NO. 103227-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBBRIE PURDELL THOMPSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Erica Eggertsen
Deputy Prosecuting Attorney
WSB # 40447 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6625

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I. INTRODUCTION

The defendant, Robbrie Thompson, shot and killed Soon Ja Nam during a robbery he committed with his friend Franklin Thuo. The next day, Thompson murdered Thuo to prevent him from talking to police. Thompson's convictions for aggravated murder and other crimes were upheld by Division II on appeal.

Thompson fails to demonstrate a RAP 13.4(b) basis for review. The court of appeals correctly applied de novo review in its assessment of Thompson's GR 37 challenge. The court determined an objective observer could not conclude race or ethnicity was a factor in the State's excusal of the only juror who doubted the passage of time would affect witness memory. Furthermore, the court correctly found the State had not committed prosecutorial misconduct by telling the jurors in opening and closing statement that the events of the case connected witnesses of varied backgrounds.

Thompson's counsel effectively represented him throughout trial. The court of appeals correctly determined that

lack of objection to fleeting testimony about his arrest did not result in prejudice reasonably likely to affect the outcome of trial. Finally, the court of appeals correctly determined that the exclusion of speculative other suspect evidence did not violate Thompson's right to present a defense. The proffered evidence did not link another person to the crime, and Thompson presented the defense that another person killed Thuo. For these reasons, the State respectfully asks this Court to deny Thompson's petition.

II. RESTATEMENT OF THE ISSUES

A. Did the court of appeals correctly determine that no objective observer could view race as a factor in the State's peremptory challenge of a juror who doubted the passage of time would affect witness memory?

B. Did the court of appeals correctly conclude that lack of objection to testimony about Thompson's arrest did not result in prejudice because the evidence was comparatively fleeting in the context of a four-week trial, was not repeated, and there was overwhelming evidence of Thompson's guilt?

C. Did the court of appeals correctly determine that Thompson's right to present a defense was not violated by the trial court's exclusion of speculative other suspect evidence?

D. Did the court of appeals correctly conclude that the State's comments about how the crimes connected a diverse group of people did not constitute race-based prosecutorial misconduct or improperly appeal to the passions and prejudices of the jury when those comments were based on the evidence?

III. STATEMENT OF THE CASE

A jury found beyond a reasonable doubt that Robbrie Thompson committed aggravated murder on two occasions. First, when he shot Soon Ja Nam during a robbery when she turned and ran for help. CP 114, 122. Second, when he executed his coconspirator Franklin Thuo to prevent him from speaking with police. CP 121, 130. Thompson was also convicted of robbery, felony assault, and unlawful possession of a firearm. CP 1-5, 8-12. These convictions were affirmed on appeal. *State v. Thompson*, No. 56625-7-II, 2024 WL 2830591 (Wash. Crt. App. June 4, 2024) (unpublished). Thompson fails to show the court of appeals erred or that review is warranted under RAP 13.4(b).

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A. Thompson Shot Soon Ja Nam During a Robbery and Killed Franklin Thuo to Prevent Him from Speaking to Police

Thompson and Thuo were friends and attended school together. 15RP[1] 1934-35. On April 27, 2019, Thompson and Thuo drove to Puyallup to rob the Handy Corner Market.[2] Shortly before entering the store, they recorded a SnapChat video.[3] The video showed Thuo in the driver's seat and Thompson in the front passenger seat. 8RP 794, 831, 833; Ex. 7. Thuo was dressed in a bright blue sweatshirt and Thompson wore a dark sweatshirt. Ex. 7. The two differed in physical stature; Thompson was both taller and heavier than Thuo. (9/16/21) RP 1317; Ex. 780.

The Snapchat video showed Thompson holding two firearms: a Glock semi-automatic pistol and a .380 auto caliber

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[1] The State refers to the transcripts labeled volumes 1-19 with the volume number. All other transcripts are referred to by date.
[2] (9/08/21) RP 74-75, 99; 8RP 782; (9/09/21) RP 5, 11, 28, 30-31, 35; 8RP 768; (09/21/21) RP 395; 15RP 1938.
[3] (9/08/21) RP 74-75, 99; 8RP 782; (9/09/21) RP 5, 11, 28, 30-31, 35; 8RP 768; (09/21/21) RP 395; 15RP 1938; 14RP 1757-61; 15RP 1988, 1991; 16RP 2066.

