Supreme Court No. ____
(COA No. 85037-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATHEW JAGGER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mathew Jagger asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Jagger appealed his conviction for attempted second degree rape of a child. The Court of Appeals affirmed. *State v. Jagger*, No. 85037-7-I, 2024 WL 4025915 (Wash. Ct. App. Sept. 3, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Where a trial court erroneously denies a peremptory strike, this Court has held automatic reversal is required. Since then, the United States Supreme Court rejected the automatic reversal rule under federal law, but held states could require automatic reversal as a matter of state law. In this case, the trial court erroneously denied Mr. Jagger's peremptory strike. The Court of Appeals applied the harmless error standard and affirmed, but one judge wrote separately to ask this Court to decide whether the automatic reversal standard should still

apply. The proper remedy for the erroneous denial of a peremptory strike is an issue of substantial public interest. RAP 13.4(b).

2. The federal and state constitutions require the State to prove all elements of an offense with sufficient evidence. For the crime of attempt, the State must establish intent and a substantial step. In this case, the State only presented evidence Mr. Jagger agreed to meet a fictitious person in a public place. Even if there was potential for future sexual contact, this was insufficient to establish attempted second degree rape of a child. The Court of Appeals decision affirming Mr. Jagger's conviction conflicts with published decisions and involves his constitutional rights. This Court should accept review. RAP 13.4(b).

3. The federal and state constitutions require the State to prove a person knowingly, voluntarily, and intelligently waived

their *Miranda*[1] rights. A valid waiver depends on the totality of the circumstances, including a person's cognitive disabilities. In this case, the police verbally recited *Miranda* warnings. Even though Mr. Jagger's cognitive disabilities substantially impaired his capacity to understand those verbal warnings, the Court of Appeals affirmed. This Court should accept review of this constitutional issue. RAP 13.4(b).

4. The corpus delicti rule requires proof of a crime independent of a person's statements to law enforcement. At its core, the rule is intended to protect against government coercion. In this case, Mr. Jagger argued the corpus delicti rule should apply to require the State to present evidence independent of his statements to a police officer who was pretending to be someone else to bait him into committing a crime. The Court of Appeals disagreed. This Court should

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (2005).

accept review of this issue of substantial public interest. RAP 13.4(b).

D. STATEMENT OF THE CASE

As part of his job, Sergeant Christopher Breault creates fake Facebook profiles in an attempt to lure people into committing crimes. 10/12/22RP 415.

Sergeant Breault created a Facebook page with the name Sara Flir. 10/12/22RP 419, 422. He searched social networking sites using the terms "methamphetamine" and "women" to find pictures for his fake profile. *Id.* at 491. The profile did not list the age he was pretending to be and only had photos of a woman who was at least 18 years old. *Id.* at 421.

Sergeant Breault did not refer to being underage in his fake profile. He had about 800 "friends," and they were all adults. *Id.* at 496.

Mr. Jagger has learning disabilities. 10/4/22RP 214, CP 510-11. He processes information slowly and struggles to retrieve information from long-term memory. CP 511. His

verbal, nonverbal, and quantitative reasoning and problem-solving skills are in the bottom 0.3 percentile. 10/4/22RP 225, CP 511. His ability to register the basic meaning of important information, like his rights when arrested, is significantly impaired. *Id.*

The State alleged Mr. Jagger sent Sergeant Breault a friend request. 10/12/22 RP 429. They messaged on Facebook and by text. *Id.* at 432. Sergeant Breault did not immediately give his fake age as 13, even though he testified it was important to establish age early on. *Id.* 440, 498.

Mr. Jagger doubted Sergeant Breault was who he pretended to be. He asked for a picture of an identification card and a photo with the fake name. 10/12/22RP 463-64. He expressed frustration about whether "Sara" was real. *Id.*

Mr. Jagger continued to express doubt. After numerous requests, Sergeant Breault finally agreed to a phone call, and Officer Shannon Ro spoke with Mr. Jagger. 10/12/22RP 475.

Officer Ro, used her normal voice and did not pretend to be younger. 10/13/22RP 543.

After the phone call, Sergeant Breault asked Mr. Jagger to meet at Kohl's in the middle of the day. 10/12/22RP 466. The sergeant said he was going shopping and Mr. Jagger could meet him at the store. *Id*. Mr. Jagger asked to meet in a more public space in the center of the mall. *Id*. at 467. Sergeant Breault insisted on meeting at Kohl's. *Id*. at 467-68. There was some discussion of sexual contact, but no indication of when it would occur. *Id*. at 470. The sergeant told Mr. Jagger to have a condom with him. *Id*.

Officers arrested Mr. Jagger as he walked towards Kohl's. 10/12/22RP at 522. Mr. Jagger did not have condoms with him, but they found some in his van. *Id*. at 523. His dog was also in his van. *Id*. at 525. Mr. Jagger lived in his van when he could not stay somewhere else. 10/13/22RP 551.

Mr. Jagger made several statements to the police. In a CrR 3.5 hearing, Mr. Jagger challenged the statements'

admissibility, alleging his cognitive abilities prevented him from validly waiving his *Miranda* rights. CP 506. Mr. Jagger alleged Sergeant Breault recited his *Miranda* rights while other officers were arresting him. CP 508. Mr. Jagger appeared nervous and asked to speak with the sergeant privately. *Id.* He talked to the officers again at the police station. CP 509.

The officers testified consistently with Mr. Jagger's allegations. Sergeant Breault stated he provided verbal *Miranda* warnings. 9/28/22RP 114. Another officer said he verbally warned Mr. Jagger before taking his statement at the police station. *Id.* at 142. The officers agreed Mr. Jagger appeared confused when they arrested him. *Id.* at 152. Nobody provided Mr. Jagger a written *Miranda* waiver form. *Id.* at 158.

Dr. Robert Beattey, a forensic psychologist and an expert in cognitive issues, also testified at the hearing. CP 519, 10/4/22RP 202. He examined Mr. Jagger and found his ability to waive his *Miranda* rights was "substantially impaired" based on his cognitive disabilities. *Id.* at 214. He believed Mr. Jagger

could waive his *Miranda* rights only if they were in writing and if he were given time to read and understand them. *Id.* at 235.

The court denied Mr. Jagger's CrR 3.5 motion. CP 302. The court found Mr. Jagger's head motion and his affirmative answers at the police station were sufficient for a waiver. CP 304. While the court found Dr. Beattey credible, it rejected his findings regarding Mr. Jagger's ability to waive his *Miranda* rights. CP 304.

During jury selection, the State challenged Mr. Jagger's decision to exercise a peremptory strike on Juror 17. 10/12/22RP 379-80. The court found purposeful gender discrimination and denied the strike. *Id.* at 370.

