Supreme Court No. _____
Court of Appeals No. 84796-1-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

NIGEL HOGAN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Nigel Hogan, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued a partially published opinion concerning GR 37 on December 2, 2024. The court denied Mr. Hogan's motion to reconsider on January 7, 2025.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether a claimed violation of GR 37 is preserved for review where the objecting party cites to GR 37 and notes for the record that the juror sought to be removed by peremptory appears to be transgender or gender non-conforming?

2. Whether in this prosecution against a Black man, an objective observer *could* conclude that race was *a factor* in the prosecutor's use of a peremptory challenge against a juror where the reasons for the strike included (1) the juror's concerns about the criminal justice system and its unfair treatment of historically underrepresented groups and (2) a

vague and untimely concern that the juror appeared "uncomfortable"?

3. Whether an appellate court's review of a claimed violation of GR 37 is de novo, or does the appellate court apply a lesser standard that defers to factual findings by the trial court?

4. Whether a statement of additional authorities under RAP 10.8 is limited *only* to authority decided after completion of the briefing where the plain language of the rule has no limitation and this Court has held otherwise?

5. Whether this Court should adopt the "objective observer" standard in administering the constitutional prohibition against sex discrimination in jury selection where it has done so as to race discrimination and sex discrimination in jury selection is improper for similar reasons?

6. Whether an objective observer could conclude that sex or gender was a factor in the prosecutor's use of a peremptory challenge against a juror who appeared to be transgender or

gender non-conforming and who was concerned about the criminal justice system's treatment of historically underrepresented groups?

7. Whether in excluding highly probative medical records based on a speculative risk of confusion, the trial court misapplied ER 403 or deprived the defendant of their constitutional right to present a complete defense?

8. Whether a charge of felony murder predicated on second degree assault is constitutionally deficient where the charging document does not identify the elements of the predicate assault?

C. STATEMENT OF THE CASE

Mr. Hogan was in his car parked on the street with his girlfriend and mother of his children, Elenise Falo, when an SUV pulled up and boxed him in. 2RP 871, 939, 961, 1007, 1050, 1262, 1475. Four or five men got of the vehicle and rushed Mr. Hogan and Ms. Falo. 2RP 871-82, 1075, 1153-54, 1262.

Mr. Hogan had a long running feud with some of these men, which included brothers Terrence and Jerome Jackson. Br. of App. at 7-9. About 5 to 10 minutes earlier, Mr. Hogan and Jerome had tried to settle their differences in a fight. 2RP 865-67, 930-32, 1149, 1258. Mr. Hogan won that fight and Jerome left, but Jerome had returned with his brother and others. Jerome and most of these men, if not all of them, were intoxicated. 2RP 661, 702, 903, 919, 1220; Br. of App. at 11-12.

Jerome opened the passenger side door of Mr. Hogan's car and hit Ms. Falo. 1RP 688; 2RP 877-78, 940-43, 1007, 1089, 1254-55, 1264. Meanwhile, Terence came towards Mr. Hogan aggressively, accusing Mr. Hogan of jumping Jerome. 1RP 1489; 2RP 1265-66, Mr. Hogan grabbed his handgun from the car and stepped out. 2RP 88, 1254, 1265.

Mr. Hogan repeatedly warned everyone to back up and retreated to the back end of his car. 2RP 943-44, 1084 1185, 1265-67. But one of the men, a large man named Paul Carter,

lunged towards Mr. Hogan, so Mr. Hogan, fearing for himself and Ms. Falo, shot him. 2RP 873-75, 1004, 1087, 1269-71, 1279. 1305. Mr. Carter survived. 1RP 1215; 2RP 1299.

Jerome, however, continued to hit Ms. Falo. 2RP 1271. To stop Jerome, Mr. Hogan shot him. 2RP 1278, 1304. Mr. Hogan did not intend to kill, but Jerome died. 2RP 654, 1272.

Scared, Mr. Hogan left in his car with Ms. Falo. 2RP 1308. Ms. Falo went to the hospital for treatment. 2RP 1164, 1208.

Officers later found one of Ms. Falo's hoop earring, which had come off during Jerome's assault upon her, on the ground near Jerome's body. 2RP 1158; Ex. 24, slide 104.

The prosecution initially declined to charge Mr. Hogan, but three years later in October 2018, the prosecution charged Mr. Hogan with second degree murder of Jerome and first degree assault of Mr. Carter. CP 1-2.