Taurus semi-automatic pistol. *Id*. The .380 Taurus is a small firearm, about the size of a person's hand. 14RP 1763. Video later recovered from Thompson's phone showed he possessed the .380 Taurus prior to the robbery.[4]

The Handy Corner Market was owned and operated by Soon Ja and Joseph Nam.[5] The couple's home could be accessed through a curtained passageway behind the store's front counter. (9/09/21) RP 98. The Nams' native language was Korean, though they typically spoke English in the store. (9/09/21) RP 75. When Soon Ja was stressed, she spoke with family members in Korean. (9/09/21) RP 75, 106; 8RP 852, 900. The Nams had recently purchased a new cash register. (9/09/21) RP 106. Soon Ja had trouble opening the register and frequently asked Joseph or their children for help. *Id*.

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[4] 13RP 1619; 15RP 1984-85; 16RP 2059; Ex. 1, 7.
[5] (9/09/21) RP 5, 11, 28, 30-31, 35, 75; 8RP 768; (09/21/21) RP 395.

Soon Ja was at the cash register when Thompson and Thuo entered the store. 8RP 902-05; 9RP 990. When the robbery began, Soon Ja turned to go through the curtain to get her husband. 8RP 905; 9RP 990. Soon Ja asked Joseph to open the cash register before a shot rang out and she dropped to the floor. 9RP 990. Autopsy later revealed that she died from a gunshot wound to the back; the bullet transected her spinal cord and traveled through her lungs before lodging in her chest under her right arm. 11RP 1304-05, 1312-14, 1336.

Joseph went to the front counter and opened the register. 9RP 990. Andrew Mantonya, a longtime customer and friend of the Nams, arrived at the store. (9/09/21) RP 74-75, 77, 95, 106. He entered as Thuo, wearing the bright blue sweatshirt, exited and got into the driver's side of a parked vehicle.[6] Once inside, Mantonya noticed Thompson at the counter. (9/09/21) RP 83. He observed that Thompson was bigger and more muscular than

[6] (9/09/21) RP 80-83, 110; 9RP 997; 10RP 1275-77.

Thuo, consistent with the physical differences between the two. (9/09/21) RP 85; 9RP 998; (9/16/21) RP 1317; Ex. 780.

Mantonya, seeing Thompson's hand in the cash register, tried to intervene. (9/09/21) RP 83, 90-91. Thompson pulled out a small-caliber handgun, which fit into the palm of his hand. (9/09/21) RP 91, 93, 122. He pointed it at Mantonya and said, "what are you going to do about it." (9/09/21) RP 91, 93, 122. After Mantonya put his hands up and turned away, Thompson left the store, and he and Thuo drove away. (9/09/21) RP 94.

The next day, police located the vehicle Thompson and Thuo had driven to the Handy Corner Market. 9RP 1054-60, 1076; 10RP 1238-39; (09/20/21) RP 315. The car was linked to Thuo through a prior traffic stop. *Id*. Thuo contacted Thompson, "panicky" and "freaking out" because the police were looking for him. (09/21/21) RP 403, 415, 417.

Thompson was with his girlfriend Brianna Bennet when he spoke to Thuo about the police investigation. (09/21/21) RP 375, 399-401, 404, 409. Thompson admitted to Bennett that he

and Thuo had committed the robbery and murder. (09/21/21) RP 404, 407, 411-13. Thompson believed Thuo was going to talk to police and told Bennet he "wanted to kill [Thuo] so that he wouldn't snitch on him." (09/21/21) RP 411-12, 415, 425-27. Thompson repeatedly told Bennet he wanted Thuo dead. (09/21/21) RP 425-30. Bennet implored Thompson not to kill Thuo. (09/21/21) RP 429. After leaving Bennett's home, Thompson searched on his phone, "[w]here is the best place to shoot someone?" 13RP 02. He turned off his phone shortly afterwards. 15RP 2007-08.

The following day, police discovered Thuo's body in the tide flats of a Tacoma marina. 9RP 1080-81; 10RP 1160, 1166-67; (09/20/21) RP 232, 321; (09/20/21) RP 319. The medical examiner later determined that Thuo's cause of death was a gunshot wound to the back of the head. 11RP 1329. Soot within the gunshot wound indicated the gun discharged while in contact with Thuo's body, while the lack of soot outside the wound

indicated there was a barrier between the gun and Thuo's head. 11RP 1323, 1325, 1341.

The day after Thuo's body was found, Thompson and Bennet met up at school, where Thompson explained how he had killed Thuo. (09/21/21) RP 439-40. Thompson said they went to the beach to carry out his plan. (09/21/21) RP 447. He told Bennet:

> … that he had a gun in a Ziploc bag and when they got out, he doesn't have earring backs on his earrings. So, he quickly just took his earring out and said that he had lost it. And then when […] Franklin bent down to look for it in the sand, he shot him in the back of his head.