Before trial, Mr. Jagger moved to dismiss the second degree rape of a child charge based on the State's failure to establish Mr. Jagger made a substantial step towards the crime. CP 298, 9/22/22RP 48. The court denied his motion. *Id.* at 58. Mr. Jagger renewed the motion at the close of the State's case, which the court also denied. *Id.* at 627, 634.

The jury found Mr. Jagger guilty of attempted second degree rape of a child and communication with a minor for immoral purposes via electronic communication. CP 277-78, 10/18/22 RP 708. The Court of Appeals affirmed. App. at 1.

E. ARGUMENT

1. The proper standard for a remedy following a trial court's erroneous denial of a peremptory strike is an issue of substantial public interest that requires this Court's guidance.

This case presents the question of what is the appropriate standard for a remedy where the trial court erroneously denies a peremptory strike and that juror serves. During jury selection, Mr. Jagger used his first five peremptory strikes to remove two men and three women. When he attempted to use his sixth peremptory strike against Juror 17, a woman, the State raised a *Batson*[2] objection, alleging purposeful gender discrimination. The court sustained the objection, based on its mistaken belief

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

that Mr. Jagger had struck four women and one man before moving to strike Juror 17.

The trial court erred when it denied Mr. Jagger's peremptory strike. There was no prima facie showing of purposeful discrimination, and Mr. Jagger provided gender-neutral reasons to explain his strike. Without directly addressing the trial court's error, the Court of Appeals applied the harmless error standard to "conclude that any error was harmless." App. at 15.

But one judge wrote a separate concurrence, urging Washington to follow other states and apply "a rule requiring per se reversal where a trial court erroneously denies a peremptory juror challenge and the objectionable juror deliberated." App. at 19. That judge called upon this Court to address this issue: "Which rule should govern in Washington courts is an issue of substantial public interest that ultimately should be determined by our Supreme Court." App. at 19.

The judge pointed to this Court's decision in *State v. Vreen*, which also involved a trial court's erroneous denial of a peremptory strike. 143 Wn.2d 923, 927, 26 P.3d 236 (2001). This Court rejected the harmless error standard, holding, "the erroneous denial of a right of peremptory challenge—is simply not amenable to harmless-error analysis." *Id.* at 930 (quoting *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc)). Instead, such an error requires automatic reversal: "erroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates[.]" *Id.* at 932.

Automatic reversal is appropriate in this context because it is virtually impossible to demonstrate prejudice following an erroneous denial of a peremptory strike. *See State v. Booth*, 22 Wn. App. 2d 565, 585, 510 P.3d 1025 (2022) (noting the harmless error standard is "difficult to meet because it requires proving prejudice from the presence of a competent, unbiased juror"). In short, the harmless error standard means there is no

remedy for a court wrongfully depriving a person of their right to use peremptory strikes.

After *Vreen*, the United States Supreme Court rejected the automatic reversal standard "as a matter of federal law." *Rivera v. Illinois*, 556 U.S. 148, 160, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). But it held, "States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*." *Id.* at 162.

As the concurring judge in this case pointed out, "many other state courts have maintained a per se reversal rule in the wake of *Rivera*." App. at 21 (Michigan, Iowa, New York); *see People v. Yarbrough*, 511 Mich. 252, 269 (2023) (Massachusetts, Minnesota, and Montana).

Without any direction from this Court post-*Rivera*, the Court of Appeals has reverted back to the harmless error standard. *See Booth*, 22 Wn. App. 2d 565; *State v. Hillman*, 24 Wn. App. 2d 185, 519 P.3d 593 (2022); *State v. Hale*, 28 Wn. App. 2d 619, 537 P.3d 707 (2023). This Court has not had an

opportunity to review those decisions as no petitions for review were filed in those cases on this issue. *See* Corrected Petition for Review, *State v. Hale*, No. 102595-5 (Nov. 30, 2023) (only seeking review of a prosecutorial misconduct claim); *see also In re Pers. Restraint of Meredith*, 191 Wn.2d 300, 311-12, 422 P.3d 248 (2018) (declining to address the automatic reversal rule post-*Rivera* because that issue was not before this Court).

But this Court has already held that automatic reversal is the correct remedy. *Vreen*, 143 Wn.2d at 932. In doing so, this Court relied on the Ninth Circuit's reasoning about why the harmless error standard is "unworkable" in this context:

> To apply a harmless-error analysis in this context would be to misapprehend the very nature of peremptory challenges. The peremptory challenge is used precisely when there is no identifiable basis on which to challenge a particular juror for cause. . . . Although a litigant may suspect that a potential juror harbors an unarticulated bias or hostility, that litigant would be unable to demonstrate that bias or hostility to an appellate court reviewing for harmless error. Similarly, the govermnent would be hard-pressed to bear its burden of proving that the seating of a peremptorily challenged juror did not harm the defendant.

Id. at 930 (quoting *Annigoni*, 96 F.3d at 1144-45). While that Ninth Circuit decision was based on federal law, its reasoning regarding the impracticality of the harmless error standard in this context still holds true.

This Court should affirm its ruling in *Vreen*. Indeed, other states have applied this same reasoning to uphold automatic reversal after *Rivera*. For example, the Iowa Supreme Court noted the impossibility to ever show prejudice "would leave the defendant without a remedy." *State v. Mootz*, 808 N.W.2d 207, 225 (2012). Likewise, the Michigan Supreme Court held: "The appropriate remedy for an error is determined not by the source of the legal principle, but by the impact of the error and its redressability." *Yarbrough*, 511 Mich. at 268. "The rationale underlying an automatic-reversal rule in this context erroneous denial of a peremptory challenge is precisely the same as one that drives the structural-error doctrine—the

difficulty or impossibility of determining prejudice to the defendant as a result of the error." *Id.* (cleaned up).

While the erroneous denial of a peremptory strike may not have constitutional implications, it impacts a party's right to exercise peremptory challenges, which is ensured by statute and court rule. RCW 4.44.130; CrR 6.4(e) (criminal); CR 47 (civil). This Court cannot permit arbitrary application of the rules governing that right with no recourse. Indeed, this Court has recognized that the right to proper application of the rules is more important than the right to peremptory strikes at all: "Wrongly denying an attempted use of a peremptory challenge where the objectionable juror then sits on the jury that convicts the defendant is a more significant error than allowing one less peremptory challenge than the court rules provide." *Meredith*, 191 Wn.2d at 311.

The United States Supreme Court invited states to independently adopt per se reversal as a matter of state law. *Rivera*, 556 U.S. at 162. Washington has a basis to do so, as the

legislature and this Court have provided all litigants the right to peremptory challenges by statute and court rule.