Mr. Hogan is Black. CP 311. During jury selection, the prosecutor *repeatedly* identified Mr. Hogan's race as an issue

for discussion and whether his status as a "person of color" would affect jurors' abilities to be fair:

> And as you can see *the defendant here is a person of color*. How do you feel about being part of a case involving a -- *a person of color* and the Seattle Police Department?
>
> Are you going to be judging evidence that's presented differently or holding the State to a different standard because of your feelings about the system or because of -- *of the defendant being a person of color*?
>
> What about if you sat as a juror on this case and you believed at the end of all the evidence and deliberations that the State has met its burden of proving all of the elements beyond a reasonable doubt, do you think you could find the defendant guilty? Go back and tell your friends and family and community that *you found a person of color guilty*.
>
> how would that make you feel to being asked to determine whether *a person of color* has committed a crime in our community or not?

> how are you going to feel about going back and telling your friends and family that you were part of finding *another person of color* guilty?
>
> how would you feel, um, if you, in fact, felt that the State had met its burden and proven beyond a reasonable doubt that Mr. Hogan submitted [sic] this crime, would it be hard for you to go back and tell your friends and family that you had participated in convicting *a person of color*?

RP 743-45, 830-34 (emphases added).

Potential juror 40 expressed the view that "there has been a history of law enforcement and the criminal justice system being unfair and unlawful to historically unrepresented and disenfranchised groups of people." 1RP 802. This was consistent with the juror 40's answer to a question about whether the juror had a strong opinion about the criminal justice system. Ex. 104. Juror 40 also agreed that, "We sometimes make judgments and have preconceptions about other people based on their race or ethnic background." Ex. 104. Juror 40 explained:

> People, depending on how you grew up, can develop racial biases towards people of color and people with different ethnic backgrounds. This happens because racial biases are deeply rooted in our country and its history. The cause of this can be from media, family, friends, lack of knowledge on the subject matter, etc. This sort of racial bias can be seen through political ideology, beliefs, and how an individual acts towards someone.

Ex. 104.

Potential jurors 33 and 34 expressed similar views to that of juror 40. 1RP 743-49. Juror 33 recognized bias in the justice against people of color and Black men, and expressed skepticism of the Seattle Police Department. 1RP 743-45. Juror 34 recognized historical bias by law enforcement and the courts "against people of color and minority groups." 1RP 746. Like juror 40, these jurors believed they could be fair and would hold the State to its burden of proof beyond a reasonable doubt. 1RP 745-49, 803.

The prosecution used its first two peremptories on jurors 33 and 34 without objection. 1RP 924. But when the prosecution used its third peremptory against juror 40, Mr.

Hogan objected, citing GR 37. 1RP 925. Following citation of the rule, defense counsel noted that juror 40 was" one of the only trans person on the jury. In the entire panel." 1RP 925. On the jury questionnaire, juror 40 identified as being Caucasian and declined to identify their gender. Ex. 104.

In seeking to strike juror 40, the prosecutor asserted the juror "struggled to sort of articulate their thoughts" and "seemed very uncomfortable." 1RP 925-26. Based on this, the prosecutor said the juror would be unable to "to take a position and stand up for it and communicate with other jurors." 1RP 926. The prosecutor further said, the juror "expressed significant concerns about the criminal justice system, which, of course, lots of people did, but it was hard to really get to the core of it." 1RP 926. The prosecutor resisted labeling the juror as transgender based on the juror's appearance and declining to answer as to gender identity. 1RP 924-25.

After reviewing the juror's answers to the questionnaire, the court permitted the strike. 1RP 926-27. The court reasoned

the prosecutor's answers showed the challenge was not based on the juror's identity, and were based on the juror being "reticent when answering questions" and the juror's view about the criminal justice system's historically harsh treatment of underrepresented groups of people. 1RP 926-27; Ex. 104.

During trial, based on the prosecutor's objection, the court excluded medical records related to Ms. Falo's treatment at the hospital because—while they corroborated the testimony of witnesses called by the defense—they were "confusing" absent expert testimony. 2RP 1228-30.

The jury did not convict Mr. Hogan of intentional murder of Jerome or of first degree assault of Mr. Carter. CP 159, 164. The jury, however, found Mr. Hogan guilty of first degree manslaughter and felony murder predicated on second degree assault, along with a firearm enhancement. CP 160, 162-63. The court vacated the manslaughter conviction as violating the prohibition against double jeopardy. CP 315.