(09/21/21) RP 440-41. Thompson told Bennett he put a plastic bag over the gun to avoid leaving casings on the beach. (09/21/21) RP 445.

Bennet told police that she believed others were present based on Thompson's description of the murder and its aftermath. (9/21/21) RP 440-41. The jury learned that Thompson communicated with others the day Thuo was killed, including

"Shawn" or "sean k."[7] Jurors also learned that police made efforts to locate and speak with individuals named Shawn, Jeremiah, Dinylo, and Mike. 12RP 1410-11. All refused to cooperate with police. *Id*.

Thompson attempted to introduce evidence that a phone associated with "Shawn Kelley" was at some point electronically detected near the marina where Thuo's body was found.[8] The court noted that the jury had seen screen shots of Thompson's communications with individuals other than Thuo prior to the murder. 13RP 1164. But the court concluded,

> …to go beyond that to say Mr. Kelley must have been at the beach where Mr. Franklin was, therefore he's responsible for this, requires a great deal more of a showing in terms of a relationship evidence-wise to the charged crime. … 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.

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[7] *See* (09/21/21) RP 412-23, 422, 457; 13RP 1593-99, 1597-98, 1602; Ex. 1338-1441.
[8] 13RP 1656-61; *see also*, 12RP 1410-33; 13RP 1656-72; 14RP 1785-92; 15RP 1811-14; 16RP 2045, 2051-52.

13RP 1664-65. The evidence was excluded as unsubstantiated other suspect evidence. *Id*.

During the defense case, Thompson attempted to admit electronic communications between himself and others. 14RP 1785-92. The court did not prohibit Thompson from presenting such evidence, but requested an offer of proof so the court could rule on admissibility. 14RP 787; 15RP 1813. Thompson never showed "location information" existing within these materials.

Thompson testified at trial. 15RP 1929. He admitted to participating in the robbery but claimed Thuo shot Soon Ja. 15RP 1938, 1949, 1955. He told the jury he was present when Thuo was killed but that someone else was responsible for his death. 15RP 1966, 1968, 1970, 2016. Outside the presence of the jury, Thompson said he saw and knew who murdered Thuo but would not provide the name. 16RP 2048-49, 2056.

In the middle of trial, the State sought to establish Thompson's ownership of a backpack and phone found at his arrest. 11RP 1367, 1369. The jurors heard that police utilized a

SWAT team to stop and remove Thompson from a vehicle. 11RP 1358-61. A police witness explained that the use of these tactics was based on a "threat matrix" assessment; in Thompson's case the decision was made based on Thompson's "suspected crimes." 11RP 1361. Defense counsel asked the witness if such arrests were common. 11RP 1363-64. The witness said they were not. 11RP 1363-64. The witness explained that the "threat matrix" considers the types of crimes and a person's past history, but in Thompson's case, he "didn't know if Mr. Thompson had any past record or not." 11RP 1363-64. Thompson did not object to any of the testimony.

The court interrupted a second witness who began to again describe Thompson's arrest. 11RP 1367, 1369. The court expressed concerns the information was potentially prejudicial. 11RP 1367, 1369. No further information about the arrest was elicited. 11RP 1372-70. Defense counsel declined the court's offer of a limiting instruction to avoid further highlighting the

evidence. (9/21/21) RP 368. No further discussion of the arrest occurred during testimony or in closing argument.

Law enforcement performed a microscopic examination of the bullets that killed Soon Ja and Thuo. 11RP 1308, 1323; 14RP 1747. The comparison showed the bullets had been fired from the same .380 auto caliber firearm, consistent with the .380 Taurus Thompson possessed. 14RP 1754, 1760-61, 1772. Examination of Thompson's phone showed he was looking for a buyer for the .380 Taurus after Thuo's murder.[9] Police also recovered video footage from the phone showing that Thompson attempted to sell expensive shoes he had taken from Thuo's body at the beach.[10]

B. The State Focused on Seating Jurors Who Could Fairly Assess Witness Credibility

Thompson was tried by a diverse jury. At least five of the 14 seated jurors were identified by the court and parties as

[9] 13RP 1587-88, 1619; 15RP 1984-85; 16RP 2027, 2068, 2070.
[10] (9/08/21) RP 111-12; 8RP 796, 802, 812, 814; 13RP 1587-89, 1610-12, 1617; 15RP 1573, 1972-73, 2025-26.

persons of color. 6RP 707-09. Their ancestry was identified as Native American, African American, Hispanic or mixed race, and Filipino American.[11] 6RP 707-09; CP 104-11. The State focused almost exclusively in jury selection on finding jurors who could fairly evaluate witness testimony. 6RP 599-614, 630-31, 634-44, 647-48. Of particular concern was finding jurors who could fairly evaluate the effect of the two-year gap between the events and the trial. 6RP 691-93.