Washington has also extended the rules governing peremptory strikes beyond federal law, which also justifies a different remedy under state law. For example, Washington independently extended *Batson* to include gender discrimination on state constitutional grounds before the United States Supreme Court did. *State v. Burch*, 65 Wn. App. 828, 836-37, 830 P.2d 357 (1992); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). This Court also enacted heightened standards to address racial discrimination. GR 37; *State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018). As such, there is a sufficient basis to determine what is the appropriate remedy for an erroneous denial of a peremptory strike in Washington.

This Court's per se reversal rule should still apply as a matter of state law. It is true that this Court issued its decision in *Vreen* prior to adopting GR 37. Relatedly, the Court of

Appeals in *Booth* was concerned with automatic reversal being "inapposite to GR 37." *Booth*, 22 Wn. App. 2d at 584. While GR 37 is critical to determine whether a particular ruling was erroneous in the first place, it should not dictate the remedy.

"The express purpose of GR 37 is 'to eliminate the unfair exclusion of potential jurors based on race or ethnicity.'" *Id.* at 583-84 (quoting GR 37(g)(a)). Therefore, GR 37 applies the heightened "objective observer" test: "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(d); *see* GR 37(f) (defining "objective observer").

If a court erroneously denied a peremptory strike under GR 37, that means an objective observer *could not* view race as a factor. This is a very high showing, especially because the reviewing court will defer to the trial court's findings and credibility determinations that support its conclusion that an objective observer could view race as a factor. *See State v.*

Tesfasilasye, 200 Wn.2d 345, 357, 518 P.3d 193 (2022) (explaining why the GR 37 workgroup adopted the higher "could view" standard instead of "would view"); *see Hale*, 28 Wn. App. 2d at 628-29 (citing *Tesfasilasye*, 200 Wn.2d at 356). Indeed, the trial court is required to make this record. GR 37(e). Contrary to the *Booth* Court's concerns, the objective standard under GR 37 does not allow "good-faith misapplication." *Booth*, 22 Wn. App. at 584 (quoting *Rivera*, 556 U.S. at 160).

Similarly, under *Batson*, if a court erroneously denied a peremptory strike, that means there was *no* purposeful gender discrimination. Again, the reviewing court will defer to the trial court's findings that there was purposeful discrimination. In this context, the objective standard under GR 37 does not drive the reviewing court's analysis. Instead, a "one-time, good-faith misapplication" of the *Batson* standard may suffice to conclude the ruling was erroneous. *Booth*, 22 Wn. App. at 584 (quoting *Rivera*, 556 U.S. at 160).

Under either analysis, because of their differing standards, high thresholds, and deference to the trial court's findings, reviewing courts will likely conclude the trial court erred only in rare instances.

Then only after the reviewing court concludes the trial court erred would the case be subject to automatic reversal. As this Court held, any other standard would be "unworkable." *Vreen*, 143 Wn.2d at 930. And as the concurring judge in this case pointed out, per se reversal "recognizes the critical importance of peremptory challenges, which are guaranteed by RCW 4.44.130 and 'allow[] the parties to eliminate those jurors perceived as harboring subtle biases with regard to the case, which were not elicited on voir dire or which do not establish legal cause for challenge." App. at 22 (quoting *Mootz*, 808 N.W.2d at 225 (citations omitted)).

Further, in a case such as this where the trial court's ruling was plainly based on a factual misunderstanding that is abundantly clear in the record and has nothing to do with race,

there is even less concern of undermining the purposes of GR 37. At least in this particular circumstance, which is truly a "one-time, good-faith misapplication" of the law, automatic reversal should apply.

This case presents this Court with the opportunity to address whether to maintain the per se reversal rule it adopted in *Vreen* after *Rivera*. This is a novel issue that is of substantial public interest, and a Court of Appeals judge has asked for this Court's guidance. This Court should grant review. RAP 13.4(b)(4).

2. The State failed to prove the crime of attempt, and the Court of Appeals decision affirming Mr. Jagger's conviction conflicts with precedent and implicates Mr. Jagger's constitutional rights.

To convict a person of an attempted crime, the State must establish intent and a substantial step towards committing the crime. *State v. Wilson*, 1 Wn. App. 2d 73, 83, 404 P.3d 76 (2017). "The intent required is the intent to accomplish the criminal result of the base crime." *State v. Johnson*, 173 Wn.2d

895, 899, 270 P.3d 591 (2012). "A substantial step is an act that is 'strongly corroborative' of the actor's criminal purpose." *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). "Mere preparation to commit a crime is not an attempt." *Wilson*, 1 Wn. App. 2d at 83.

In this case, there was no plan to engage in any sexual acts when Mr. Jagger agreed to meet a police officer pretending to be a 13-year-old girl in the middle of the day in a public place. This was an initial meeting: their plan was to shop and "hang out." 10/12/22 RP 466, 470. Therefore, the State failed to prove Mr. Jagger took a substantial step or that he had the requisite intent to commit second degree rape of a child.

The Court of Appeals disagreed. It relied on three published Court of Appeals decisions but failed to acknowledge the critical distinctions between those cases and Mr. Jagger's case. App. at 8-9. First, "Sara" and Mr. Jagger planned to meet in a public place, as opposed to meeting in a hotel room where sexual activity could happen. *Cf. State v. Sivins*, 138 Wn. App.

52, 64, 155 P.3d 982 (2007); *State v. Townsend*, 105 Wn. App. 622, 631, 20 P.3d 1027 (2001). In fact, Mr. Jagger had suggested an even more public meeting spot than Kohl's. 10/12/22RP 467-68. Secondly, "Sara" and Mr. Jagger planned to go shopping. While there was some general talk of sex, there was no specific plan to engage in any specific acts that day when they met at the mall. *Cf. State v. Wilson*, 158 Wn. App. 305, 317, 242 P.3d 19 (2010).

The facts in this case are more similar to *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994). In that case, the parties were still negotiating, which was insufficient to prove attempt. *Id.* at 338. Likewise, Mr. Jagger and "Sara" were still getting to know each other. They planned to meet to see how they got along. And while there was some talk of potentially having sex in his car at some point, they never agreed they would have sex during this initial encounter. 10/12/22 RP 470; CP 571.

But the Court of Appeals held *Grundy* was not applicable because that case was decided when the crime of attempt

required an "overt act." App. at 7-8. While an "overt act" is different than a "substantial step," even under *Grundy*, mere preparation is not enough. 76 Wn. App. at 337 ("The overt act must be more than preparation[.]"). In this case, Mr. Jagger going to meet "Sara" for the first time at the mall to see if she was real was mere preparation.

