NO. 103824-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NIGEL SINCLAIR HOGAN,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Nigel Hogan was convicted of murder for fatally shooting a young man in Seattle in 2015. During jury selection, Hogan's attorney objected under GR 37 to the State's exercise of a peremptory challenge. However, the only basis for the GR 37 objection was that the prospective juror was transgender, which is plainly outside the scope of GR 37. The trial court overruled the objection because: (1) an objective observer could not conclude that the challenge was exercised on the basis of gender identity; (2) it was not apparent to the trial court that the juror actually *was* transgender; and (3) the trial court agreed with the State that the juror was having difficulty answering questions during voir dire.

In the Court of Appeals, Hogan argued that saying the words "GR 37" is sufficient to preserve all possible claims on appeal, whether stated on the record or not, and thus, bases other than gender identity supported the

objection. Hogan further argued that because transgender people experience discrimination based on their gender identity, they are particularly aware of other forms of discrimination, and thus peremptory challenges against transgender individuals fall within the ambit of GR 37. In the alternative, Hogan argued that an enhanced *Batson*[1] test for racial discrimination should extend to gender identity.

Although it is undisputed that transgender people suffer discrimination based on their gender identity and gender expression in general, Hogan's arguments in the Court of Appeals suffered from an obvious fatal flaw: the record does not establish that the prospective juror *was* transgender. In fact, the trial court expressly found that the juror's gender identity was not apparent, and Hogan's

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

attorney did not press the matter further or make an objection on any other basis.

Now, in his petition for review, Hogan focuses on general statements in the juror's questionnaire about criminal justice issues, extrapolates from those general statements that they are opinions about race, and argues that GR 37 should prevent excusal of any juror who makes virtually any critical statement about the justice system, no matter how generalized those statements may be. But GR 37 is intended to end racial discrimination in jury selection, not to prevent excusal of all jurors of any race who express the not-uncommon opinion that the justice system can be unfair. No matter how Hogan frames his arguments, the Court of Appeals correctly held that Hogan's GR 37 claim was neither preserved nor supported by the record.

This Court should deny review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b). Hogan's claims do not meet these criteria.

C. ISSUES PRESENTED

1. Should this Court deny review of Hogan's claim that merely speaking the words "GR 37" preserves all possible GR 37-related claims, even where the record

does not support the only basis stated in the trial court, i.e., that the prospective juror was transgender?

2. Should this Court deny review of Hogan's claim that a heightened *Batson* standard should apply to gender identity when the record does not support a conclusion that the prospective juror was transgender, or indeed, any conclusion regarding the juror's gender?

3. Should this Court deny review of Hogan's claim that the Court of Appeals should have accepted a brief that was not authorized by the Rules of Appellate Procedure?

4. Should this Court deny review of Hogan's claim of evidentiary error that is subject to the deferential abuse-of-discretion standard?

5. Should this Court deny review of Hogan's claim of purported error in a charging document that has already been rejected by this Court?

D. STATEMENT OF THE CASE

Nigel Hogan was charged with second-degree murder and first-degree assault, both with firearm enhancements, for fatally shooting Jerome Jackson and seriously injuring Paul Carter III in October 2015.[2] CP 1-2. The jury found Hogan guilty of second-degree murder[3] but could not reach unanimity on the first-degree assault charge. CP 160-63, 317-19. The trial court imposed a standard-range sentence of 222 months on the murder charge. CP 306-10.

During jury selection, the State exercised its third peremptory challenge to strike prospective Juror 40. 1RP 925. The defense objected, stating as follows:

> And defense would like to raise a GR 37 argument to that. This individual is one of the

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[2] For a detailed description of these crimes, *see* Brief of Respondent, No. 84796-1-I, at 3-8.

[3] The jury also found Hogan guilty of first-degree manslaughter; that charge was vacated to avoid double jeopardy. CP 315-16.

> only trans persons on the jury. In the entire panel.