The State questioned Juror 35 about whether different perspectives and the passage of time might affect a witness's memory and account. RP 600-01. Juror 35 indicated she would be surprised if witnesses had different perspectives about the same event. 6RP 600-01. When asked if she believed "individuals … might have a challenge being able to remember precisely the same events two years later," she answered, "[n]o." 6RP 600-01.

[11] The State uses identifying terms from the record. 6RP 707-09.

The State exercised a peremptory challenge as to Juror 35, and Thompson raised a GR 37 objection. 6RP 690-91. The State was unaware Juror 35 was a person of color. 6RP 690-91. The court found that Juror 35 was "mixed of some origin" and required the State to provide the basis for its strike. 6RP 691, 694. The State told the court it was concerned about potential jurors' ability to fairly assess witness recollections affected by the passage of time, differing backgrounds, prior experience, and personal knowledge. 6RP 691-93. Applying these concerns to Juror 35, the prosecutor said:

> …I did not get the impression that there was the ability to appreciate the differences. This is a case where it's over two years later. I absolutely expect that there are going to be some that do have different recollections, that are going to have faulty memories, are going to have to be refreshed maybe more than the average case. So I'm concerned about someone who does not appreciate -- does not appreciate the life factors or the reasons or the factors that could contribute to that. …

6RP 690-91. After explaining the reasons for the challenge to Juror 35, the State noted that she was the youngest member of the jury panel. 6RP 693.

The court found the State had provided a sufficiently race neutral reason for its strike of Juror 35. 6RP 694-95. The court observed that Juror 35 did not have "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 is critical in a case that is, as pointed out, more than 800 days old and also likely to have witnesses who are testifying, who are of different ages with different life experiences and different memories." 6RP 694-95. The court analyzed the challenge according to GR 37's guidelines, noting that other jurors were asked similar questions, and the State's challenge did not implicate GR 37's presumptively invalid bases. *Id*. In summarizing its ruling, the court stated that it didn't think an objective observer "would" conclude the strike was based on Juror 35's race. *Id*.

C. The State Emphasized the Connections Between the People Affected by Thompson's Crimes

The State in opening and closing focused on how Thompson's crimes affected and connected victims and witnesses who didn't know each other and came from various

walks of life. At that beginning of opening statement, the State told the jury:

> … This is a case about connections, the often invisible connections that bind us all. 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 [sic]; 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. …

(9/8/21) RP 10. The State returned to this theme at the end of opening statement, and at the outset and conclusion of closing argument. (9/8/21) RP 39; 16RP 2095, 2148-49. Thompson did not object to any reference to the cultural backgrounds of the victims and witnesses. (9/8/21) RP 10, 39; 16RP 2095, 2148-49.

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IV. ARGUMENT

A. The Court of Appeals Correctly Determined That No Objective Observer Could View Race as a Factor in the State's Excusal of a Juror Who Doubted the Passage of Time Would Affect Witness Memory

The court of appeals correctly rejected Thompson's GR 37 challenge. *Thompson*, 2024 WL 2830591 at *10-11. The opinion does not conflict with this Court's precedent, a published decision of the court of appeals, or present a significant question of constitutional law warranting review. RAP 13.4(b)(1)-(3).

This Court's precedent was correctly applied to the trial court's denial of Thompson's GR 37 challenge. GR 37 prohibits "the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a); *State v. Jefferson*, 192 Wn.2d 225, 242-43, 429 P.3d 467 (2018). Under GR 37, the court must consider whether an objective observer "could view" race or ethnicity as a factor in the use of a peremptory challenge. *State v. Tesfasilasye*, 200 Wn.2d 345, 357, 518 P.3d 193 (2022); GR 37(e). 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).