The State did not prove intent or a substantial step. The Court of Appeals decision affirming his conviction conflicts with these published Court of Appeals decisions and also implicates Mr. Jagger's constitutional rights. This Court should grant review. RAP 13.4(2), (3).

3. Mr. Jagger has cognitive deficits that inhibit his ability to understand verbal information. The Court of Appeals decision concluding he validly waived his *Miranda* rights after they were spoken to him undermines his important constitutional rights.

The federal and state constitutions protect against involuntary statements to police, requiring, at a minimum, that a person knowingly, voluntarily, and intelligently waived their

Miranda rights before those statements may be admitted at trial. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

The State bears the burden to prove a person knowingly, intelligently, and voluntarily waived their *Miranda* rights. *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). In determining whether a statement is voluntary, the court must consider a person's mental disabilities. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). A valid waiver only occurs when the person "actually does understand the significance and consequences of a particular decision." *Godinez v. Moran*, 509 U.S. 389, 401, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

The court must also consider whether the advisement reasonably conveys the person's constitutional rights and the impact of waiving those rights. *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). The court must consider the totality of the circumstances, including the person's mental capacity, use of a written waiver, whether the

rights were individually and repeatedly explained to the suspect, and whether the suspect had prior experience with the criminal legal system. *United States v. Crews*, 502 F.3d 1130, 1140 (9th Cir. 2007); *Aten*, 130 Wn.2d at 664.

In this case, Mr. Jagger has cognitive disorders that make it virtually impossible for him to comprehend oral warnings. 10/4/22RP 214. Dr. Beatty evaluated Mr. Jagger and found his intellectual functioning fell in the bottom 10th percentile. CP 527. Mr. Jagger's cognitive disabilities place him in the bottom 0.1 percent overall. 11/4/22RP 216, CP 528.

Dr. Beattey found Mr. Jagger's ability to understand auditory information was extremely low. CP 527-28. But he had an average ability to understand written information. CP 527. Because the police spoke the *Miranda* warnings and did not provide any written warnings, Dr. Beattey concluded Mr. Jagger could not understand his rights. 11/4/22 RP 214, CP 530. Dr. Beattey also found Mr. Jagger had a "seriously erroneous" understanding of his rights. CP 532.

The Court of Appeals disagreed, concluding Mr. Jagger validly waived his *Miranda* rights. App. at 12-13. It deferred to the trial court, which completely dismissed Dr. Beatty's conclusions. App. at 13. In doing so, the Court of Appeals failed to consider whether Mr. Jagger's cognitive disabilities and inability to understand verbal warnings rendered his waiver involuntary. *See Aten*, 130 Wn.2d at 664. This Court should accept review because this case presents an important constitutional question. RAP 13.4(b)(3).

4. This Court should also accept review to decide whether the corpus delicti doctrine should apply to cases such as this, where law enforcement lured someone into committing a crime and the conviction rests entirely on those statements to a police officer pretending to be someone else.

The purpose of the corpus delicti rule is to prevent unjust convictions based on false confessions to the govermnent. *Smith v. United States*, 348 U.S. 147, 152-53, 75 S. Ct. 194, 99 L. Ed. 192 (1954). Under that rule, a defendant's incriminating statement alone is not enough to prove a crime occurred. *State*

v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2007) (citations omitted)). Instead, the State must present independent evidence. *Id.* "[T]he evidence must independently corroborate or confirm a defendant's incriminating statement." *Id.* Without independent proof a crime occurred, the defendant's statement is inadmissible. *Aten*, 130 Wn.2d at 656.

At its core, the corpus delicti rule is concerned with the power imbalance between the accused and law enforcement. It is based in skepticism and distrust of a person's statements to law enforcement, which "may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law," or given by a person who has mental disabilities. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1125 (1986). The rule is intended to prevent convictions based on evidence "secured by means of police coercion or abuse." *Id.* at 577.

The concerns underlying the corpus delicti rule are inherent in this case. The Court of Appeals disagreed. It

concluded Mr. Jagger's statements to a police officer who was pretending to be someone else were not a traditional confession and were part of the crime. App. at 14. It relied on two Court of Appeals decisions, but neither case involved the particular circumstances here. App. at 14 (citing *State v. Dyson*, 91 Wn. App. 761, 959 P.2d 1138 (1988); *State v. Pietrzak*, 110 Wn. App. 670, 41 P.3d 1240 (2002)).

But police coercion and abuse are paramount in a case such as this, where the government intentionally creates circumstances to lure a person—often an intellectually impaired or otherwise vulnerable person—into committing a crime, and there is no actual victim. *See* Michael Winerip, *Convicted of Sex Crimes, but With No Victims*, The New York Times Magazine (updated Sept. 28, 2021).[3] In Washington, the police have ensnared hundreds of people by these traps. *Id.*

[3] Available at: https://www.nytimes.com/2020/08/26/magazine/sex-offender-operation-net-nanny.html

These "net nanny" cases trigger the same rationales underlying the corpus delicti rule. Here, the police created an elaborate scheme to try and bait Mr. Jagger, who has cognitive disabilities and low intellectual functioning, into potentially committing a crime. Then, the State prosecuted Mr. Jagger using his statements to a police officer pretending to be fake person. The corpus delicti rule should apply here to ensure the reliability of his statements—the sole evidence used to convict him. This Court should accept review of this issue of substantial public interest. RAP 13.4(b)(4).

F. CONCLUSION

Based on the preceding, Mr. Jagger respectfully requests that review be granted pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 4,805 words, and complies with RAP 18.17.

Respectfully submitted this 19th day of September 2024.

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APPENDIX

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATHEW JOHN JAGGER, Appellant.	No. 85037-7-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Mathew Jagger appeals his conviction, arguing the State presented insufficient evidence he had the intent to commit and took a substantial step towards committing second degree rape of a child. We hold that the evidence was sufficient under the current "substantial step" standard to establish attempt, and that a former standard used to define the elements of attempt is not applicable to the attempted second degree rape of a child charge advanced here based on the "substantial step" standard. Jagger additionally argues the trial court erred in finding he waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), admitting Jagger's statements in violation of the corpus delicti rule, finding Jagger used a peremptory challenge in violation of Batson v. Kentucky, 476 U.S. 79, 88-89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and imposing the victim penalty assessment. Except as to the victim penalty assessment, these arguments lack merit. We affirm Jagger's conviction and remand to strike the victim penalty assessment.

I

In 2021, Lynnwood police officer Christopher Breault worked in the special operations section conducting internet related investigations. Posing as a 13 year old girl named "Sara," Officer Breault created a Facebook profile to "start investigations on communications, specifically for communications for immoral purposes." In May 2021, "Sara" received a friend request from a profile labeled "Mat Jagger." On May 7, 2021, Jagger sent a Facebook message to "Sara." "Sara" replied on June 18, 2021.

