an abuse of discretion, the court then considers de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Jennings, 199 Wn.2d at 59.

Thompson repeatedly tried to introduce evidence that other people were at or near the marina the night Thuo was killed. Defense counsel elicited testimony from a detective that police contacted several of Thompson's known associates, but they refused to speak. 2RP 1411. When defense counsel inquired further about the extent of the investigation, the State objected and explained outside of the jury's presence that two of the people named had hired counsel, which was improper for the detective to testify about. 2RP 1410-11, 1415-16.

Outside the presence of the jury, the detective stated that police learned about four people who were associates of Thompson. He did not know whether Thuo knew those four people. Two of those people "may have been involved" in

Thuo's murder, and at least one of them was represented by counsel. 2RP 1429. The court limited defense counsel's cross-examination of the detective to his identification of the other men's names and that they were uncooperative with police attempts to contact them. 2RP 1420-21, 1425, 1430-34.

During cross-examination of a different detective, defense counsel asked if any cell phone information had been gathered from the marina and the State objected. 2RP 1657. Outside the presence of the jury, the State explained that there was evidence that one of Thompson's associates was near the marina the night of the murder, but that person was represented by counsel and the State had "no nexus whatsoever to indicate that he participated in this offense." 1RP 1659-60, 1682.

The following week, defense counsel again noted cellphone information placed one of the men at the beach and attempted to make an offer of proof through the detective's testimony outside the presence of the jury. 2RP 1680-81. The

prosecution contended it amounted to inadmissible other suspect evidence and the trial court agreed. 2RP 1681-82.

Outside the presence of the jury, Thompson confirmed he knew the person who shot Thou but would not name the people who drove him to the marina and shot Thou because he feared for his own life. 2RP 2048-50, 2056-57.

The court ruled Thompson could testify he did not shoot Thou but prohibited introduction of the other suspect evidence. 2RP 2045-46, 2057. The court reasoned that Thompson's testimony about giving his phone away, statements to Bennett, and possession of Thou's shoes, all pointed to Thompson being the shooter, and did not establish a sufficient nexus for other suspect evidence. 2RP 2037, 2040, 2042, 2044-46, 2057.

The Court of Appeals concluded the trial court did not error in excluding the other suspect evidence because "[a]ny link to the actual murder based solely on location was purely speculative" and the opportunity for someone else to have committed the murder did not establish an adequate nexus. Op.

at 28. But "the threshold analysis for 'other suspect' evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for 'whether the evidence has a logical connection to the crime.'" State v. Ortuno-Perez, 196 Wn. App. 771, 790, 385 P.3d 218 (2016) (quoting Franklin, 180 Wn.2d at 381-82).

Contrary to the Court of Appeals reasoning, Thompson presented a chain of circumstances that tended to create a reasonable doubt as to his guilt. He denied shooting Thou. 2RP 1970, 2015-16, 2018-19, 2075. His statements to Bennett also led her to believe other people were present during Thou's murder. 2RP 440, 444, 472. The fact that cellphone data corroborated Thompson's assertion he was not alone at the marina when Thou was killed, was highly relevant to his defense that he did not shoot Thou. 1RP 6, 23-24; 2RP 1666-67, 1671-72.

Indeed, the undisputed evidence would have showed that at least one of Thompson's associates was near the marina the

night of the murder, and "may have been involved" in the murder. 1RP 1659-60, 1682; 2RP 1428-29, 1666-67, 1671-72. But police did not develop information confirming the associate's involvement one way or the other because both men were represented by counsel and refused to cooperate and provide information to police. 2RP 1429-30. Thus, the jury learned the men were associates of Thompson, that police had made unsuccessful attempts to contact them, and that none of the men were arrested. 2RP 1409-11, 1433-34. But the jury never learned that there was actual evidence which placed at least one of the men at the marina during the murder. In short, the jury was told the police suspected the men might be involved, but not what evidence led them to have that suspicion in the first place.

Exclusion of evidence about the cellphone data violated Thompson's right to present a defense. Because the Court of Appeals decision involves a significant question of constitutional law, review is appropriate under RAP 13.4(b) (3).

4. The prosecutor committed misconduct by repeatedly evoking the witness's ethnicities and defense counsel was ineffective for failing to object.

The right to a fair trial is a fundamental liberty secured by the Washington and United States Constitutions. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999); U.S. Const. amend VI and XIV; Const. art. I, § 22. Prosecutorial misconduct may deprive a defendant of the right guaranteed under these provisions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).

Even absent an objection, reversal is required when the conduct is so flagrant and ill-intentioned that curative instructions could not have obviated the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Moreover, "when a prosecutor *flagrantly or apparently intentionally* appeals to racial bias in a way that undermines the defendant's credibility or the

presumption of innocence, their improper conduct is considered per se prejudicial, and reversal of the defendant's convictions is required." State v. Bagby, 200 Wn.2d 777, 788-89, 522 P.3d 982 (2023) (emphasis in original).

In making this determination, courts ask whether an objective observer could view the conduct as an appeal to the jurors' potential prejudice, bias, or stereotypes. State v. Zamora, 199 Wn.2d 698, 717-18, 512 P.3d 512 (2022). "The objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination." Id.

Here, the prosecutor ended their opening statement as follows:

> That same pistol wielded by the defendant connected and destroyed lives of people who never knew how connected they were.
>
> We, all of us, live in the same world. All of us have been touched by bullets by the same gun. They can end lives, they can end marriages, they can destroy businesses and they can bring us,

> regardless of our differences, together in the same room.
>
> In the end, the State expects the evidence to show that a child from Kenya, a Korean-American couple who kept a shop in Puyallup for decades, Latino contractor out buying beverages for a family get-together were all connected, and that bullets fired by the defendant from his .380 caliber pistol affected all of them, changed their lives forever, and in at least two cases, ended their lives forever.

3RP 39. The prosecutor ended their closing statements in the same manner, telling the jury:

> That gun yielded by the defendant connected and shattered lives of people who never knew how connected they were. We can choose to focus on our differences, on the thing that divide us, but, ultimately, that single gun connected a Korean-American immigrant who kept a store in Puyallup; a Kenyan-American boy, grades weren't the best, but he was doing everything he could going to improve himself, going to mentoring sessions and going to church; a Latino-American contractor who is just picking up drinks for his family. Their lives are forever changed, if not ended, by the bullets that this defendant fired.

2RP 2148-49.

The prosecutor's intentional references to the witnesses' as "Kenya[n]", "Korean-American" and "Latino" was intended

to draw the jury's attention to their ethnicities to evoke racial biases and sympathies. Highlighting the witness's ethnicities was not relevant to any fact and had nothing to do with the crimes Thompson was charged with. It served no function other than to inflame the passions of the jury and encourage them to decide the case on something other than the evidence before them.

The Court of Appeals concluded however, that the test for race-based misconduct did not apply because "[t]he prosecutor's brief comments about their backgrounds were based on evidence and reasonable inferences in the record." Op. at 30. The Court of Appeals reasons there was testimony that Soon Ja preferred to speak Korean when emotional or excited. Thus, "[t]he jury could infer that she may have asked Joseph to open the cash register in Korean, which Thompson would not have understood, possibly contributing to his decision to shoot her." Op. at 30. Similarly, "Thuo's Kenyan background was relevant to testimony from his cousin, who had recently moved

from Kenya and shared a room with Thuo." Id. Despite acknowledging that Mantonya's ethnicity "was not relevant to any testimony," the Court of Appeals reasoned "the references to his ethnicity were fleeting and fit within the State's purpose of emphasizing how the crimes affected people from varied backgrounds." Id.