1RP 925. This is the only record defense counsel made regarding the objection; nothing further was stated. The only information in the record regarding the juror's gender identity was the response "prefer not to answer" on a questionnaire.[4] Ex. 104; 1RP 925. The juror self-identified as "Caucasian." Ex. 104.

The State argued that defense counsel was making an unfounded assumption as to the juror's gender identity based only on the juror's appearance. 1RP 925-26. In addition, the State noted that the juror was very uncomfortable discussing their political views in front of the other jurors (although those views were shared by many other jurors), expressed concern that the juror would have difficulty expressing their opinions during

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[4] The other options were "Female," "Male," and "Non-binary." Ex. 104.

deliberations, and argued that there was no possibility that an objective person would believe the State was striking the juror "based on an outside possibility that they were transgender." 1RP 925-26.

In overruling defense counsel's GR 37 objection, the trial court agreed that there was no basis upon which to conclude that the juror was transgender and that it was not apparent to the court that the juror was transgender. The court also confirmed that the State's observations about the juror's difficulty answering questions were correct. 1RP 926-27. Defense counsel made no further arguments and provided no other basis for objecting to the peremptory challenge. Defense counsel said nothing to challenge the trial court's findings regarding the juror's gender or their difficulty answering questions.

Juror 40 had made the following statements in their questionnaire: (1) they had "strong feelings" about excessive force used by police; (2) they were dismayed

that law enforcement comprised such a large portion of the city's budget; and (3) they thought the justice system was "too harsh," particularly with respect to "underrepresented groups" and "poor people." Ex. 104. None of these statements mentioned race, or, for that matter, gender. In response to a specific question about racial or ethnic bias, Juror 40 had written that "depending on how you grew up," people could have "racial biases toward people of color and people with different ethnic backgrounds." Ex 104. Defense counsel did not cite or rely on this information when objecting to the State's peremptory challenge.

E. ARGUMENT

1. THIS COURT SHOULD NOT REVIEW A GR 37 CLAIM THAT IS NEITHER PRESERVED NOR SUPPORTED BY THE RECORD.

In its opinion affirming Hogan's conviction and sentence, the Court of Appeals held that the objection

based on the juror's purported gender identity was an invalid objection under GR 37, and that merely stating the words "GR 37" is insufficient to preserve claims on other grounds that were not raised in the trial court. Slip op. at 5-11. These holdings are correct. Although GR 37 provides that citing the rule is sufficient to trigger further discussion outside the presence of the venire in the trial court, there must still be an adequate record of the basis for the objection to preserve the issue for appeal. Here, the words "GR 37" were spoken when the jury was already absent, and the only basis for the objection was that the prospective juror was transgender. This is not a valid objection under GR 37, and it is insufficient to preserve claims on any other basis.

GR 37(c) provides that an objection "shall be made by simple citation to this rule," but that is not the end of the sentence. To the contrary, the rule further provides that "any further discussion shall be conducted outside

the presence of the panel." GR 37(c). Here, the GR 37 objection was made when the jurors were not present, and thus, further discussion as contemplated by GR 37(c) followed immediately. 1RP 924-27. It is undisputed that the only basis Hogan's attorney stated on the record was that the prospective juror was transgender; nothing further was said to elaborate upon the basis for the objection, and no further arguments were made. 1RP 925.

The use of peremptory challenges is not an issue of constitutional magnitude. *State v. Lupastean*, 200 Wn.2d 26, 47-48, 513 P.3d 781 (2022). Accordingly, arguments that were not raised in the trial court cannot be raised for the first time on appeal. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (an objection at trial that evidence is "prejudicial" is insufficient to preserve an appellate claim that the evidence is "irrelevant"). The only claim preserved for appeal in this case was an objection on grounds that the juror was transgender. As the Court

of Appeals correctly held, this is not a valid objection based on the plain language of GR 37, which expressly prohibits peremptory challenges based on race or ethnicity. Slip op. at 5-7. Thus, "by affirmatively asserting a facially improper basis for a GR 37 objection, i.e., one bereft of any declared relationship to race or ethnicity, a GR 37 objection is not properly raised and is properly denied." Slip op. at 6-7.