> ["Sara":] hi
>
> [Jagger:] Hay beautiful how are you doing hun
> ??
>
> ["Sara":] I am ok and u
>
> [Jagger:] I'm ok to just really bored
>
> ["Sara":] That's no good
>
> [Jagger:] I know hun and I didn't have anything to do Sunday around 11:45am and I don't know what to do when being bored again hun
>
> ["Sara":] I got ya
> Not sure what I am up to
>
> [Jagger:] Would you like to meet up on Sunday around 11:45 am hun

The following day, Jagger sent "Sara" his cell phone number. "Sara" sent Jagger a text message and the two began communicating regularly to make arrangements to meet. During their conversations, Jagger sent "Sara" two photos of himself,

which Officer Breault used to identify the sender as Jagger. After a few days of texting, "Sara" told Jagger her age:

> ["Sara":] Can I tel u a secret
>
> [Jagger:] Yes hun
> Yes you can hun
> ??? 🤔
>
> ["Sara":] Like I told u I like older guys and u are really good looking
>
> [Jagger:] Yes I know hun
>
> ["Sara":] I just want to let U know I'm 13 but still want to hang out with u do all that stuff. I just want make sure your good wit that
>
> [Jagger:] Yes I am hun 😘

The next day, Jagger messaged "Sara":

> [Jagger:] If you were able to run away with me right now would you hun
> ???
> Yes or no
>
> ["Sara":] Where wuld we go
> What about your gfriend
>
> [Jagger:] Any where we want to
> You are my girlfriend now hun
> Does your mom and sister know that you like to be with older men
>
> ["Sara":] No
>
> [Jagger:] Just wondering
>
> ["Sara":] What shuld I tel them about running away with u
>
> [Jagger:] Nothing if you want
>
> ["Sara":] Do u think that's best babe
>
> [Jagger:] No I think that they would call the cops and say that I kidnapped you and I'm raping you

> Because of my age
> I think that we should when you are 17 or 18 years old

"Sara" asked more about Jagger's girlfriend:

> ["Sara":] How long have you 2 been together
>
> [Jagger:] About a year
> And she knew how old you are to
>
> ["Sara":] Wht did she say
>
> [Jagger:] She said as long as that it what she wants
> That we can be together
>
> ["Sara":] Does she knw everything
>
> [Jagger:] Yes hun
> And she doesn't care if we are together in a relationship
> Is that ok with you hun
>
> ["Sara":] Will u still date her
>
> [Jagger:] I'm with you but I will still be with her tell you turn 18 but we are in a relationship and she understands that we have to wait untilyou are 18 to Move out with me

The two made plans to meet at the mall and discussed what they should do together:

> [Jagger:] Would you like to have sex with me in the back of my van hun??
> If not that's ok
>
> ["Sara":] I wuld
>
> [Jagger:] We can do that if you want to
>
> ["Sara":] K can u bring a condom and then we can talk about using it or not.
> I just a little nervous 😬. . . .
>
> [Jagger:] K
> I know hun

After discussion back and forth about Jagger's suggestion of meeting at a coffee shop, Jagger confirmed where the two should meet:

> [Jagger:] So where do you want to meet me tomorrow hun
>
> . . . .
>
> ["Sara":] I have to get something at Kohl's so I will be there do u want to meet in the pking lot
>
> [Jagger:] Where at in the parking ??
>
> ["Sara":] Near the front doors

On July 7, 2021, Sergeant Michael Atwood arrived at the parking lot where Jagger's vehicle was seen, and parked between the Kohl's entrance and Jagger's vehicle. As Jagger walked towards the Kohl's entrance, Sergeant Atwood arrested him and retrieved his cell phone. Jagger consented to a search of his van, where officers found a brown paper bag containing condoms.

A jury found Jagger guilty of attempted second degree rape of a child and communication with a minor for immoral purposes via electronic communications. Jagger appeals.

II

Jagger argues the State presented insufficient evidence he had the intent to commit and took a substantial step towards committing second degree rape of a child. We disagree.

Due process requires the State to prove beyond a reasonable doubt every element of a crime. State v. Rodriguez, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). In reviewing a claim for insufficient evidence, we consider " 'whether, after

viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.' " State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis added) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The sufficiency of the evidence is a question of constitutional law that we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Attempt consists of two elements: intent and a substantial step. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). To convict Jagger of attempted second degree rape of a child, the State had to prove beyond a reasonable doubt that Jagger intended to have sexual intercourse and took a substantial step toward having sexual intercourse with a child under the age of 14.[1] RCW 9A.44.076(1); RCW 9A.28.020. A "substantial step" is an act that is " 'strongly corroborative' " of the actor's criminal purpose. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012) (quoting State v. Luther, 157 Wn.2d 63 78, 134 P.3d 205 (2006)). Mere preparation to commit a crime is not a substantial step. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). But "[a]ny

[1] The State also had to prove that Jagger was at least 36 months older than the other person. RCW 9A.44.076(1). Jagger does not challenge on appeal that there was sufficient evidence he was at least 36 months older than age 13.

slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000).

Jagger engaged in sexually explicit messaging with a person claiming to be a 13 year old girl and arranged to have sex with her in the back of his van. The content of their messaging over the two months preceding Jagger's arrest included his encouraging "Sara" to keep their relationship secret from her family, his suggesting clandestine meetings, his stating they were already "in a relationship," his soliciting a long term relationship in place of his existing relationship with his girlfriend, his acknowledgement that others could accuse him of "raping" her because of his "age," and his express inquiry about whether the supposed 13 year old wished to have sex. Viewed in the light most favorable to the State, these are individually somewhat suggestive of intent to have a sexual relationship, and taken together are clearly so. Jagger drove to the agreed upon meeting place in his van and began walking towards Kohl's before he was apprehended. Consistent with "Sara's" request, Jagger had condoms in his vehicle. Viewing the evidence in the light most favorable to the State, the jury could find beyond a reasonable doubt that Jagger intended to have sexual intercourse with a 13 year old and took a substantial step toward the commission of the crime of second degree rape of a child.