The Court of Appeals opinion reasoning fails for two reasons. First, the cultural background of Thou and Soon Ja was not relevant for any reason. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Thompson was not alleged to have committed the crimes against Thou or Soon Ja Nam, because of their race, ethnicity, culture, or due to any language barriers. Compare Zamora, 199 Wn.2d at 715 (recognizing race or ethnicity may be relevant "to discuss motive for committing race-based hate crime."); In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 834, 408 P.3d 675

(2018) (reference to Asian/Pacific Islanders relevant to explain hierarchy of defendant's gang membership and who "could be full-fledged members."). Nothing about the witness's race or ethnicity made it more or less probable that Thompson did or did not commit the crimes he was charged with. Second, excusing the irrelevant reference to Mantonya's ethnicity as "fleeting" ignores this Court's mandate that an intentional appeal to a juror's racial bias "cannot be cured and it is per se prejudicial." Bagby, 200 Wn.2d at 803.

Defense counsel was also ineffective in failing to object to the challenged statements. Strickland, at 466 U.S. "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 721-22, 327 P.3d 660 (2014), abrogated on other grounds by, State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). No legitimate reason supported the failure of defense counsel to properly object and request curative

instructions given the per se prejudicial nature of the prosecutor's improper comments.

Because the Court of Appeals decision conflicts with precedent from this Court, and involves significant questions of constitutional law, review is appropriate under RAP 13.4(b) (1) and (3).

E. CONCLUSION

Thomspon respectfully asks this Court to grant review and reverse his convictions.

I certify that this document contains 7,203 words, excluding those portions exempt under RAP 18.17.

DATED this 3rd day of July, 2024.

Respectfully submitted,
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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 4, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBBRIE PURDELL THOMPSON, Appellant.	No. 56625-7-II UNPUBLISHED OPINION

GLASGOW, J.—Robbrie Purdell Thompson robbed a convenience store owned by Soon Ja Nam and Joseph Nam. Thompson shot Soon Ja[1] in the back when she ran from him. Thompson then pointed the gun at a customer while Joseph opened the cash register. Thompson took cash from the register and fled. Soon Ja died from her injuries.

Franklin Thuo drove Thompson to and from the convenience store. Two days after the robbery, police found Thuo's body on a beach with a bullet wound in the back of his skull. The bullets that killed Nam and Thuo were fired by the same gun.

The State charged Thompson with two counts of aggravated first degree murder of Soon Ja and Thuo, first degree felony murder of Soon Ja, first degree robbery, conspiracy to commit first degree robbery, and two counts of second degree assault of Joseph and the customer, all with firearm sentencing enhancements. The State also charged Thompson with second degree unlawful possession of a firearm.

[1] We refer to the Nams by their first names for clarity.

During voir dire, the State exercised a peremptory challenge against juror 35, defense counsel made a GR 37 objection, and the court allowed the peremptory challenge. The jury convicted Thompson of all charges, aggravating factors, and sentencing enhancements. The trial court dismissed the felony murder conviction on double jeopardy grounds and found Thompson indigent, but the court imposed several legal financial obligations.

Thompson appeals. He argues that the State's exercise of a peremptory challenge against juror 35 violated GR 37. Thompson asserts that he received ineffective assistance of counsel and that the trial court violated his right to present a defense. Thompson also argues that the prosecutor committed misconduct in opening and closing arguments and that defense counsel rendered ineffective assistance by failing to object. Thompson reasons that cumulative errors denied him a fair trial. And he argues that the State did not present sufficient evidence to convict him of second degree assault of Joseph. Finally, Thompson raises several issues related to a scrivener's error in the judgment and sentence and legal financial obligations, which the State concedes.

We affirm Thompson's convictions. But we accept the State's concessions and remand for the trial court to correct the scrivener's error and strike the challenged legal financial obligations from Thompson's judgment and sentence.

FACTS

I. BACKGROUND

Thompson and Thuo were friends who met early in high school. They both regularly bought and sold athletic shoes. When Thompson, who is Black, received his driving learner's permit in February 2019, he was 6'2" and 285 pounds. In April 2019, Thuo was approximately 6'1" and 250 pounds. Thuo was a sophomore and Thompson was a junior in high school. Thuo

was born in Kenya, and in April 2019 he shared a bedroom with a cousin who had recently moved from Kenya.

One Saturday in late April 2019, Thuo and his cousin left their house to go to the gym, both wearing blue sweatshirts. The cousin forgot his gym pass, so they parted ways; instead, Thuo drove a friend's car to pick up Thompson. They then drove to a convenience store in Puyallup owned by Soon Ja and Joseph, intending to rob the store.

The Nams were Korean, and English was not their first language. Soon Ja sometimes had problems opening the cash register and would seek out her husband or children for help.

The store had a residence in the back where the Nams lived. When the robbers entered the store, Soon Ja turned to go back into the residence to get Joseph to open the cash register. She was shot in the back and collapsed. Joseph went to the front to open the cash register.

Then, a longtime customer entered the store. As he was entering, the customer passed a stocky Black man slightly over six feet tall wearing a blue sweatshirt who was leaving the store. Inside, the customer saw another Black man at the counter who was taller and was wearing a dark gray or black sweatshirt. When the customer saw the man's hand in the cash register, he yelled and moved to tackle him. Joseph called out to the customer that the man had a gun, and the man then pulled a gun out of his sweatshirt and pointed it at the customer, who put his hands up and turned away. The man with the gun then left the store, he got into the passenger side of a car, and the car drove away. The customer called police.

Soon Ja was taken to the hospital where she was declared dead on arrival. She was 79 years old.

Police put out a bulletin for the description of the car and found it near Thuo's house the next day, on Sunday. Police searched Thuo's house but could not reach Thuo. On Monday morning, police found Thuo's body on tide flats at a marina in Tacoma with a bullet wound in the back of his head.

Thuo's body was fully dressed but wearing no shoes. Security camera footage from his home showed him leaving his house for the last time wearing a distinctive, expensive pair of white shoes. The next day, Thompson made a video advertising the shoes for sale.

The bullets that killed Soon Ja and Thuo were both .380 caliber and were fired from the same gun, but the gun was never found.

The State charged Thompson with aggravated first degree murder of Soon Ja and Thuo. This included aggravating factors that Soon Ja was murdered in furtherance of a first degree robbery, to conceal commission of a crime, and because Soon Ja was a potential witness. And the State also alleged that Thuo was murdered to conceal commission of a crime and because he was a potential witness. The State also charged Thompson with first degree felony murder of Soon Ja, first degree robbery, conspiracy to commit first degree robbery, second degree assault of Joseph, and second degree assault of the customer, all with firearm sentencing enhancements. The second degree assault charges alleged that Thompson assaulted Joseph and the customer under two alternative means: with a deadly weapon, and with intent to commit a felony. The State also charged Thompson with second degree unlawful possession of a firearm.

II. VOIR DIRE

In voir dire, the prosecutor asked juror 35 a question about memory:

> [PROSECUTOR]: If you hear different witnesses talk about the same or similar events, particularly in this case several years later, would you find it surprising if

> their testimony was slightly different or different from other witnesses, or maybe even different slightly from what they may have said earlier? Would that surprise you?
>
> JUROR NO. 35: Yeah, kind of.
>
> [PROSECUTOR]: Okay. . . . If you were asked about something that happened two plus years ago, do you feel like you would feel just as comfortable now . . . to completely and accurately talk about it and give the details as you would have two years ago?
>
> JUROR NO. 35: Yes.
>
> [PROSECUTOR]: Can you think of other individuals that might have a challenge being able to remember precisely the same events two years later?
>
> JUROR NO. 35: No.