A timely objection on appropriate grounds allows a trial court "an opportunity to address an issue before it becomes an error on appeal," and failing to timely object on appropriate grounds "deprive[s] judges of the opportunity to correct errors as they happen." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Merely stating the words "GR 37" is not sufficient to trigger the trial court's consideration of all theoretical arguments, raised or not.

In arguing that the Court of Appeals erred by holding that unstated grounds for a GR 37 objection were not preserved, Hogan conflates the *de novo* standard of review for GR 37 claims with basic principles of error preservation. *See* Petition at 22-24. These two concepts are not the same. While it is true that GR 37 claims are subject to *de novo* review, this means only that the reviewing court stands in the same position as the trial court in applying the "objective observer" legal standard. *State v. Tesfasilasye*, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022). It does *not* mean that GR 37 claims need not be supported by an adequate record, or that all possible arguments may be made for the first time on appeal regardless of the existing record. In other words, the reviewing court looks at the same record that the trial court had before it and determines whether the trial court's legal conclusions were sound based on the record that was made; it does not read facts into the record that

do not exist. For example, the *de novo* standard of review applies to a trial court's decision to grant a motion for summary judgment, but the appellate court is confined to the existing record that the trial court considered when performing that *de novo* review. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015).

Hogan also urged the Court of Appeals to expand the scope of GR 37, arguing that because transgender individuals experience discrimination themselves in general, they are especially attuned to discrimination based on race or ethnicity, and thus, GR 37 should apply. The Court of Appeals correctly rejected this claim as well.

First, this argument was also not preserved. As the Court of Appeals stated, "In the entirety of the dialogue [with the juror], there is no reference to race or ethnicity, or any indication that race or ethnicity is related to the basis on which Hogan brought the objection." Slip op. at 8. But more importantly, the record simply does not

support the conclusion that the juror was transgender. As the trial court found, the juror had "*not identified as transgender*" in their questionnaire, and it was "*not apparent*" to the trial court "*that they were transgender*" at all. Slip op. at 4 (emphasis in original). Therefore, the record is insufficient to review a claim that GR 37 encompasses transgender identity or expression, because the factual predicate for this claim does not exist.[5]

The Court of Appeals also correctly concluded that the trial judge's firsthand observations of the juror must be

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[5] As the Court of Appeals also observed, case law holds that GR 37 does not apply to gender "or any other protected status covered by the equal protection clause and our state constitution" other than race or ethnicity. *State v. Brown*, 21 Wn. App. 2d 541, 554, 506 P.3d 1258, *review denied*, 199 Wn.2d 1029 (2022). "The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). The rule is aimed at curing discrimination *in jury selection*, not all discrimination in general, nor could it ever accomplish such an impossible task.

given deference on appeal. Slip op. at 13. As this Court recently held, when a decision relies on the trial judge's ability to assess a juror's "responses, demeanor, and tone in context, appellate review is appropriately restrained." *State v. Smith*, 3 Wn.3d 718, 727, 555 P.3d 850 (2024). This principle should apply with equal force to the trial court's direct observations of the juror's physical appearance, which no appellate court can replicate. Here, the trial court made firsthand observations of the juror's appearance, and their demeanor and tone when answering the parties' questions. These firsthand observations are entitled to deference, and this Court should deny review for this reason as well.

Despite the grounds upon which the Court of Appeals correctly decided this case, Hogan now changes focus. Specifically, he now focuses upon the generalized statements the juror made in their questionnaire, and invites this Court to accept review and expand GR 37

beyond "eliminat[ing] the unfair exclusion of potential jurors based on race or ethnicity" to eliminating exclusion of potential jurors based on their views that systems can be unfair. Particularly on this inadequate record, this Court should decline that invitation.