Jagger relies on State v. Grundy, 76 Wn. App. 335, 336, 886 P.2d 208 (1994), to argue his actions did not amount to a substantial step. Grundy held negotiation about purchasing cocaine did not progress far enough to support a

conviction for attempted possession. Id. at 337. Grundy was decided under a different statutory definition for attempt. Under an earlier statute, former RCW 9.01.070 (1909), now repealed, the elements of attempt were intent and an act " 'tending but failing to accomplish' " the crime, also referred to as an overt act. State v. Gay, 4 Wn. App. 834, 838-39, 841, 486 P.2d 341 (1971). An "overt act" meant a "direct, ineffectual act done towards commission of a crime, and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt." State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). In 1975, the legislature adopted the "substantial step" language of our current statute. LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.28.020 (adopting the language currently in RCW 9A.28.020). "The standard of a substantial step will not be identical to the standard of an overt act." State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978). Instead, the definition of substantial step "which is the same as that employed by the Model Penal Code, normally 'will broaden the scope of attempt liability.' " State v. Jackson, 62 Wn. App. 53, 56, 813 P.2d 156 (1991) (quoting Model Penal Code § 5.01 cmt. 6(a), at 329 (1985)). Because it is based on a different standard defining attempt, in addition to its being distinguishable, Grundy is not applicable to the charge of attempted second degree rape of a child advanced against Jagger based on the "substantial step" standard.

Courts rejected sufficiency challenges in cases similar to this one in Townsend, State v. Wilson, 158 Wn. App. 305, 318, 242 P.3d 19 (2010), and State v. Sivins, 138 Wn. App. 52, 64, 155 P.3d 982 (2007). In Townsend, the court

concluded the defendant's Internet messages to someone he thought was a 13 year old girl and his going to an arranged meeting at a motel room to have sex were sufficiently corroborative of his intent to have sexual intercourse with a child. 147 Wn.2d at 670-71, 680. In Wilson, Wilson engaged in an e-mail exchange with "Jackie" and arranged to have " 'oral and full sex' " with a supposed 13 year old girl. 158 Wn. App. at 317. After agreeing on a price, Wilson exchanged photographs with "Jackie," obtained "Jackie's" address, and drove to the agreed upon meeting place with the $300 he agreed to pay, all of which sufficiently corroborated his intent to commit the crime of second degree rape of a child. Id. at 318. In Sivins, the evidence was sufficient to convict the defendant of attempted second degree rape of a child where the defendant engaged in sexual communications with a person whom he believed to be 13 years old, stated he wanted to meet the girl and would have sex with her, and drove several hours and rented a motel room in her hometown. 138 Wn. App. at 64.

The same circumstances supporting sufficiency are evidenced here. Jagger engaged in messaged conversation with "Sara," discussed intent to have sex expressly, agreed on a meeting place, and Jagger went there as planned. The evidence is sufficient to support a determination that Jagger intended to have sexual intercourse with a 13 year old girl and that he took a substantial step toward committing second degree rape of a child.

III

Jagger argues the trial court erred in finding he made a knowing, intelligent, and voluntary waiver of his right to remain silent, claiming he lacked the capacity to waive his right. We disagree.

A

The trial court conducted a CrR 3.5 hearing to determine the admissibility of Jagger's statements to police officers.

Officer Breault testified he advised Jagger of his Miranda rights using a department issued card, and thought Jagger said he understood his rights. Officer Breault testified that Jagger "shook his head" in an affirmative yes when asked if he understood. Jagger told Officer Breault that he wanted to speak to the officer away from everyone else. After moving away from the other officers, Officer Breault and Jagger engaged in a conversation centered around Jagger and his explanations of what happened and justification for why he was at Kohl's. Officer Breault testified, "It was clear to me that he understood what was going on, but the information when we were having a conversation was a lot of justifying or coming up with information to say why he was there."

Detective George Bucholtz testified regarding his interview with Jagger. After Jagger was transported to the Lynnwood police department, Detective Bucholtz and Detective Russ Sattarov took Jagger to an interview room and removed his handcuffs. Detective Bucholtz read Jagger his Miranda rights from a preprinted sheet, which mirrored the department issued card. Detective Bucholtz testified that Jagger indicated he understood his rights and wanted to speak with

detectives. Detective Bucholtz testified Jagger appeared to understand the questions, but "he was being evasive in his answers."

Dr. Robert Beattey, an expert in forensic psychology, testified on Jagger's behalf and opined that Jagger was unable to make a knowing, intelligent, and voluntary waiver of his Miranda rights due to his limited intellectual capacity. Dr. Beattey testified Jagger "has okay verbal comprehension, but his processing speed and working memory are significantly impaired" and "his ability to take in verbal information and then use it for decision-making is substantially impaired." During his interview with Dr. Beattey, Jagger stated he did not request to speak with an attorney because he did not think he did anything wrong. Jagger told Dr. Beattey, " 'I've heard [Miranda warnings] said different ways, I kind of blur it out. There's no point in listening to them.' " Dr. Beattey testified Jagger likely heard the words as a blur because he lacked the ability to process information as quickly as he could read information.

The trial court found Dr. Beattey "credible in relation to what his determinations were in this case," but

> [w]hile Dr. Beatt[e]y concludes that testing reveals that the information was likely a blur because he lacked capacity to process any verbal information as quickly as the warnings were in the case, the Court does not find this persuasive based on [Jagger's] response to other questions of Dr. Beatt[e]y surrounding Miranda, his immediate indication when advised why he was arrested to provide an explanation for his behavior, his acknowledgment at the scene that he understood his rights, the questions and responses thereto in the recorded interview, his previous contacts with law enforcement, and Dr. Beatt[e]y's own caution that only a few tests he used in his assessment were specifically designed to be used in forensic context.

(Formatting added.) The trial court held that Jagger knowingly, intelligently, and voluntarily waived his Miranda rights when speaking to Officer Breault in the Kohl's parking lot and during his interview at the Lynnwood police department.

B

The right not to incriminate oneself arises from the Fifth Amendment to the United States Constitution, as well as Article I, section 9 of the Washington Constitution. State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). To protect this right, a suspect must receive Miranda warnings when facing custodial interrogation by a state agent. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). The State bears the burden to show that the suspect knowingly, intelligently, and voluntarily waived their Miranda rights. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). "A defendant's mental disability and use of drugs at the time of a confession are [factors to be] considered, but those factors do not necessarily render a confession involuntary." State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Rather, courts look to the totality of the circumstances to determine whether a confession is voluntary. Id. at 663-64.

The trial court issued findings of fact and conclusions of law in its order denying Jagger's motion to suppress. We review the trial court's findings of fact for substantial evidence. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the assertion. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The trial court's legal

conclusions regarding the adequacy of the Miranda warnings are issues of law that we review de novo. State v. Mayer, 184 Wn.2d 548, 555, 362 P.3d 745 (2015).