Verbatim Rep. of Proc. (VRP) (Sept. 2, 2021) at 600-01. The prosecutor then asked several other jurors similar questions—those jurors responded that they would not be surprised by different recollections, that "memory is different for different people and can be somewhat unpredictable," and that personality traits and life experience may affect perception. *Id.* at 602.

The prosecutor then asked the jury panel about perspectives, using cars as an example, and juror 35 again responded. After stating that she liked Subarus and disliked Volkswagens, juror 35 stated that, if she were to watch each kind of car go by, she would be able to describe both cars with the same level of detail. Juror 43 also expressed an interest in cars but explained that people who were not familiar with cars may struggle to tell different models apart.

When defense counsel questioned the jury panel, they called on juror 35 because of her answers to the jury questionnaire where she said that she rarely changed her mind. Juror 35 said that in deliberations she would "go with what I know, and the evidence that I have heard" instead of the opinions of others. *Id.* at 667. But she said that she would be able to change her opinion.

The State exercised peremptory challenges against five jurors, including 35. All five jurors were 25 years old or younger; juror 35 was the youngest at 18. Thompson objected to the peremptory challenge against juror 35 under GR 37. Thompson asserted, and the trial court agreed, that juror 35 appeared to be a person of color, and possibly Black or mixed race. The GR 37 objection required the State to provide a race-neutral basis for the peremptory challenge.

The State expressed concerns about the effect of juror 35's youth on her perception of witnesses. One prosecutor was concerned about juror 35's ability to appreciate the fact that different people may remember different details of the same event, especially several years later. The other prosecutor emphasized that juror 35 "couldn't conceive of a bad memory or inconsistent statements," even with the passage of time. *Id.* at 692-93. "The specific time frame set forth was two years, which happens to be precisely the time frame at issue in this case, and she couldn't conceive that two years might diminish one's memory or result in inconsistencies between the statements over time, which is terribly relevant." *Id.* at 693.

The trial court was struck by how "immature" juror 35's answers about memory were. *Id.* at 694. It stated, "I don't think that her explanations were very convincing. I don't think she had a very good grasp of the memory-related issue and how it's possible that other people could have different versions of the same event," which the court noted was "critical" in a case like Thompson's that was "more than 800 days old." *Id.* at 694-95. The trial court observed that juror 35 was asked several questions about this issue, and that other jurors were asked similar questions and provided different answers. And the trial court found that the State had not disproportionately used peremptory challenges against any race or ethnicity.

The trial court denied the GR 37 challenge, stating, "I don't view an objective observer listening to the questions that were posed to [juror 35] *would* conclude that her race" contributed to the peremptory challenge. *Id.* at 694 (emphasis added). It ruled that juror 35's "lack of insight into her reasons why people would have potentially different memories of the same events" and the concerns about her ability "to work with a group in a jury to determine whether or not her opinion could be changed" were race-neutral reasons for removing her from the jury pool. *Id.* at 695.

After the jury was empaneled, the State supplemented the record by noting that two seated members of the jury appeared to be Black, one was Native American, one was Filipina, and another was possibly Latinx. The State also noted that it had used another peremptory challenge on a 19-year-old White woman.

III. TRIAL

Overall, the State's theory of the case was that Thompson shot Soon Ja while Thuo was the getaway driver, and that Thompson later killed Thuo to keep him from confessing once police linked Thuo to the car used in the robbery. In contrast, Thompson admitted to being involved in planning the robbery, but he insisted that he left the store to serve as the getaway driver before Soon Ja was killed. And he claimed that someone else shot Thuo at the marina, although he would not say who.

A. Opening Argument

The State began opening argument by emphasizing the varied backgrounds of the people affected by the two shootings:

> During the course of this trial the State expects that you'll hear, under oath, and from people who before April 27, 2019, didn't know each other; people who

> came from as far away as Africa and Asia and as close as Puyallup; people who are old, and young and in between; people of African and European nation decent; people who through a chain of connections were brought to an intersection of time and space in which their lives were forever changed and in at least two cases ended when the defendant fired two bullets.

VRP (Sept. 8, 2021) at 10. The State returned to this theme at the end of opening argument:

> In the end, the State expects the evidence to show that a child from Kenya, a Korean-American couple who kept a shop in Puyallup for decades, [and a] Latino contractor out buying beverages for a family get-together were all connected, and that bullets fired by the defendant from his .380 caliber pistol affected all of them, changed their lives forever, and in at least two cases, ended their lives forever.

Id. at 39. Defense counsel did not object to the State's discussion of witnesses' ethnic backgrounds.

In Thompson's opening, counsel argued that Thuo was the one who shot Soon Ja and someone else was responsible for Thuo's death.

B. Evidence Presented

1. Evidence about Thompson's arrest

One of the officers who arrested Thompson testified about the arrest. The officer explained that a SWAT team arrested Thompson in a rideshare minivan on his way to school. He stated that police cut off the minivan and pinned it between two police vehicles, then they broke the windows "to ensure access and [as] an anxiety manipulation tactic" and used "a noise-flash diversion device," more commonly known as a flash-bang grenade. VRP (Sept. 16, 2021) at 1360. The prosecutor then asked about the tactics used:

> [PROSECUTOR:] What was the reason for having to break the window or taking that type of protocol, if you know?
>
> [OFFICER:] One was just the threat matrix. Before we conduct any type of this operation, we're briefed on what the threat matrix is. And all the tactics are based off of the threat of the individual. We were briefed on the suspected crimes of Mr. Thompson, and that was what led down to a SWAT vehicle takedown rather than, say, a traffic stop by a marked unit.

> [PROSECUTOR:] Would it be accurate to say the goal would be to be quick, effective, and minimize any type of delay or interaction?
>
> [OFFICER:] Yes, ma'am. We were also very concerned [about] making this happen prior to him arriving to the school grounds.

Id. at 1361. Defense counsel did not object to this testimony. And on cross-examination, defense counsel asked why a SWAT team was called to arrest Thompson:

> [DEFENSE COUNSEL:] [I]t's not uncommon for the SWAT team to assist with an arrest, is it?
>
> [OFFICER:] I guess . . . I would say it is fairly uncommon. There's a lot of arrests that happen, and not very many of them reach the number of points on a threat matrix to call the SWAT team and to have that happen.
>
> [DEFENSE COUNSEL:] On the threat matrix, is that because of the type of crimes or charges that . . . he was suspected of committing? Is that where it comes from?
>
> [OFFICER:] In this case, specifically, I believe so. Yes, ma'am. But it also takes into a suspect's past, arrest history, and past crimes. I don't know if Mr. Thompson had any past record or not.

Id. at 1363-64.

The State then called another member of the SWAT team to testify about the arrest. The trial court interjected and excused the jury. The trial court then warned the State, "[t]he fact of arrest has little relevance" and testimony about law enforcement's threat assessment was "very dangerous territory." *Id.* at 1367-68. The State explained that it was trying to connect a phone found in the van to Thompson, which the court agreed was relevant. But the court cautioned, "I don't think we need to hear about the arrest any longer." *Id.* at 1370.

Defense counsel then sought to "adopt as an objection by the defense those remarks made by the Court." *Id.* at 1370-71. The trial court told defense counsel that it would consider a curative instruction if counsel proposed one.

Back in the presence of the jury, the officer explained that police found a backpack and phone near where Thompson had been sitting in the van.