The primary support Hogan offers for his proposed GR 37 expansion is *State v. Walton*, 29 Wn. App. 2d 789, 542 P.3d 1041, *review denied*, 3 Wn.3d 1025 (2024), in which the court held that GR 37 prevents excusing jurors based on their opinions about racial issues, regardless of the jurors' race or ethnicity. *Walton* is readily distinguishable. In *Walton*, the two jurors whom the court held were erroneously excused—both of whom identified as white—specifically discussed the issue of racial discrimination in their answers to questions during voir dire. *Walton*, 29 Wn. App. 2d at 803-09. Here, by contrast, Juror 40 expressed only "generalized misgivings

about the criminal justice system,"[6] and made statements about racial bias "only at the highest level of generality."[7] The Court of Appeals correctly held that such general opinions are insufficient to preclude excusing a juror under GR 37—particularly in a case where those general opinions were never mentioned as a basis for defense counsel's objection.

Lastly, it must be noted that Hogan falsely asserts that the State challenged Juror 40 specifically based on "the fact of *Mr. Hogan being a person of color.*" Petition at 22 (emphasis in original). The purported basis for this assertion are: (1) the prosecutor's questions during voir dire, asking whether prospective jurors could be fair in light of the fact that Hogan is a person of color, and (2) Juror 40's aforementioned generalized answers to the written questionnaire. Petition at 5-8. In making this

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[6] Slip op. at 1.

[7] Slip op. at 9.

argument, however, Hogan presents Juror 40's generalized written statements as if they were verbal statements made in response to the prosecutor's questions. Petition at 7-8. This mischaracterization of the record should not go unnoticed, as it is the only way in which Hogan attempts to tie Juror 40's generalized statements directly to the issue of race. There simply is no connection between the prosecutor's questions and the juror's written statements, which were written *before* in-court questioning even began. This Court should deny review.

2. THE HEIGHTENED *BATSON* STANDARD FOR PEREMPTORY CHALLENGES BASED ON RACE OR ETHNICITY DOES NOT APPLY TO GENDER IDENTITY.

Hogan further urges this Court to review his claim that the heightened *Batson* standard declared in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), provides

an alternative basis for a new trial in this case. But this claim suffers the same fundamental infirmity as those raised under GR 37—i.e., it lacks supporting facts. In addition, this claim was not raised in the trial court. Accordingly, to raise it for the first time on appeal, Hogan must demonstrate a manifest constitutional error affecting his constitutional rights under RAP 2.5(a). *See Brown*, 21 Wn. App. 2d at 550. An alleged error is not "manifest" under this rule unless the defendant establishes an issue of constitutional magnitude that has resulted in actual prejudice to his rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Hogan cannot meet this burden.

In *Jefferson*, this Court held that the longstanding *Batson* test for racial discrimination in jury selection was inadequate. *Jefferson*, 192 Wn.2d at 239-43. Accordingly, this Court held that "the question at the third step of the *Batson* framework is *not* whether the

proponent of the peremptory strike is acting out of purposeful discrimination," but rather, "whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.'"[8] *Id.* at 249 (emphasis in original). The Court acknowledged that this "objective observer" standard had been incorporated into GR 37, but that rule was inapplicable to Jefferson's case because it went into effect after his trial. *Id.* at 243. But, as is also the case with GR 37, this Court's decision in *Jefferson* is solely concerned with racial discrimination; gender, gender identity and gender expression are not encompassed within the *Jefferson* rule. *See Jefferson*, 192 Wn.2d at 239-42 (tracing the long history of attempts to combat "race discrimination in the selection of jurors").

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[8] The first two steps are (1) whether the defendant has made a *prima facie* showing sufficient to raise an inference of discrimination, and (2) whether the opposing party can articulate a race-neutral reason for the challenge. *Jefferson*, 192 Wn.2d at 231-32.