Officer Breault testified Jagger "shook his head" in an affirmative yes when asked if he understood his rights, and requested to speak to Officer Breault away from others to explain what happened and justify why he was in the Kohl's parking lot. Similarly, Detective Bucholtz testified Jagger stated he understood his rights and wanted to speak with the detective. See State v. Cushing, 68 Wn. App. 388, 394-95, 842 P.2d 1035 (1993) (a trial court may consider a defendant's demeanor, comprehension of events, memory of the crime, and participation in the interview as evidence of voluntariness). Though Dr. Beattey testified Jagger's capacity to waive his Miranda rights was substantially impaired, the trial court found his testimony unpersuasive. A trial court's factual findings arising out of contradictory testimony are entitled to great weight, even where fundamental constitutional rights are implicated. State v. Davis, 34 Wn. App. 546, 552, 662 P.2d 78 (1983). Substantial evidence supports the trial court's findings that Jagger's statements were voluntarily made. The trial court did not err in finding Jagger's statements admissible.

IV

Jagger argues the trial court erred by admitting his statements to the police in violation of the corpus delicti rule. We disagree.

"Corpus delicti" means the "body of the crime" and requires the State to prove both a criminal act and a resulting injury or loss. See Aten, 130 Wn.2d at 655. Attempt crimes do not require a showing of injury or loss. State v. Smith,

115 Wn.2d 775, 781, 801 P.2d 975 (1990). Our review is de novo. State v. Green, 182 Wn. App. 133, 143, 328 P.3d 988 (2014).

Jagger's argument assumes the incriminating statements he made to "Sara" were confessions. However, the statements constituted part of the crime. We have refused to apply the corpus delicti rule to exclude statements made before or during the commission of a crime. See State v. Dyson, 91 Wn. App. 761, 763-64, 959 P.2d 1138 (1988); see also State v. Pietrzak, 110 Wn. App. 670, 681-82, 41 P.3d 1240 (2002). In Dyson, we rejected the argument that the defendant's statements covering negotiation and agreement for an act of prostitution were inadmissible because they were not corroborated by independent proof. 91 Wn. App. at 763. The court defined "confession" as an "expression of guilt as to a past act" and held the corpus delicti rule did not apply because Dyson's statements were "made as part of the crime itself," and were not a confession to a completed crime. Id. at 763-64. In Pietrzak, the State presented evidence that Pietrzak told people he disliked the victim and wanted to kill her. 110 Wn. App. at 675-76. After Pietrzak made these statements, the victim disappeared. Id. at 672, 675. We held Pietrzak's incriminating statements made before the crime were not confessions and therefore did not require independent corroboration. Id. at 680-81.

Jagger's statements to "Sara" were part of the crimes of attempted second degree rape of a child and communication with a minor for immoral purposes via electronic communications. The corpus delicti rule does not apply.

V

Jagger argues the trial court erred in finding he committed a Batson violation when he used a peremptory challenge on juror 17. However, we do not decide whether the court erred in denying the peremptory challenge under Batson, because we conclude that any error was harmless.

The State objected to Jagger's peremptory challenge against juror 17 under Batson. The State said, "[T]he sixth peremptory is now the fifth woman to be challenged by Defense Counsel" and the State believed it had a "duty to raise it given that it appears that women are being struck primarily." Jagger stated he challenged juror 17 because

> [s]he gave very kind of vanilla answers to questions; we couldn't get a good read on her. Being unable to get a good read on a juror and the client feeling uncomfortable with that juror is enough that we felt another woman could take her place in the box. Gender was not a part of our analysis.

The trial court asked for further elaboration on the answers of juror 17 that Jagger disliked or did not feel comfortable with. Jagger stated,

> I thought her answers were very vanilla, kind of standard, sure, I'll do whatever the law is, and that always makes one kind of nervous because especially after the bias presentation, a lot of jurors are very candid about having been thoughtful about this, so even if they come to a place where they can be fair, there is some nuance and thought to it.
>
> I didn't get that depth at all from 17 when I was questioning. She answered burden questions from the State in a way that suggested that she would comply with the law, felt it was very important if someone wanted to follow the law, very important to take them [in]to account. They came across like the standard Law and Order kind of law enforcement answers.
>
> She is involved in real estate and seemed to come from a very different place, seemed to come from a place of privileged place in society. She was dressed to the nines, her hair immaculately done.

> She had a handbag that looked like it was quite expensive. It was my impression that some facts of our case might not be well received by someone so removed from poverty, particularly with pictures of the van and the fact that [Jagger] was homeless and living in his van I felt like would make him very unrelatable in a way that would hurt her reception of our case.

The trial court sustained the objection. The trial court rejected Jagger's gender neutral explanation, stating, "I don't know that I can extend reliance on conduct or appearance . . . to satisfy a gender-neutral reason in this case," indicating it did not believe the explanation supported a peremptory challenge. It is clear the trial court did not believe the observed circumstances of jury selection supported the reasons given, implicating the principle that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). Jagger did not challenge juror 17 for cause, and juror 17 was seated on the jury.

In Rivera v. Illinois, the United States Supreme Court held that "[i]f a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." 556 U.S. 148, 157, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). In Washington, because "there is no right to a peremptory challenge under either the United States Constitution or the Washington Constitution, . . . the erroneous loss of a peremptory challenge does not undermine the fundamental judicial process," and therefore does not constitute per se reversible error. State v. Booth, 22 Wn. App. 2d 565, 581-82, 510 P.3d 1025 (2022). Rather, we analyze the erroneous denial of a peremptory challenge under the nonconstitutional harmless error standard. Id. at 584. Under this

standard, an "error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Jagger argues juror 17's presence on the jury materially affected the outcome of trial because her answers indicated a "lack of thoughtfulness" about the jury's role. However, Jagger's claim is based on speculation. Juror 17 agreed she could follow the law even if she disagreed with the law given to her, and stated she would not automatically find for the State if the defense did not put on evidence because "[i]t's still all evidence. You have to look at it to see if it is without a reasonable doubt. If there's any doubt, you can't really do much with that. I think which party provides it isn't as important." There was no basis on which to challenge juror 17 for cause and Jagger did not attempt to make such a challenge. "A juror who was not subject to a for-cause challenge is necessarily competent and unbiased." State v. Hillman, 24 Wn. App. 2d 185, 195, 519 P.3d 593 (2022). "[E]ven if the defense can show they should have been allowed their peremptory strike, this is not the type of error that undermines the validity of the final verdict or that warrants reversal of the final judgment." Id. Because Jagger does not show that juror 17's presence on the jury materially affected the outcome of the trial, any error in sustaining the Batson challenge was harmless. Jagger's inability to meet the harmless error standard under Booth and Hillman ends the analysis of his claim of error in the trial court's Batson ruling.

VI

Jagger argues the trial court erroneously imposed the victim penalty assessment. The State concedes remand is appropriate to strike the fee. We accept the State's concession, and remand accordingly.