At a break, defense counsel asked for "time to reflect" on whether to propose a curative instruction because the instruction could "be more damaging than not, because it highlights the testimony." *Id.* at 1378. Several days later, counsel decided not to propose a curative instruction because they thought "it would draw too much attention, particularly given the time that's passed since the testimony was offered." VRP (Sept. 21, 2021) at 368.

2. Robbery, assaults, and Soon Ja's murder

Joseph did not testify at trial, and no witness testified that a gun was ever pointed at Joseph.

An officer who took Joseph's statement while paramedics tended to Soon Ja testified that Joseph was "in shock" after the robbery. VRP (Sept. 14, 2021) at 989. "He started saying that someone had shot his wife in front of him, and he just didn't comprehend what was happening to her. He didn't understand why that happened." *Id.* at 990. "[H]e was more concerned about what was going to happen to his wife" than discussing the robbery. *Id.* The officer stated that Joseph said Soon Ja "came into the back" and asked him "to open the cash register, and then she got shot and then she dropped to the ground. And he went to the front and opened the cash register." *Id.*

The customer who arrived in the middle of the robbery maintained that the man who walked out of the store before he entered was smaller and wearing a blue sweatshirt, while the man at the counter with the gun was taller, heavier, and wearing a black or gray sweatshirt. And the State presented photos from the security camera at Thuo's home showing him wearing a blue sweatshirt before the robbery and returning that evening wearing a Seahawks jersey and carrying the blue sweatshirt.

The customer testified that the gun Thompson pointed at him was small enough to fit in the palm of his hand. The State also presented photos and videos recovered from Thompson's phone, including a Snapchat video made shortly before the robbery, which showed Thompson holding a .380 caliber Taurus handgun, which is about the size of a person's palm. And the cousin who shared a room with Thuo testified that Thuo did not own a gun, and Thuo's father testified that no one in their household owned guns. Although the Taurus was never found, the State also presented messages from Thompson's phone seeking to sell his "380" the morning after the robbery, and again after Thuo's murder. Ex. 1397, 1440.

3. Thuo's murder

Thompson had a girlfriend at the time of the murders. At trial, portions of her interview with police were played or read to the jury and the girlfriend testified that her statements to police were accurate and truthful. The girlfriend told police that Thompson said that Thuo killed Soon Ja. But Thompson feared that Thuo would talk to police, and Thompson told his girlfriend that he was going to kill Thuo to keep him quiet.

The State submitted texts recovered from Thompson's phone where Thompson's girlfriend told him not to "do anything stupid" on Sunday night while Thompson responded, "[Y]ou just gotta look at it from my side." Ex. 1413. She later told him, "[I] jus[t] don[']t get it" and said that she would not go to sleep until he told her that he wasn't going to "do it." Ex. 1415. The day after Thuo's murder, the girlfriend texted Thompson asking how he "did what we talked ab[ou]t." Ex. 1431. Thompson told her that she needed to learn "what not to say on iMessage" because the messages would be saved even if she deleted them. Ex. 1433.

The girlfriend told police that two days after Thuo died, Thompson admitted that he had killed Thuo. Thompson told her that he and Thuo went to the marina with others, and Thompson took out one of his earrings and pretended to lose it so that Thuo would bend down and look for it. Thompson then put a gun in a plastic bag and shot Thuo in the back of the head while Thuo was bent down. The medical examiner who performed Thuo's autopsy testified that he was shot in the back of the head with a gun that "was in contact with the body at the time it was fired." VRP (Sept. 16, 2021) at 1323. There was less soot in the wound track than usual, which suggested that some material had blocked some of the soot, and there was no hole in Thuo's clothing to indicate that he had been shot through his sweatshirt hood.

4. Other suspect evidence

Thompson repeatedly tried to introduce evidence that other people were at or near the marina the night Thuo was killed. Defense counsel elicited testimony from a detective that police contacted several of Thompson's known associates, but "they either wouldn't return a call or just refused to speak." VRP (Sept. 22, 2021) at 1411. When defense counsel inquired further about the extent of the investigation, the State objected and explained outside of the jury's presence that two of the people named had hired counsel, which was improper for the detective to testify about.

Outside the presence of the jury, the detective stated that police learned about four people who were associates of Thompson. He did not know whether Thuo knew those four people. Two of those people "may have been involved" in Thuo's murder, and at least one of them was represented by counsel. *Id.* at 1429. The trial court allowed defense counsel to ask whether the four people cooperated with the investigation, but barred inquiry about why they were not investigated further. The detective then testified that the four people did not cooperate with police.

A different detective testified about information retrieved from Thompson's phone. The detective testified that the phone was likely turned off between 10:00 p.m. and 12: 00 a.m. on the night Thuo was murdered. The detective surmised this because delivery of a text message from Thompson's mother was delayed. But he did not testify about any evidence that Thompson's phone was at the marina the night Thuo died.

On cross-examination, defense counsel asked if the detective had gathered any cell phone information from the marina and the State objected. Outside the presence of the jury, the State explained that there was evidence that one of Thompson's associates was near the marina the night of the murder, but that person was represented by counsel and the State had "no nexus whatsoever to indicate that he participated in this offense." VRP (Sept. 23, 2021) at 1659.

The trial court explained that, to introduce other suspect evidence, "there needs to be some evidence suggesting another suspect committed the charged offense. The defendant must show a train of facts or circumstances that can clearly point out that someone besides the defendant is the guilty party." *Id.* at 1665.

Later, the trial court similarly excluded additional evidence of videos and messages that purportedly placed other people near the marina around the time of Thuo's murder.

5. Thompson's testimony

Thompson testified at trial. He acknowledged that he owned the phone recovered from the minivan he was arrested in.

Thompson claimed that the robberies were Thuo's idea. He testified that Thuo owned a Taurus handgun and was carrying it when they entered the convenience store. Thompson said that he was carrying an unloaded Glock, and that he dropped the clip for that gun when they entered

the store, panicked, and ran out to the car before they interacted with anyone inside the store.[2] Thompson testified that he drove away from the store but did not know the way home, so he returned to the store to find Thuo hiding outside waiting for him. He picked Thuo up and then left. Thompson said Thuo claimed to have shot Soon Ja.

Thompson also testified that he and Thuo went to the marina with others on Sunday night, and that they were walking back to the car with Thuo walking behind Thompson, when someone else shot Thuo. He asserted that the gun used to shoot Soon Ja was not the same gun used to kill Thuo. Thompson asserted that videos of him with the Taurus handgun and the messages from his phone were created because he was "trying to help" Thuo sell the gun. VRP (Sept. 29, 2021) at 2071. But some of these message exchanges took place after Thuo's death.

During a break in cross-examination, outside the jury's presence, the State asserted that it expected Thompson to refuse to identify who he claimed shot Thuo, so asking would be "a futile question." *Id.* at 2034. Defense counsel then argued that Thompson's testimony that he was at the marina with others opened the door to the previously excluded other suspect evidence. The trial court ruled that the State had not opened the door. Defense counsel then asserted that barring Thompson from saying he knew who shot Thuo violated Thompson's right to present a defense. But the trial court rejected this argument.

Outside the jury's presence, Thompson refused to identify who shot Thuo, stating, "I think they would kill me if I tell you." *Id.* at 2048. Defense counsel then made an offer of proof, asserting that Thompson might testify consistent with the excluded cell phone evidence that two of

[2] Police found a magazine for a .357 caliber Glock in the store, as well as a .357 Glock and another magazine in Thompson's closet. The Glock magazine from the store, and the cartridges from that magazine had no identifiable fingerprints on them.

Thompson's associates were at the marina. But Thompson refused to identify who was with him at the beach.