The *Tesfasilasye* decision established that de novo review applies to GR 37 challenges in the absence of factual findings or trial court assessments regarding credibility. *Tesfasilasye*, 200 Wn.2d at 356. Accordingly, the court of appeals correctly applied de novo review to Thompson's GR 37 claim. *Thompson*, 2024 WL 2830591 at *9. Such review renders moot any issue regarding the trial court's misstatement of the GR 37 standard as "would" rather than "could." *Tesfasilasye*, 200 Wn.2d at 350; *Thompson*, 2024 WL 2830591 at *11. Application of de novo review showed an objective observer could not view race or ethnicity as a factor in the State's challenge. *Thompson*, 2024 WL 2830591 at *10.

The appellate court accurately observed that Juror 35's answers about memory and perception differed from all other jurors. *Id*. at *11. These answers directly implicated the State's main goal during jury selection, selecting jurors who could fairly

evaluate witness testimony. *Id*. "Juror 35 repeatedly expressed a belief that two years—the same gap between 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." *Id*. In contrast, "all other jurors … were aware that memory and perception can differ among individuals and with the passage of time." *Id*. Fair evaluation of witness testimony is a race-neutral concern, and the State struck the only juror who expressed specific, unusual views. *Id*. Those views implicated her ability to fairly evaluate the testimony of witnesses with different backgrounds or whose memories were affected by the passage of time. The appellate court did not err in affirming the trial court's ruling.

Thompson wrongly attempts to portray the State's challenge and the trial court's analysis as implicating GR 37(h)'s presumptively invalid bases for juror excusal. Petition at 23. But neither the State nor the court concluded that Juror 35's answers were "unintelligent" or "confused." 6RP 691-95. As the appellate

court rightly noted, "juror 35's answers were not unintelligent or confused;" rather, it was her clearly expressed, specific beliefs that were at issue. *Thompson*, 2024 WL 2830591 at *11.

Nor does Thompson show that Juror 35's youth was the primary basis for the State's challenge or a proxy for discrimination. Petition at 22. The State and the court referenced Juror 35's youth as a possible explanatory factor for her unusual beliefs about time and memory. 6RP 691-95. The actual issue was the substance of her unusual beliefs. *Id*. Similarly, Thompson's focus on Juror 35's responses to unrelated questions about cars or inquiries in the juror questionnaire is misplaced. Petition at 21. The basis of the State's challenge and the court's ruling was her unusual beliefs about time and memory, not her answers to unrelated topics. 6RP 691-95.

Thompson contends the court of appeals' discussion of the applicable standards of review conflicts with *Tesfasilasye*. Petition at 24. It does not. The appellate court discussed how *Tesfasilasye* left open possible "further refinement of the

standard of review" to include deference to factual findings, in "a case that squarely presents the question based on a well-developed record." *Id*. (quoting *Tesfasilasye*, 200 Wn.2d at 356). The court of appeals observed that an abuse of discretion analysis could actually aid in detecting bias. *Thompson*, 2024 WL 2830591 at *9-10. This discussion did not contradict *Tesfasilasye*. *Id*. Neither did the court of appeals' conclusion that under either de novo or abuse of discretion, the trial court correctly denied Thompson's GR 37 challenge. *Id*.

Thompson asserts that review should be accepted to clarify or refine the GR 37 standard of review. Petition at 18. But his case does not "squarely present[] the question" of whether a more deferential standard is sometimes appropriate. *See Tesfasilasye*, 200 Wn.2d at 356. The excusal of Juror 35 did not hinge on the trial court's assessment of her "demeanor, body language, voice inflections, [or] other nuances." *Thompson*, 2024 WL 2830591 at *9. A decision on whether courts should apply

abuse of discretion to review factual findings more appropriately takes place in a case where such findings occurred.

Thompson also wrongly contends the decision conflicts with *State v. Lahman*, 17 Wn. App. 2d 925, 488 P.3d 881 (2021). The prosecutor in *Lahman* challenged a 23-year-old juror with an Asian surname because he was young and lacked experience with domestic violence. *Lahman*, 17 Wn. App. 2d at 928. The juror was not questioned about domestic violence. *Id*. Other jurors who lacked similar experience were seated on the jury. *Id*. at 928, 936. In this context, the State's focus on the jurors' youth and "lack of life experiences," "left open the possibility that the prosecution … relied on a stereotype," specifically, that Asian individuals focus on academics to the detriment of interpersonal skills. *Id*. at 937.

The court of appeals correctly determined that *Lahman* is inapposite. *Thompson*, 2024 WL 2830591 at *11. In contrast to *Lahman*, Juror 35 was questioned about the basis for the State's challenge and her answers were completely unique among

potential jurors. *Id*. The State's specific concern arose from the content of her answers, not vague assertions about her age or life experiences. *Id*. Thus, unlike in *Lahman*, age was not potentially a proxy for another, discriminatory basis for removal. *Id*.