For the same reasons discussed in the first argument section above—i.e., lack of error preservation and lack of a supporting record—Hogan's *Batson/Jefferson* claim fails as well. In addition, Hogan has not demonstrated that the purported error he alleges is a "manifest" error under RAP 2.5(b).

3. THE MOTION TO STRIKE WAS PROPERLY GRANTED.

In a footnote, the Court of Appeals granted the State's motion to strike Hogan's statement of additional authorities. Slip op. at 15 n.7. Hogan argues review is warranted to correct the basis upon which the State's motion was granted. Petition at 25-27. This issue does not merit review.

Hogan is correct that the State moved to strike the statement of additional authorities on grounds that it was not a statement of additional authorities at all, but rather an unauthorized supplemental brief. *See* Statement of

Additional Authorities, and State's Motion to Strike and Response, attached as *Appendix*. The State argued Hogan had used RAP 10.8 as a vehicle to file another brief, not to bring additional authorities to the Court of Appeals' attention. *Appendix*.

In granting the State's motion, the Court of Appeals cited *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 24, 332 P.3d 1099 (2014), for the proposition that a statement of additional authorities is meant to provide the court with new authorities, not "to permit parties to submit court cases that they failed to timely identify when preparing their briefs." This footnote quotes *O'Neill* directly and differs only slightly from the argument the State made—i.e., that Hogan's statement of additional authorities was actually a supplemental brief filed in an attempt to bolster claims he had already made. *See Appendix*. To the extent the Court of Appeals' footnote differs from this Court's footnote in *Futurewise v. Western Washington*

Growth Mgmt. Hrgs. Bd., 164 Wn.2d 242, 248 n.2, 189 P.3d 161 (2008), the point is still well-taken that Hogan could have, and should have, included those additional cases and bolstered arguments in his opening brief or his reply brief. The motion was properly granted in any event, and this distinction does not merit review.[9]

4. HOGAN'S REMAINING CLAIMS DO NOT MERIT REVIEW.

Hogan also claims that the Court of Appeals erred in the unpublished portion of its opinion by rejecting a claim of evidentiary error, and by holding that the charging document contained the necessary elements of felony murder. These claims also do not merit review.

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[9] Even if this Court were to decide that the Court of Appeals' footnote merits correction or clarification, a *per curiam* decision or limited remand would suffice; full review is neither warranted nor necessary.

Hogan raised an evidentiary issue regarding his girlfriend's medical records, which he offered to corroborate her testimony about injuries she claimed to have suffered during the confrontation that led to the murder. Slip op. at 19-24. Claims of evidentiary error are reviewed for manifest abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). An abuse of discretion occurs only if no reasonable judge would have ruled as the trial court did. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Here, the trial court allowed "liberal use and reference to the medical records" during testimony, but excluded the records themselves under ER 403 because they were likely to confuse the jury and invite speculation, and because they were cumulative of testimony. Slip op. at 20. As the Court of Appeals held, these were tenable grounds for the trial court's ruling. *Id.* at 22. Further, Hogan was not denied the right to present a defense because his

girlfriend's medical records and purported injuries were covered thoroughly during testimony. *Id.* at 22-24. This claim does not merit this Court's review.

The Court of Appeals also rejected Hogan's argument that the elements of the underlying felony must be included in a charging document for felony murder. Slip op. at 25-26. This Court has rejected that same argument multiple times. *State v. Kosewicz*, 174 Wn.2d 683, 691-92, 278 P.3d 184 (2012); *State v. Anderson*, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); *State v. Fillpot*, 51 Wn. 223, 228, 98 P. 659 (1909). There is no need to revisit this well-settled law.

F. CONCLUSION

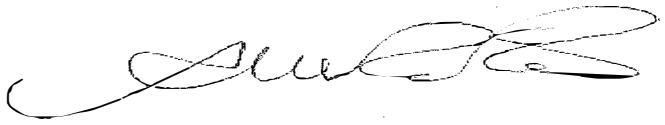
For the foregoing reasons, the State respectfully asks this Court to deny the petition for review.