As for the excluded cell phone evidence placing Thompson's friends at the marina, the trial court explained that it would require more evidence than possible geographic proximity to Thuo's body before it would admit other suspect evidence. The trial court again refused to admit the cell phone evidence that others were at the marina during Thuo's murder.

C. Jury Instructions, Closing Arguments, and Verdict

The jury instructions explained that a person commits second degree assault when they "assault[] another with a deadly weapon or assault[] another with intent to commit a felony." Clerk's Papers (CP) at 100. "An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact" does so even if the actor did not "actually intend to inflict bodily injury." CP at 103.

The instructions provided that to convict Thompson of second degree assault of Joseph, the jury had to find that Thompson assaulted Joseph "with a deadly weapon" or "with intent to commit robbery in the first degree." CP at 101. The jury did not have to be unanimous as to which of the alternative means applied, as long as each juror found that one of the means had been proved beyond a reasonable doubt.

During closing argument, the State briefly raised the theme of connections discussed in opening argument before turning to the jury instructions and evidence presented. The State returned to its theme a final time at the end of closing argument:

> That gun [w]ielded by the defendant connected and shattered lives of people who never knew how connected they were. We can choose to focus on our differences, on the thing that divide us, but, ultimately, that single gun connected a Korean-American immigrant who kept a store in Puyallup; a Kenyan-American

> boy, grades weren't the best, but he was doing everything he could going to improve himself, going to mentoring sessions and going to church; a Latino-American contractor who is just picking up drinks for his family. Their lives are forever changed, if not ended, by the bullets that this defendant fired.

VRP (Sept. 29, 2021) at 2148-49. Defense counsel did not object to these comments.

Thompson's counsel conceded in closing that Thompson was guilty of felony murder of Soon Ja because she was killed during a robbery he participated in. Thompson also conceded guilt of second degree unlawful possession of a firearm and conspiracy to commit a robbery. But counsel maintained that Thuo was the person who shot Soon Ja, committed the actual robbery, and pointed a gun at the customer. And counsel asserted that there was no direct evidence that Thompson killed Thuo.

The jury convicted Thompson of all charges and firearm sentencing enhancements. It entered special verdicts finding the alleged aggravating factors. The jury found that Thompson murdered Soon Ja in furtherance of a first degree robbery. It also entered special verdicts finding that Thompson murdered Thuo to conceal commission of a crime and that the murder was related to the fact that Thuo was a potential witness. Finally, the jury unanimously found that Thompson was armed with a firearm when he committed all of the crimes.

IV. SENTENCING

At sentencing, the trial court stated it was dismissing Thompson's conviction for felony murder of Soon Ja on double jeopardy grounds. The court identified the standard range for each of Thompson's aggravated first degree murder convictions as "25 years to a term less than *de facto* life in prison" under the case law. CP at 202. Defense counsel requested an exceptional downward sentence totaling 25 years based on Thompson's youth. The State requested a sentence of 45 years

on each aggravated murder count, to run concurrently with each other and all the other counts and firearm enhancements.

The trial court, after an extensive discussion of the background juvenile sentencing caselaw, found that youth did not contribute to Thompson's offenses. The trial court imposed concurrent sentences of 40 years for each of the aggravated murder counts, and ran those sentences concurrent to all of the other counts and firearm sentencing enhancements "to avoid a de facto life sentence." VRP (Jan. 21, 2022) at 2302. But the trial court failed to remove the felony murder conviction from one portion of the judgment and sentence.

Thompson appeals his convictions and seeks to strike his legal financial obligations and correct his judgment and sentence.

ANALYSIS

I. GR 37

Thompson argues that the trial court erred by allowing the State to exercise a peremptory challenge against juror 35. Thompson says that juror 35 was removed because her answers were "'unintelligent or confused.'" Br. of Appellant at 47 (quoting GR 37(i)). He asserts that "both a focus on youth and 'unintelligent or confused answers' are historically associated with improper discrimination in jury selection." Reply Br. of Appellant at 2 (quoting GR 37(i)). He emphasizes that only one other prospective juror got the same number of questions from the prosecutor. Moreover, the trial court said an objective observer "would not" view race as a factor, applying the wrong standard. Br. of Appellant at 49. Thompson asserts that an objective observer *could* view race as a factor in the State's peremptory challenge, requiring reversal. We disagree.

A. Standard of Review

The state and federal constitutions guarantee criminal defendants the right to trial by an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, §22. "Furthermore, prospective jurors themselves have the constitutional right not to be excluded from serving on a jury due to discrimination." *State v. Orozco*, 19 Wn. App. 2d 367, 373, 496 P.3d 1215 (2021).

GR 37 is intended "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). Courts have generally applied a de novo standard of review in this context. *See, e.g., State v. Harrison*, 26 Wn. App. 2d 575, 582, 528 P.3d 849 (2023); *State v. Listoe*, 15 Wn. App. 2d 308, 321, 475 P.3d 534 (2020); *State v. Omar*, 12 Wn. App. 2d 747, 750-51, 460 P.3d 225 (2020). The Washington Supreme Court has explained that de novo review is appropriate when "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." *State v. Tesfasilasye*, 200 Wn.2d 345, 356, 518 P.3d 193 (2022). However, the Supreme Court has left "further refinement of the standard of review open for a case that squarely presents the question based on a well-developed record." *Id.*

This court has declined to hold that de novo review applies in all circumstances in GR 37 cases. *State v. Hale*, 28 Wn. App. 2d 619, 628-29, 537 P.3d 707 (2023). We have explained that jury selection determinations "often rely on subtleties in human interactions that are absent from a cold written record." *Id* at 629. Jurors' and attorneys' demeanor, body language, voice inflections, and other nuances "may affect whether an objective observer could view race as a factor for a peremptory challenge." *Id.* "[T]rial courts are in the best position to evaluate jurors because they can observe the jurors' demeanor." *Id.*; *see, e.g.*, *State v. Davis*, 175 Wn.2d 287, 312,

290 P.3d 43 (2012), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018); *State v. Lawler*, 194 Wn. App. 275, 282, 374 P.3d 278 (2016).

The concurrence/dissent suggests that de novo review in all GR 37 cases is necessary to effectuate the Washington Supreme Court's open letter challenging all of us to eliminate racism from Washington's justice system. Concurrence/dissent at 1 (quoting Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 2 (June 4, 2020)).[3] But applying abuse of discretion review in at least some GR 37 cases would not defeat the purposes of GR 37 or the Washington Supreme Court's letter. Appellate courts can and should find abuse of discretion where we can see on the record that a trial court decision is a result of bias or that a trial court allows use of a peremptory challenge motivated by bias. Analyzing these decisions under a de novo standard is not only inconsistent with the GR 37 standard itself, but it could actually shield these decisions from the daylight we must shine on our justice system. Indeed, calling such decisions anything other than abuse of discretion would defeat the purpose of the Washington Supreme Court's letter.

Here, we affirm under either the de novo standard or a more deferential one.

B. GR 37 Analysis

GR 37(d) requires a party to articulate the reasons for their peremptory challenge once there has been an objection to the challenge under the rule. The trial 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." GR 37(e) (emphasis

[3]https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7].

added). "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." GR 37(f).