The court of appeals' analysis of Thompson's GR 37 challenge involved a straightforward application of this Court's precedent to the facts. Thompson fails to show a basis for review.

B. The Court of Appeals Correctly Concluded That Fleeting Testimony about Thompson's Arrest Did Not Affect the Outcome of Trial

The court of appeals correctly determined that Thompson failed to show prejudicial deficient performance regarding counsel's decisions to refrain from objection and decline a limiting instruction. *Thompson*, 2024 WL 2830591 at *12-13. The correct legal standard was applied to the facts in determining there was no reasonable probability the arrest evidence undermined confidence in the verdict. Thompson does not show a significant question of constitutional law warranting review.

To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that counsel's representation was deficient; and (2) that the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The court of appeals denied Thompson's ineffective assistance claim based on lack of prejudice without determining whether counsel performed deficiently. *Thompson*, 2024 WL 2830591 at *12.

Thompson wrongly contends the court erred in its analysis of prejudice by "fail[ing] to appreciate" that lacking confidence in the outcome establishes prejudice. Petition at 30. Prejudice exists when there is a "reasonable probability" that but for counsel's deficient performance, the outcome would have been different. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The court of appeals applied this standard, correctly recognizing that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*,

2024 WL 2830591 at *12 (quoting *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 36, 296 P.3d 872 (2013)). No legal error occurred.

Thompson essentially argues that the appellate court's application of the correct rule to the facts resulted in the wrong conclusion. Contrary to Thompson's contention, the opinion shows the court conducted a careful analysis. *Thompson*, 2024 WL 2830591 at *12. The court recognized the potential prejudicial effect of the arrest evidence. *Id*. It agreed with Thompson that the evidence was "irrelevant and unnecessarily emphasized Thompson's perceived dangerousness." *Id*. The court, however, weighed this "comparatively fleeting" testimony with the "overwhelming evidence that Thompson committed the murders, robbery, and assaults." *Id*.

The court of appeals accurately concluded that the evidence of Thompson's guilt was "overwhelming." *Id*. Thompson acknowledged in closing argument that he was guilty of felony murder, robbery, and unlawful possession of a firearm. *Id*. There was ample evidence he personally shot both Soon Ja

and Thuo based on Mantonya's observations, Thompson's statements and confession to Bennet, and Thompson's control of the murder weapon. *Id*. The court's conclusion that the brief and unrepeated information about the arrest was not sufficient to undermine confidence in the outcome was supported by its careful analysis of the full factual picture of the case.

Thompson erroneously characterizes the fleeting information about his arrest evidence as propensity evidence. Petition at 30-31. Propensity evidence is that which "prove[s] the character of a person in order to show action in conformity therewith." ER 404(b). In Thompson's case, there was no evidence that could be used for propensity. Jurors learned that in general, a "threat matrix" briefing can include criminal history. 11RP 1361-64. The witness who attended the briefing in Thompson's case testified that he did not know if Thompson had any prior history, strongly suggesting there was none. *Id*. This witness also said that the decision to use a SWAT team for the arrest was based on Thompson's "suspected crimes." *Id*.

Thompson's contention the jurors must have used the absence of information about past criminal history to conclude he was a violent criminal is unsupported.

Furthermore, any prejudice associated with the details of Thompson's arrest was mitigated by the nature of the case. The jury was aware that Thompson's suspected crimes included two firearm-facilitated murders in less than 48 hours, assault, and robbery. That police used protective measures during the arrest did not suggest that Thompson's personal characteristics or history factored into police decision making. Rather, jurors would reasonably infer such arrests occur any time a person is suspected of recently executing two people with a firearm.

The court of appeals correctly determined that Thompson was not prejudiced by counsel's lack of objection or decision to decline a limiting instruction with respect to evidence of Thompson's arrest. *Thompson*, 2024 WL 2830591 at *12. The fleeting evidence about Thompson's arrest within the entire context of the case did not "undermine confidence in the

outcome." *Yates*, 177 Wn.2d at 36. Application of the correct rule to the facts of Thompson's case does not present a significant question of constitutional law warranting review.

C. The Court of Appeals Correctly Determined that Thompson's Right to Present a Defense was Not Violated by Exclusion of Speculative Other Suspect Evidence

The court of appeals correctly found that exclusion of speculative other suspect evidence did not violate Thompson's right to present a defense. *Thompson*, 2024 WL 2830591 at *13-14. Thompson does not establish a significant question of constitutional law warranting review.