We affirm Jagger's conviction and remand for the trial court to strike the victim penalty assessment.

Birk, J.

WE CONCUR:

Feldman, J.

Bowman, J.

FELDMAN, J. (concurring) — While I agree with the majority's reasoning and holding, I write separately to identify an alternative to the majority's application of harmless error review to the trial court's denial of Jagger's peremptory strike. Numerous courts have instead applied a rule requiring per se reversal where a trial court erroneously denies a peremptory juror challenge and the objectionable juror deliberated. Because harmless error review is the prevailing rule in the Washington Court of Appeals, I concur on that point. But both rules—harmless error review and per se reversal—have distinct advantages and strong support. Which rule should govern in Washington courts is an issue of substantial public interest that ultimately should be determined by our Supreme Court.

Our Supreme Court addressed these competing rules in *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001). The trial court in *Vreen* erroneously denied a peremptory juror challenge and the objectionable juror deliberated. *Id.* at 927. Division three of our court held that denial of the peremptory strike was erroneous and per se reversible. *Id.* at 927. Our Supreme Court granted review and affirmed. *Id.* at 927, 932. Rejecting the State's argument that the court should abandon its per se reversal rule because it predated the development of harmless error review, the court concluded that harmless error review is unworkable where a trial court erroneously allows a juror to sit despite an attempted peremptory challenge. *Id.* at 930-31. The court explained: "short of taping jury deliberations, there is no way of knowing exactly how the error affected the outcome, if at all." *Id.* at 931. The

court thus held that "erroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates." *Id.* at 932.

Applying federal law, in contrast, the U.S. Supreme Court has rejected the argument that the "deprivation of a state-provided peremptory challenge requires reversal as a matter of federal law." *Rivera v. Illinois*, 556 U.S. 148, 160, 129 S. Ct. 1446 (2009). The Court in *Rivera* explained that the United States Constitution does not guarantee peremptory challenges, so "the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Id.* at 157. But the Court also emphasized that peremptory challenges are "a creature of statute" and that states therefore "retain discretion to design and implement their own systems." *Id.* at 157-58 (quoting *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273 (1988)). Emphasizing the point, the Court added: "States are free to decide, *as a matter of state law*, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*." *Id.* at 162 (first emphasis added).

Because *Rivera* is not controlling in cases where the right to a peremptory challenge is established by state law, state courts have diverged in the wake of *Rivera*. According to the Michigan Supreme Court, a majority of states have adopted harmless error analysis, as the U.S. Supreme Court did in *Rivera*. *People v. Yarbrough*, 511 Mich. 252, 284 n.33 (2023) (quoting *People v. Roldan*, 353 P.3d 387, 395-96 (Colo. App. 2011)) (Bernard, J. concurring)) (noting that "at least twenty-nine states and the United States do not employ the remedy of automatic reversal, but, instead, require a defendant to show prejudice—namely, that a biased juror actually sat on the jury—in order to gain appellate relief"). Our court

did so in *State v. Booth*, 22 Wn. App. 2d 565, 583, 510 P.3d 1025 (2022). The *Booth* court noted that *Vreen* relied heavily on federal cases, most notably *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc)), which were "unanimously abrogated" in *Rivera*. *Id.* The court then held, "we analyze the error using the nonconstitutional harmless error standard." *Id.* at 584. Division three of our court adopted a similar rule in *State v. Hillman*, 24 Wn. App. 2d 185, 519 P.3d 593 (2022), and division two followed in *State v. Hale*, 28 Wn. App. 2d 619, 537 P.3d 707 (2023).

But many other state courts have maintained a per se reversal rule in the wake of *Rivera*. For example, the Michigan Supreme Court observed in *Yarbrough* that the statutory right to peremptory challenges "would be virtually immunized from appellate protection by the application of the harmless-error standard" and therefore held "that automatic reversal is the appropriate remedy for the erroneous denial of a defendant's peremptory challenge when the error is preserved and no curative action is taken." 511 Mich. at 268. In *State v. Mootz*, 808 N.W.2d 207, 225 (Iowa 2012), the Iowa Supreme Court echoed our Supreme Court's recognition in *Vreen* that the erroneous denial of a peremptory strike "is not amenable to harmless error analysis because of the difficulty in showing actual prejudice." *Id.* The court also observed that "[a]n automatic reversal rule will help ensure a district court will not deprive criminal defendants of their right to peremptory challenges." *Id.* at 226. It therefore retained the per se reversal rule. *Id.* In *People v. Hecker*, 15 N.Y.3d 625 (2010), the court similarly emphasized "[t]hough not a trial tool of constitutional magnitude, peremptory challenges are a

mainstay in a litigant's strategic arsenal" and a "privilege of the accused," which is protected by statute. *Id.* at 661 (quoting *People v. Luciano*, 10 N.Y.3d 499, 502 (2008)). Like the Iowa Supreme Court in *Mootz*, the court in *Hecker* expressly rejected the argument that state courts should adopt harmless error review merely because the U.S. Supreme Court did so in *Rivera*. *Id.* at 661-62; *Mootz*, 808 N.W.2d at 225-26. The court instead concluded, "we look to our precedents and hold that [a trial court's erroneous denial of a peremptory challenge] under New York law mandates automatic reversal." *Heckler*, 15 N.Y.3d at 661.

These competing rules—harmless error review and per se reversal—also have distinct advantages. In support of its holding, the court in *Booth* noted that harmless error review advances the goal of GR 37, which is "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37 (a). The court explained that "parties and courts would be 'dissuaded' from bringing or granting GR 37 motions if we 'h[e]ld that a one-time, good-faith misapplication' of GR 37 automatically requires retrial." *Booth*, 22 Wn. App. 2d at 584 (citing *Rivera*, 556 U.S. at 160). The per se reversal rule, in contrast, recognizes the critical importance of peremptory challenges, which are guaranteed by RCW 4.44.130 and "allow[] the parties to 'eliminate those jurors perceived as harboring subtle biases with regard to the case, which were not elicited on voir dire or which do not establish legal cause for challenge.'" *Mootz*, 808 N.W.2d 225 (quoting *Commonwealth v. Hampton*, 928 N.E.2d 917, 927 (Mass. 2010) (citation and internal quotation marks omitted)). The per se reversal rule thus enhances both the actual and perceived fairness of a criminal proceeding by providing meaningful

relief to an accused where the trial court erroneously denied a peremptory juror challenge and the objectionable juror deliberated. Whether to retain the per se reversal rule in the wake of *Rivera* is and remains an issue of substantial public interest that ultimately should be determined by our Supreme Court.

With these observations, I respectfully concur.

Feldman, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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Date: September 19, 2024

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