In making its determination, the court "should consider" circumstances including "the number and types of questions posed to the prospective juror," as compared to the number and types of questions asked of other jurors; whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge; whether a reason might be disproportionately associated with a race or ethnicity; and 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)(i)-(v). There are seven presumptively invalid justifications for peremptory challenges, including the juror having prior contact with law enforcement or not being a native English speaker, for example. GR 37(h)(i)-(vii). The rule also lists several reasons that "have historically been associated with improper discrimination in jury selection," including that the juror was sleeping or inattentive, exhibited a problematic attitude or body language, "or provided unintelligent or confused answers." GR 37(i). When a trial court erroneously allows a peremptory challenge over a GR 37 objection, the remedy is a new trial. *See Listoe*, 15 Wn. App. 2d at 329.

The Supreme Court has emphasized that the test is whether an objective observer *could* view race as a factor in a peremptory challenge, not whether an objective observer *would* view race as a factor. *Tesfasilasye*, 200 Wn.2d at 357. "Under the 'could view' standard, a judge is required to deny a peremptory challenge when the effect is discriminatory regardless of whether there was discriminatory purpose. The 'could view' standard is also more likely to prevent peremptory dismissals of jurors based on the unconscious or implicit biases of lawyers." *Id.*

(citation omitted). We note, however, that in *Tesfasilasye,* the trial court's application of an incorrect "would view" standard did not by itself warrant reversal; the Supreme Court recognized that the trial court applied a "would view" standard and went on to determine for itself whether an objective observer "could view" race as a factor in the peremptory challenges at issue in that case. *Id.* at 355, 359-61.

This court has held that an objective observer could view race as a factor when the State exercised peremptory challenges against all three prospective jurors who "exhibited an awareness of racial justice issues when a Black defendant was on trial." *Harrison*, 26 Wn. App. 2d at 582. And Division Three has held that an objective observer could view race as a factor in the State's peremptory strike of a young Asian American juror. *State v. Lahman*, 17 Wn. App. 2d 925, 937, 488 P.3d 881 (2021). But in that case, the juror's "statements during voir dire did not differ markedly from those of other prospective jurors" and the prosecutor received limited information from the juror "largely due to the fact that [the juror] was asked few questions." *Id.* The prosecutor's explanation for striking the juror focused on his youth and lack of life experiences, not his specific responses to any questions, which "played into at least some improper stereotypes about Asian Americans, particularly given the lack of any record about the relative ages of other jurors." *Id.* at 937-38.

Here, while it is true that the trial court appears to have misstated the standard as "would view," applying the correct "could view" standard, an objective observer could not conclude that race was a factor in the peremptory strike against juror 35.

Relying in part on *Lahman*, Thompson argues that the prosecutor improperly focused on juror 35's youth, and he asserts that the prosecutor and the trial court essentially characterized juror

35's answers as "'unintelligent or confused,'" which has "'historically been associated with improper discrimination in jury selection.'" Br. of Appellant at 47 (quoting GR 37(i)). But juror 35's answers were not unintelligent or confused, and the prosecutor's and trial court's discussion of them was far more specific than in *Lahman*. Although her answers on the jury questionnaire led defense counsel to inquire further, during voir dire, she clearly and succinctly stated that she expected to form her own opinion based on the evidence but would be able to change her opinion if sufficiently convinced. While the trial court specifically noted that juror 35's answers about memory reflected immaturity and were unrealistic, the court did not imply that juror 35 was generally unintelligent.

Further, unlike the young juror in *Lahman*, both parties questioned juror 35 extensively, and her answers differed from other jurors. Juror 35 repeatedly expressed a belief that two years—the same gap between the charged events and the trial—would not degrade her memory of events, and she did not think that witnesses should have a problem remembering events from two years before. In contrast, the State asked similar questions throughout voir dire, and all other jurors who answered the same question were aware that memory and perception can differ among individuals and with passage of time.

It is true that the State asked only one other juror, juror 43, the same number of questions as juror 35 (17 questions), but defense counsel asked juror 35 a total of 23 questions. And while Thompson contends that juror 43 provided "similar answers" to juror 35, those answers related only to each juror's ability to describe cars in detail because both liked cars. The State's other questions related to juror 35's insistence that passage of time should not affect memory, which

was the stated basis of the State's challenge. This, without more, could not prompt an objective observer to think that race was a factor in the peremptory challenge against juror 35.

The State's other peremptory challenges focused on young jurors. Moreover, five seated members of the jury were Indigenous or people of color, including two who the court and counsel agreed appeared to be of African American descent. And Thompson does not and could not assert that the State disproportionately exercised peremptory challenges against any race or ethnicity in this case.

Viewing all of the circumstances, an objective observer could not view race as a factor in the State's peremptory challenge against juror 35, under either a deferential standard in light of the trial court's ability to objectively observe the prosecutor's and jurors' demeanor or a de novo review standard. The trial court did not err by denying the GR 37 challenge.

II. EVIDENTIARY ISSUES

A. SWAT Evidence

Thompson argues that he received ineffective assistance when defense counsel failed to move to exclude, object to, or seek a curative instruction for testimony about SWAT involvement in Thompson's arrest. He asserts that the testimony was inflammatory and irrelevant and that any objection would have been sustained. And he insists that there was no legitimate tactical reason for counsel to not object or request a curative instruction. Thompson argues that he was prejudiced because the testimony "shifted the jury's attention to Thompson's general propensity for violence" and "allowed the jury to speculate as to Thompson's propensity for criminality." Br. of Appellant at 62. We disagree.

A defendant claiming ineffective assistance must show both that counsel performed deficiently and that counsel's performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). The failure to demonstrate either prong of the test will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 36, 296 P.3d 872 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The State's reason for testimony about Thompson's arrest was to establish ownership of the phone found near him in the van he was riding in. But the detailed testimony about the procedure for his arrest by a SWAT team was irrelevant and unnecessarily emphasized Thompson's perceived dangerousness. Although defense counsel's questions on cross-examination about the frequency of SWAT arrests may have been intended to mitigate the damage, they in fact inflamed it further by allowing the officer to testify that they consider a "suspect's past, arrest history, and past crimes" before ordering a SWAT arrest. VRP (Sept. 16, 2021) at 1363-64. Though the trial court offered to give a curative instruction, defense counsel decided not to propose one to avoid drawing more attention to the testimony.

We note that the trial court felt it necessary to sua sponte interrupt testimony to halt the discussion of SWAT's involvement in the arrest. But even assuming defense counsel performed deficiently by failing to object, Thompson cannot show prejudice.

There was overwhelming evidence that Thompson committed the murders, robbery, and assaults. Counsel admitted in closing that Thompson participated in the robbery and he was guilty of felony murder of Soon Ja. Counsel also conceded Thompson was guilty of second degree unlawful possession of a firearm and conspiracy to commit a robbery. Moreover, there was a significant amount of evidence that Thompson was the shooter in both murders. The customer who walked in on the robbery testified that the man wearing black and carrying the gun was noticeably larger and heavier than the man in blue who walked out of the store. And the jury received evidence that Thompson was several inches taller and at least 35 pounds heavier than Thuo, and it was Thuo who was wearing the blue sweatshirt that day. The customer also testified that Thompson pointed the gun at him when he tried to intervene.

Next, there was extensive evidence that Thompson possessed the .380 Taurus handgun that killed both Soon Ja and Thuo before the robbery and he tried to sell the gun after Thuo's murder. Meanwhile, multiple family members testified that Thuo had never owned a gun. Further, Thompson's girlfriend testified that he planned to kill Thuo to keep him quiet, and Thompson later confessed to her unique details of the crime that could be confirmed only by autopsy, such as that Thompson wrapped the gun in a bag to reduce gunshot residue. Two witnesses' testimony about SWAT involvement in Thompson's arrest, which did not reveal any prior criminal history and was not revisited during closing, was comparatively fleeting in the context of a four-week trial with approximately 50 witnesses.