The fundamental due process right to present a defense includes the right to offer testimony, compel the presence of witnesses, and cross-examine. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). It does not provide "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

This Court has held that other suspect evidence is admissible when it establishes a reasonable doubt as to the defendant's guilt. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). There must be "some combination of facts or circumstances [] point[ing] to a nonspeculative link between the other suspect and the charged crime." *Id*. In contrast, "[o]ther suspect evidence that establishes only [] suspicion is inadmissible." *Id*. at 380. Such evidence is properly excluded as lacking relevance. *Id*. at 378-79. A ruling excluding other suspect evidence is evidentiary and reviewed for abuse of discretion. *Id*. at 377 n. 2.

The other suspect evidence Thompson sought to admit created only suspicion that another person could be responsible for Thuo's murder. *Thompson*, 2024 WL 2830591 at *14. The excluded electronic data showed that a phone associated with "Shawn Kelley" was at some point near the marina where Thuo's body was discovered. 13RP 1656-61; *Thompson*, 2024 WL 2830591 at *14. The jury heard evidence from Bennet and

Thompson that unnamed other individuals were present when Thuo was killed. (9/21/21) RP 440; 15RP 1970. Thompson told the jury someone else shot Thuo; he told the court he knew who Thuo's killer was but would not provide the name. 16RP 2048-49, 2056. Viewed in context, the excluded vague data point does not create a reasonable doubt as to Thompson's guilt. *Franklin*, 180 Wn.2d at 381.

Completely absent was any information establishing Thompson's relationship with Kelley, that Kelley was present when Thuo was killed, or that Kelley had the opportunity, motive, or means to kill Thuo. "Evidence establishing nothing more than suspicion that another person might have committed the crime [is] inadmissible." *Franklin*, 180 Wn.2d at 381. The appellate correctly found that Thompson failed to establish a nonspeculative link between the phone data, another person, and Thuo's murder. *Thompson*, 2024 WL 2830591 at *14. The trial court did not abuse its discretion in excluding the evidence, and

the presentation of Thompson's defense, that another person killed Thuo, was not compromised.

Thompson wrongly asserts that his case is analogous to *State v. Ortuno-Perez*, 196 Wn. App. 771, 385 P.3d 218 (2016). Petition at 36. The State charged Ortuno-Perez with murder based on a deadly shooting. *Ortuno-Perez*, 196 Wn. App. at 774. Ortuno-Perez claimed that a named person at the murder scene, who was similarly armed and had a motive to shoot the victim, was the perpetrator. *Id*. at 775-76, 785. The trial court excluded the evidence. *Id*. The appellate court reversed, finding the circumstantial evidence established a "logical connection" between another suspect and the crime. *Id*. at 790.

No similar circumstantial evidence created a "logical connection" between unanchored phone data and Thuo's murder. Unlike in *Ortuno-Perez*, Thompson did not name the other suspect. There was no evidence showing that Kelley was present when Thuo was killed. No evidence showed any reason why

Kelley might be involved. No evidence showed motive or that Kelley was armed.

A detective's vague statement outside the presence of the jury that police thought "Dinylo" and "Shawn" "may have been involved," did not establish anything more than suspicion. 12RP 1429. Bennet's testimony that she thought "Jeremiah" and "Mikey" might have been with Thompson was similarly speculative. 3RP 440. None of this evidence created anything more than suspicion that Kelley was involved in the crime.

The court of appeals correctly applied this Court's precedent in determining the phone data was properly excluded in the trial court's discretion. *Thompson*, 2024 WL 2830591 at *14. Thompson's right to present a defense did not include the right to present inadmissible evidence. *Maupin*, 128 Wn.2d at 924-25. The exclusion did not affect Thompson's ability to present the defense that he was not Thuo's killer. Thompson does not establish a basis for review.

D. The Court of Appeals Correctly Determined That the State's Comments About How the Crimes Connected People from Different Walks of Life Was Not an Improper Appeal to Racial Bias or Sympathies

The court of appeals correctly determined that the State's brief comments about relevant witness backgrounds during opening and closing argument did not constitute misconduct. *Thompson*, 2024 WL 2830591 at *14-15. Thompson fails to show the decision conflicts with this Court's precedent or presents a significant question of constitutional law.