On appeal, Mr. Hogan argued primarily that the trial court erred in overruling his GR 37 objection. In the published portion of the its opinion, the Court of Appeals held Mr. Hogan had not preserved this issue for review. Slip op. at 3-11. The court further held that even if Mr. Hogan's had preserved the issue for review, there was no GR 37 violation. Slip op. at 12-15. The court further rejected Mr. Hogan's claim that the prosecutor's peremptory against juror 40 violated the state and federal constitutions. Slip op. at 15-19.

In the unpublished portion, the court rejected Mr. Hogan's arguments that the trial court's exclusion of the medical records was a misapplication of the rules of evidence and a violation of his constitutional rights. Slip op. at 19-24. The court also rejected Mr. Hogan's argument that the charging document was constitutionally deficient. Slip op. at 25-26.

Without calling for an answer, the court quickly denied Mr. Hogan's motion to reconsider.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide (1) whether simply citing to GR 37 in an objection is sufficient to preserve a claimed GR 37 violation for review; (2) whether review is de novo; and (3) whether the trial court erred by denying Mr. Hogan's objection to the prosecutor's peremptory challenge against juror 40.

a. The plain language of GR 37 requires only "simple citation" to the rule for an objection and most appellate court decisions hold review is de novo.

Criminal defendants have a state and federal constitutional right to a fair and impartial jury trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Tesfasilasye*, 200 Wn.2d 345, 356, 518 P.3d 193 (2022).

"Racial bias has long infected our jury selection process." *Tesfasilasye*, 200 Wn.2d at 347. Peremptory challenges, which generally permit a party to strike a potential juror from the panel without providing a reason, "have a history of being used based largely or entirely on racial stereotypes or generalizations." *Id.* at 356. Although it is unconstitutional to strike a juror based on race, the constitutional test developed by

the United States Supreme Court in *Batson*[1] to stop racial discrimination through peremptories has failed. *Id.* at 356-57. This is largely because the *Batson* framework did not "address the issue of unintentional, institutional, or unconscious race bias." *State v. Jefferson*, 192 Wn.2d 225, 243, 429 P.3d 467 (2018) (cleaned up).

To reduce racial bias in jury selection, this Court enacted GR 37. *Id.* GR 37 is a broadly written rule aimed "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a).

Unlike the *Batson* framework, GR 37 does *not* require a prima facie showing of discriminatory purpose before requiring a justification from the party exercising the peremptory. GR 37(d); *State v. Hale*, 28 Wn. App. 2d 619, 630, 537 P.3d 707 (2023). And even where a party provides a race-neutral reason tending to a show a non-racial discriminatory purpose, this may

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

be insufficient to justify the strike.[2] GR 37(e); *Tesfasilasye*, 200 Wn.2d at 357; *Hale*, 28 Wn. App. 2d at 630.

Rather than focusing solely on whether there is a discriminatory purpose by a party in using a peremptory, GR 37 requires a court to consider the "totality of the circumstances." GR 37(e). In this consideration, courts must sustain a GR 37 objection if "an objective observer *could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphases added).

An "objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f).

In making the determination about what an objective observer could conclude, GR 37 outlines several non-exclusive

[2] After GR 37 was enacted, the Washington Supreme Court modified the *Batson* framework (as permitted by *Batson*) to not require proof of purposeful discrimination. *Jefferson*, 192 Wn.2d 229-30.

circumstances that should be considered. GR 37(g). This includes "whether a reason might be disproportionately associated with race or ethnicity." GR 37(g)(iv). Additionally, presumptively invalid reasons for a peremptory challenge include "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling." GR 37 (h)(ii).

An allegation that a prospective juror "provided unintelligent or confused answers" as a reason for a peremptory challenge has "historically been associated with improper discrimination in jury selection in Washington State." GR 37(i). A party relying on this reason or similar reasons for a peremptory strike "must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner." GR 37(i).

Significantly, "GR 37 does not state that the rule is meant to eliminate the unfair exclusion of potential jurors based on *the prospective juror's* race or ethnicity." *State v. Harrison*, 26 Wn.