Thus, there is not a reasonable probability that the outcome of the trial would have been different had counsel objected or sought a curative instruction. We hold that Thompson did not receive ineffective assistance of counsel.

B. Other Suspect Evidence

Thompson next asserts that the trial court violated his right to present a defense by excluding cell phone data that placed other people at the marina the night of Thuo's murder. He reasons that the evidence "was highly relevant to the thoroughness of the police investigation and whether Thompson in fact committed the murder." Br. of Appellant at 67. Thompson insists that there was an adequate nexus between the other suspects and Thuo's murder such that the cell phone evidence created a reasonable doubt about Thompson's guilt. Thompson contends that exclusion of the evidence was not harmless beyond a reasonable doubt, requiring reversal. We disagree.

A criminal defendant's right to present a defense includes "the rights to examine witnesses against him and to offer testimony." *State v. Castro DeJesus*, 7 Wn. App. 2d 849, 865, 436 P.3d 834 (2019). A defendant has the right to offer evidence that someone else committed the charged crime if the evidence is relevant, which means that it tends to connect someone other than the defendant with the charged crime. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). "We review a trial court's decision to exclude other suspect evidence for abuse of discretion." *State v. Wade*, 186 Wn. App. 749, 765, 346 P.3d 838 (2015). And if admissible other suspect evidence was erroneously excluded, the error is subject to constitutional harmless error analysis. *Franklin*, 180 Wn.2d at 383.[4]

To be relevant and admissible, other suspect evidence must have a "logical connection to the crime." *Id.* at 381. Circumstantial evidence of another suspect may be admissible, and a trial

[4] We note that the State argues there was not a sufficient offer of proof to establish exactly what Thompson's other suspect evidence was. But the record is sufficient to conclude that Thompson would have offered cell phone location evidence establishing that at least one of Thompson's friends was also at or near the marina on the night Thuo was killed.

court cannot exclude other suspect evidence based on the strength of the State's case. *Id.* at 381. But overall, "[e]vidence establishing nothing more than suspicion that another person might have committed the crime [is] inadmissible." *Id.* at 380.

In *Franklin*, the defendant was dating two women; he lived with one of them, and she disapproved of his relationship with the other woman. *Id.* at 373. Franklin was charged with cyberstalking the second woman based on Craigslist ads and harassing e-mails. *Id.* at 376. Franklin asserted that his live-in girlfriend had posted the ads and sent the e-mails, based on the fact that his personal laptop was the only computer in their home, the live-in girlfriend had access to his e-mail, and she had sent threatening messages to the victim before. *Id.* The trial court excluded the other suspect evidence and the Supreme Court reversed. *Id.* at 377.

In explaining the other suspect standard, the *Franklin* court distinguished *State v. Downs,* 168 Wash. 664, 13 P.2d 1 (1932). "The defendants in *Downs* offered evidence that a potential suspect—the apparently infamous burglar '"Madison Jimmy"'—was in town at the time the charged burglary was committed. There was no evidence actually connecting Madison Jimmy in any way to the particular burglary." *Franklin*, 180 Wn.2d at 379 (citation omitted) (quoting *Downs*, 168 Wash. at 666). The Supreme Court explained that mere evidence of another person's motive or opportunity, "'or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.'" *Id.* (quoting *State v. Kwan,* 174 Wash. 528, 533, 25 P.2d 104 (1933)).

Here, Thompson would not name which of the several other people who were allegedly at the marina had shot Thuo. The cell phone evidence that Thompson sought to admit would have only placed at least one of those people at the marina. Thompson offered no other evidence or

testimony about motive or access to the murder weapon, for example. Any link to the actual murder based solely on location was purely speculative.

Similarly, with regard to the police investigation, a detective testified that police contacted four known associates of Thompson, who did not cooperate with the investigation. And Thompson testified that other people besides himself and Thuo were at the marina, although he would not say who, and his girlfriend corroborated this testimony. Opportunity for someone else to have committed the murder, by itself, does not render other suspect evidence admissible without an adequate nexus connecting the specific individual to the charged crime.

We hold that the trial court did not abuse its discretion by excluding the other suspect evidence. And for all of these reasons, the trial court's exclusion of cell phone location information did not deprive Thompson of a defense.

III. PROSECUTORIAL MISCONDUCT

In opening arguments, the prosecutor explained that Thompson's actions affected "a child from Kenya, a Korean-American couple who kept a shop in Puyallup for decades, [and a] Latino contractor out buying beverages for a family get-together." VRP (Sept. 8, 2021) at 39. The prosecutor made similar comments in closing about how Thompson's gun connected a diverse group of people.

Thompson contends that these references to the ethnic backgrounds of the victims amounted to prosecutorial misconduct. Thompson asserts that the prosecutor "appealed to the passions and prejudices of the jury by emphasizing the ethnicities of the complaining witnesses to garner sympathy and invited the jury to send a message by holding Thompson accountable." Br. of Appellant at 77. Thompson argues that referring to the victims' race or ethnicities was irrelevant

and done only "to evoke racial biases and sympathies." *Id.* at 83. And he insists that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured any prejudice. He also argues that defense counsel rendered ineffective assistance by failing to object or seek a curative instruction. We disagree.

When a defendant objected to the prosecutor's remarks at trial, the defendant must show both that the remarks were improper, and that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant did not object, then they have waived their claim unless they also demonstrate that the remarks were flagrant and ill-intentioned and that a curative instruction could not have neutralized the prejudice. *Id.* at 760-61.

Although there is a different standard for appeals to racial bias, the Washington Supreme Court has also acknowledged that "not all express mentions of race will carry the danger of appealing to jurors' potential racial bias." *State v. Zamora*, 199 Wn.2d 698, 715, 512 P.3d 512 (2022). For example, in prosecuting race-based hate crimes, "race or ethnicity may be relevant or even necessary to discuss within the context of trial." *Id.* More specifically, the different standard "applies only when a prosecutor mentions race in an effort to appeal to a juror's potential racial bias, i.e., to support assertions based on stereotypes rather than evidence." *In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 834, 408 P.3d 675 (2018).

Here, the prosecutor never mentioned *Thompson's* race or ethnicity during opening or closing arguments. Thompson insists that the prosecutor's comments about the ethnic backgrounds of the victims were intended to invoke racial *sympathies*, not anti-Black or anti-Korean or anti-Latino prejudices.

The jury heard testimony that the Nams were from Korea and that Soon Ja preferred to speak Korean when emotional or excited. The jury could infer that she may have asked Joseph to open the cash register in Korean, which Thompson would not have understood, possibly contributing to his decision to shoot her. Thuo's Kenyan background was relevant to testimony from his cousin, who had recently moved from Kenya and shared a room with Thuo. The prosecutor's brief comments about their backgrounds were based on evidence and reasonable inferences in the record. And while the ethnicity of the customer who walked in on the robbery was not relevant to any testimony, the references to his ethnicity were fleeting and fit within the State's purpose of emphasizing how the crimes affected people from varied backgrounds. *See State v. Bagby*, 200 Wn.2d 777, 794, 522 P.3d 982 (2023). These comments did not "flagrantly or apparently intentionally appeal[] to racial bias in a way that undermine[d] the defendant's credibility or the presumption of innocence." *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). Thus, the different test for race-based prosecutorial misconduct does not apply.

Similarly, under the standard prosecutorial misconduct test, because the statements were based on the evidence and for the most part relevant to the State's theory of the case, they were not improper, much less flagrant or ill-intentioned. *Emery*, 174 Wn.2d at 760-61.