The court of appeals correctly concluded that the heightened standard for misconduct involving racial bias did not apply to the State's remarks. *See State v. Zamora*, 199 Wn.2d 698, 709, 512 P.3d 512 (2022); *Thompson*, 2024 WL 2830591 at *15. Per se prejudicial race-based misconduct occurs only "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." *State v. Bagby*, 200 Wn.2d 777, 788-89, 522 P.3d 982 (2023) (emphasis in original).

The State's brief remarks about how the crimes connected victims and witnesses from varied backgrounds did not undermine Thompson's credibility or the presumption of innocence. *See Bagby*, 200 Wn.2d at 788-89. As Thompson acknowledged, the comments did not appeal to racial prejudice. *Thompson*, 2024 WL 2830591 at *15. None of the remarks referred to Thompson or implicated racial stereotypes. *Id*.

Furthermore, the remarks about witness ethnicity were connected to relevant evidence. *Thompson*, 2024 WL 2830591 at *15. Reference to race or ethnicity is appropriate when relevant within the context of a particular trial. *In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 834, 408 P.3d 675 (2018). Relevant witness background information is admissible. *See*, *e.g.*, *State v. Brown*, 132 Wn.2d 529, 579, 940 P.2d 546 (1997).

In Thompson's case, witness background information was relevant to juror evaluation of the evidence. Jurors learned that customers observed a language barrier when communicating with the Nams, and that Soon Ja spoke in Korean when

frustrated. 8RP 852, 900; (9/09/21) RP 75, 106. Soon Ja was shot in the back when she turned to her husband for help during a stressful robbery at gunpoint. 9RP 990; 11RP 1304, 1314. Jurors could reasonably infer Thompson failed to recognize Soon Ja was complying in the robbery because she was speaking in Korean, and he shot her to prevent her from contacting police. *Thompson*, 2024 WL 2830591 at *15.

Jurors also learned that Thuo's cousin, who testified about Thuo's recent habits and his actions the day of the robbery, had just immigrated to the United States from Kenya a few months before the charged events. (9/8/21) RP 89. This background information was relevant to the witness's relationship with Thuo and his personal knowledge.

Though less relevant than the Nams' or Thuos' backgrounds, the reference to Mantonya's ethnicity did not implicate racial prejudice or undermine Thompson's presumption of innocence. *Thompson*, 2024 WL 2830591 at *15. In sum, the State's brief comments about how the events

connected individuals of varied backgrounds were related to the evidence and did not involve racial prejudice. The court of appeals properly concluded that the heightened race-based prosecutorial misconduct standard did not apply. *Thompson*, 2024 WL 2830591 at *14-15.

The court of appeals also correctly determined that the State's remarks about witness backgrounds did not improperly appeal to the "passions and prejudices" of the jurors under the non-race based prosecutorial misconduct assessment. *Thompson*, 2024 WL 2830591 at *15. Thompson did not object to the State's comments. Thus, Thompson waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The court of appeals correctly concluded that the State's remarks were not flagrant and ill-intentioned when they were based on the evidence and relevant to the State's theory of the case. *Thompson*, 2024 WL 2830591 at *15.

Thompson argued that the State's comments both appealed to racial sympathies and improperly encouraged the jury to hold him accountable. *See Thompson*, 2024 WL 2830591 at *15; Petition at 41. Acknowledging that crimes connected witnesses of varied backgrounds is not an improper appeal to sympathy. The crimes themselves, not the background of the witnesses, arouse natural indignation. *See State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). In the words of the appellate court, "[i]n 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." *See Thompson*, 2024 WL 2830591 at *15. These facts, not the State's comments, were likely to arouse natural indignation. The court of appeals correctly concluded that the prosecutor's brief statements "referring to people form many different walks of life were not improper or prejudicial." *Thompson*, 2024 WL 2830591 at *15.

Furthermore, given the brevity of the remarks in the larger context of the arguments, Thompson cannot show that an instruction would not have cured any prejudice. For the same reason, and because there was overwhelming evidence of his guilt, Thompson cannot show counsel was ineffective for declining to object. Thompson fails to show that review is necessary to address a significant constitutional question or correct a misapplication of this Court's precedent.

V. CONCLUSION

Thompson fails to show a basis for review under RAP 13.4(b). For the foregoing reasons, the State respectfully asks this Court to deny Thompson's petition for review.

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This document contains 6,515 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of August, 2024.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Erica Eggertsen
ERICA EGGERTSEN
WSB #40447/OID #91121
Pierce County Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma WA 98402
Telephone: (253) 798-6625
erica.eggertsen@piercecountywa.gov

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8/21/2024	*s/ Kimberly Hale*
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PIERCE COUNTY PROSECUTING ATTORNEY

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