I certify in accordance with the Rules of Appellate Procedure that this document contains 3,915 words.

DATED this 21st day of April, 2025.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney



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APPENDIX

- Hogan's statement of additional authorities
- State's motion to strike and response to statement of additional authorities
- Hogan's answer to motion to strike

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON, Appellant, v. NIGEL HOGAN, Appellant.	)	No. 84796-1-I STATEMENT OF ADDITIONAL AUTHORITIES

Nigel Hogan, the appellant, submits this statement of additional authorities. RAP 10.8.

The primary issue in this appeal is whether the trial court erred in overruling Mr. Hogan's GR 37 objection to the State's use of a peremptory challenge against juror 40. As emphasized in the opening and reply briefs, the standard of review is de novo, meaning this Court determines anew whether GR 37 was properly applied by the trial court. Consequently, additional arguments on why the trial court erred in overruling the GR 37 objection is appropriate.

Relatedly, "A trial court's obligation to follow the law remains the same *regardless of the arguments raised by the parties before it*." *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008) (emphasis added); *accord Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (quoting and applying this principle), *affirmed*, 170 Wn.2d 768, 246 P.3d 785 (2011).

Here, the plain text of GR 37 requires only a "simple citation" to the rule in order to trigger the trial court's application of the rule. GR 37(c). And the rule sets out what the trial court must do in detail. GR 37(e)-(i).

Given the principle set out in *Quismundo*, once GR 37 is triggered, the trial court must apply GR 37 properly regardless of the arguments of the parties. Consequently, Mr. Hogan's additional arguments on appeal about why the trial court misapplied GR 37 are proper.

As argued, given juror 40's views on racial justice issues, the prosecutor's citation of those views as a reason for the use

of the peremptory, and the fact that Mr. Hogan is Black, "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e). GR 37 required the trial court to deny the prosecution's peremptory challenge to juror 40.

This document contains 309 words, excluding the parts of the document exempted from the word count by RAP 18.17

Respectfully submitted this 11th day of September, 2024.

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Attorney for Appellant

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 84796-1-I
	)	
vs.	)	
	)	STATE'S MOTION TO
NIGEL HOGAN,	)	STRIKE AND RESPONSE
	)	TO STATEMENT OF
Appellant,	)	ADDITIONAL
	)	AUTHORITIES
	)	
	)	

Pursuant to RAP 17.1 and RAP 10.8, the State moves to strike the "Statement of Additional Authorities" filed by Hogan on September 11, 2024 (Part 1) and offers a substantive response (Part 2).

1. MOTION TO STRIKE

The State of Washington, Respondent, is the moving party, and moves to strike the aforementioned "statement of additional authorities."

A statement of additional authorities is exactly that: an opportunity to cite additional authorities that "must relate to a point made in the briefing or at oral argument," and "must include a pinpoint citation either to the pertinent page of the brief or to a point argued orally." RAP 10.8(a) and (b). It is not a supplemental brief.

Hogan admits his pleading provides "additional arguments on why the trial court erred in overruling the GR 37 objection" rather than providing the Court with additional authorities. Hogan attempts to justify this because "the standard of review is de novo," suggesting that this somehow dispenses with error preservation

requirements and compliance with the Rules of Appellate Procedure.

This unauthorized brief should be stricken and should not be considered by the Court.

2. STATE'S RESPONSE TO ADDITIONAL ARGUMENTS

Aside from being unauthorized, Hogan's additional arguments are without merit. Hogan focuses on the language of GR 37 that provides that saying "GR 37" is sufficient to bring an objection to the trial court's attention. *See* GR 37(c). Hogan suggests this portion of that subsection means that all possible GR 37-related arguments are preserved for appeal once a party utters the words "GR 37." However, the rule further provides that "any further discussion shall be conducted outside the presence of the panel." In other words, the purpose of the first part of GR 37(c) is to ensure that arguments

about a party's objection to a peremptory challenge do not take place in front of the entire venire.