Thompson also argues that the prosecutor's comments about how the crimes affected a wide array of people inflamed the jury's passions and prejudices and invited them to hold him accountable. Prosecutors overstep in closing argument if they argue facts that are not in the record or improperly appeal to the passions and prejudices of the jury. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). But a "'prosecutor is not muted because the acts committed arouse natural indignation.'" *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (quoting *State v.*

Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)). In this case, Thompson murdered a 79-year-old woman by shooting her in the back, robbed her elderly husband, pointed a gun at a bystander who tried to intervene, then killed a fellow 16-year-old boy by shooting him in the back of the head to keep him from talking to police. The prosecutor's brief statements referring to people from many different walks of life were not improper or prejudicial. *Emery*, 174 Wn.2d at 760-61. For the same reasons, counsel did not render ineffective assistance by failing to object.

Thompson argues that cumulative errors prejudiced him and require a new trial. Because we find no error, the cumulative error doctrine does not apply.

IV. SUFFICIENCY OF THE EVIDENCE

Thompson was charged with second degree assault of Joseph with two alternative means: assault with a deadly weapon and assault with intent to commit a felony. The jury instructions allowed the jury to convict Thompson of second degree assault of Joseph as long as each individual juror believed that Thompson either assaulted Joseph with a deadly weapon or assaulted him with intent to commit a robbery; no unanimity as to means was required. When a jury is instructed that it may convict on either of two alternative means of committing a crime without being unanimous on which means, there must be sufficient evidence to support a conviction under each means. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

Thompson argues that there is insufficient evidence to support one of the alternative means of committing second degree assault against Joseph, assault with a deadly weapon. This means requires proof Thompson intended to create, and created, apprehension and fear of bodily injury in Joseph with a deadly weapon. Thompson emphasizes that Joseph did not testify at trial and "[t]here was no evidence that Thompson or an accomplice ever directed a gun" at him. Br. of

Appellant at 93. Thus, he asserts that the only way for the jury to convict him of second degree assault of Joseph was through speculation. We disagree.

The test for sufficiency of the evidence is whether any rational trier of fact could find the elements of the crime beyond a reasonable doubt when viewing the evidence in a light most favorable to the State. *State v. Dreewes*, 192 Wn.2d 812, 821, 432 P.3d 795 (2019). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). And we defer to the fact finder's resolution of conflicting testimony and evaluation of the evidence's persuasiveness. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

To convict a defendant of second degree assault, a jury must find that the defendant intended "either to create apprehension of bodily harm or to cause bodily harm," and that the victim actually experienced a reasonable apprehension of injury. *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). No bodily injury is required. *Id.* at 710, 712. There are several alternative means of committing second degree assault, including assaulting a person with a deadly weapon or with intent to commit a felony. RCW 9A.36.021(1)(c), (e). A loaded or unloaded firearm is a deadly weapon. RCW 9A.04.110(6).

Thompson relies on Division One's opinion in *In re Personal Restraint of Arntsen*, where after a road rage incident, the defendant approached the victim's car while holding a rifle "without ever pointing the rifle at her," then returned to his own vehicle and left. 25 Wn. App. 2d 102, 117, 522 P.3d 135 (2023). The victim testified that she thought Arntsen meant to do her harm but did not know what kind. *Id.* at 118. Division One reversed Arntsen's conviction for second degree

assault because "the evidence did not sufficiently allow the jury, without speculating, to find" that Arntsen intended to create a fear of bodily injury in the victim, in part because he never pointed the gun at the victim. *Id.* But the Supreme Court recently reversed Division One's decision. *In re Pers. Restraint of Arntsen*, 2 Wn.3d 716, 543 P.3d 821 (2024).

The Supreme Court concluded that a jury could infer that Arnsten intended to make the victim fear injury when he "approached [the victim] with his AK-47 after swerving and nearly colliding with her car and forcing her to an abrupt stop in the middle of the road." *Id.* at 726. And the victim's testimony that she "thought Arntsen must have had the rifle in order to use it, either to shoot her or to harm her in some other way" would support an inference that the victim reasonably feared bodily injury. *Id.* "While Washington courts have often recognized that pointing a gun is sufficient to show specific intent for assault, we have never held that it is necessary." *Id.* at 729.

The instructions in this case explained that an "assault" is "an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury." CP at 103.

It is true that Joseph did not testify, and there was no direct testimony that he reported feeling fear or apprehension that he would be injured. There was also no testimony that Thompson ever pointed a gun at Joseph. But taking the evidence and drawing all reasonable inferences in favor of the State, a rational trier of fact could infer that Thompson's conduct in this case was intended to and did create fear and apprehension that Thompson would also harm Joseph. A reasonable jury could find that Thompson intended to create an apprehension of bodily injury in Joseph when Thompson shot Joseph's wife in front of him after she asked Joseph to open the cash

register. Even though there was no testimony that Thompson pointed the gun at Joseph, Joseph was fully aware that Thompson had a gun, based on his warning to the customer who tried to intervene. And a reasonable jury could find that Joseph's actions of complying with the robbery instead of resisting or tending to his critically injured wife, who had collapsed on the floor in front of him after being shot, showed that he experienced a reasonable apprehension of bodily injury. Joseph was extremely concerned about Soon Ja after the danger had passed, so his actions in the moment of complying with the robbery instead of tending to his fatally injured wife support an inference that Joseph experienced reasonable apprehension of bodily injury.

We hold that sufficient evidence supported Thompson's conviction for second degree assault of Joseph.

V. SENTENCING ISSUES

A. Scrivener's Error

Thompson asserts, and the State concedes, that his judgment and sentence includes the conviction for first degree felony murder of Soon Nam even though the trial court vacated that conviction on double jeopardy grounds. The remedy for a scrivener's error is to remand to the trial court to correct the judgment and sentence. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). We accept the State's concession and remand for the trial court to correct the error.

B. Legal Financial Obligations

Finally, Thompson argues, and the State concedes, that we should remand for the trial court to strike the community custody supervision fees, the DNA collection fee, and the crime victim penalty assessment from Thompson's judgment and sentence. Trial courts may no longer impose community custody supervision fees or the crime victim penalty assessment on indigent

defendants, or the DNA fee on any defendant, and the laws took effect while Thompson's case was still pending on appeal. LAWS OF 2022, ch. 29, § 8(2)(d); LAWS OF 2023, ch. 449, §§ 1(4), 4; *State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023). We accept the State's concession and remand for the trial court to strike the community custody supervision fees, DNA collection fee, and crime victim penalty assessment.

CONCLUSION

We affirm Thompson's convictions. But we accept the State's concessions and remand for the trial court to correct the scrivener's error and strike the community custody supervision fees, DNA collection fee, and crime victim penalty assessment from Thompson's judgment and sentence.

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.

Glasgow, J.

I concur:

Price, J.

VELJACIC, A.C.J. (concurring in part, dissenting in part)—I agree with my colleagues in the majority in nearly all aspects, including agreement with the conclusion in the review of the GR 37 challenge. But I disagree that a deferential standard of review should be applied to GR 37 challenges. GR 37 matters should be reviewed under a de novo standard of 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." *State v. Tesfasilasye*, 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)). De novo review of GR 37 challenges better ensures fidelity to the principles underlying GR 37 and is integral to ensuring justice is done in our courts. As judges, we can only be better by "lean[ing] in to do this hard and necessary work" of "carefully reflecting on our actions." Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 2 (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7].

Veljacic, A.C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

July 03, 2024 - 1:09 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Robbrie Purdell Thompson, Appellant
Superior Court Case Number:	19-1-01652-5

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