In this case, however, the jurors *were not present when the peremptory challenges were exercised.* Therefore, the arguments regarding Hogan's objection took place immediately. The only basis Hogan identified for his objection was that Juror 40 was purportedly transgender—a basis the trial court rejected. RP (6/1/22) 926-27.

A court will not consider GR 37-based arguments for the first time on appeal unless the defendant demonstrates a "manifest constitutional error" under RAP 2.5(a). State v. Matamua, 28 Wn. App. 2d 859, 873, 539 P.3d 28 (2023), review denied, 2 Wn.3d 1033 (2024). This Court should reject the notion that just saying "GR 37" is sufficient to preserve every possible argument that

could have been raised in the trial court but was not. This is plainly not the intent of the rule.

I certify in accordance with the Rules of Appellate Procedure that the State's motion to strike contains 151 words, and the response to the "statement of additional authorities" contains 287 words.

Dated this 12th day of September, 2024.

LEESA MANION (she/her)
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Attorneys for Respondent

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON, Respondent, v. NIGEL HOGAN, Appellant.	)	No. 84796-1-I ANSWER TO STATE'S MOTION TO STRIKE STATEMENT OF ADDITIONAL AUTHORITIES

Nigel Hogan, the appellant, filed a statement of additional authorities citing *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008) and *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009), *affirmed*, 170 Wn.2d 768, 246 P.3d 785 (2011). He provided argument about how a principle recognized in those cases applies to the primary issue in this case concerning the application of GR 37. This is permitted by RAP 10.8 ("The statement must include argument explaining the reasons for the additional authorities and must include a pinpoint citation either

to the pertinent page of the brief or to a point argued orally."). The statement Mr. Hogan filed is a not a "supplemental brief."

Admittedly, counsel did not provide a pinpoint citation to the appellant's opening brief (which would Br. of App. at 17-33), but the statement says the additional authorities are related to the primary issue in the appeal concerning GR 37. No one should be confused. The Court should waive the defect. RAP 1.2(a), (c).

"Motions to strike . . . waste everyone's time." *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 24, 332 P.3d 1099 (2014) (internal quotation omitted). If there is an opportunity to respond, a motion to strike is not appropriate. *Id.* The rule on statements of additional authorities permit a response. RAP 10.8.

The State has no substantive response to the additional authorities and the principle that courts must apply the law regardless of the parties' arguments.

Rather, the State says: "A court will not consider GR 37-based arguments for the first time on appeal unless the defendant demonstrates a 'manifest constitutional error' under RAP 2.5(a)." Mot. at 4 (citing *State v. Matamua*, 28 Wn. App. 2d 859, 873, 539 P.3d 28 (2023)). *Matamua* does not support this broad proposition. In that case, the trial court modified the voir dire process by having the parties identify non-white jurors "to which GR 37 applies." 28 Wn. App. at 865. No party objected to this process that resulted in many jurors being removed from the ambit of GR 37. *Id.* at 872. While this was likely error, the error was not "manifest" because the defendant was "not challenging any ruling following a GR 37 objection for a white juror." *Id.* at 873.

The issue in this case concerns whether the trial court properly applied GR 37 upon Mr. Hogan's objection under that rule to the State's use of a peremptory challenge against juror 40. That issue is preserved. Review is de novo. And any deficient argument by defense counsel in the trial court on GR

37's application does not excuse the trial court (or this Court) from failing to properly apply GR 37.

The State's motion to strike should be denied and this Court should consider Mr. Hogan's statement of additional authorities.

This document contains 474 words, excluding the parts of the document exempted from the word count by RAP 18.17

Respectfully submitted this 12th day of September, 2024.

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KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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Appellate Court Case Number:	103,824-1
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