App. 2d 575, 585, 528 P.3d 849 (2023) (Lee, J., concurring). The rule "instead refers generally to 'race or ethnicity' with no limitations." *Id.*

Consequently, and consistent with considering the "totality of the circumstances," the race of *the defendant* is relevant in a GR 37 analysis. *Id.* at 585; *State v. Walton*, 29 Wn. App. 2d 789, 806, 542 P.3d 1041 (2024) (fact that defendant was Black was relevant under GR 37 in evaluating the proffered reasons for striking a white juror) *review denied*, 3 Wn.3d 1025, 556 P.3d 1113 (2014). Moreover, GR 37's plain language "clearly aims to broadly remove dismissal based on race and ethnicity, *including views about the same*, from the use of peremptory challenges." *Walton*, 29 Wn. App. 2d at 800. In other words, while GR 37 applies to all parties regardless of race, the race of the defendant is relevant in determining whether an objective observer could conclude race was a factor in the use of the peremptory.

A party raises an objection to a peremptory challenge simply by citing to the rule. GR 37(c). Once invoked, the trial court must conduct the GR 37 analysis. *State v. Listoe*, 15 Wn. App. 2d 308, 321, 475 P.3d 534 (2020).

b. The published decision interpreting GR 37 conflicts with precedent and involves issues of substantial public interest that should be determined by this Court.

The Court of Appeals held that Mr. Hogan's "GR 37 objection is not properly raised." Slip op. at 6-7. The court reasoned that because defense counsel, in making his GR 37 objection, noted that the juror appeared to be transgender, this nullified the objection. The court reasoned that defense counsel's words presented a facially improper basis for a GR 37 objection because GR 37 applies to race discrimination in the use of peremptories, not sex or gender discrimination. Slip op. at 7-11.

But GR 37 does *not* require any showing of a discriminatory purpose before requiring a justification from the

party exercising the peremptory. GR 37(d); *Hale*, 28 Wn. App. 2d at 630. And the plain language of GR 37 says an objection is made "by simple citation" to the rule. GR 37(c). No basis for a GR 37 objection need be stated. *Listoe*, 15 Wn. App. 2d at 321. All a court need to do is read the rule and apply it.

"The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." *Blomstrom v. Tripp*, 189 Wn.2d 379, 394, 402 P.3d 831 (2017) (cleaned up). Here, Mr. Hogan's GR 37 objection was plain and all the trial court needed to do was apply the rule as written.

Rather than apply jurisprudence related objections and issue preservation, the Court of Appeals appeared to apply some version of the invited error doctrine without citing to it. The court reasoned that "Hogan *misdirected* the court . . . by volunteering solely a facially invalid basis for its GR 37 objection." Slip op. at 11 (emphasis added); *see also* oral argument at 17:00-10 (Judge Diaz stating that defense counsel

dug "a rabbit hole" by referring to the juror being transgender and that the State and the court ran down that hole).[3]

This is unfair. Absent counsel noting juror 40's appearance as transgender, nothing in the record would have showed this. The record does not show that defense counsel affirmatively misdirected the court or set up the error, so invited error does not apply. *See Matter of Dependency of A.L.K.*, 196 Wn.2d 686, 696, 478 P.3d 63, 68 (2020). And no one argued invited error, making it inapplicable as an issue. RAP 12.1(a); *Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 50-51, 534 P.3d 339 (2023).

Here, notwithstanding the discussion of juror 40's status as transgender or non-transgender, the record plainly shows the prosecution used a peremptory challenge against juror 40 due to the juror's concerns about racial injustice. 1RP 743-49, 802, 924-27; Ex. 104. But for Mr. Hogan being Black, it is very

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[3] https://tvw.org/video/division-1-court-of-appeals-2024091210/

unlikely the prosecutor would have used the peremptory, as shown by the prosecutor's focus on Mr. Hogan's race during voir dire. RP 743-45, 830-34.

The Court of Appeals in *Walton* recognized that, regardless of the race of the challenged juror, this kind of conduct by a prosecutor implicates GR 37:

> an objective observer could view race as a factor in the State's peremptory challenge of this juror who expressed a distrust of law enforcement based on concerns about racism in policing, specifically police brutality surrounding the Black Lives Matter movement. The fact that Walton is a Black man centered those perspectives in a way that may not have occurred if the accused was a White person.

Walton, 29 Wn. App. 2d at 806. The *Walton* Court went on to note:

> The State intentionally focused on this particular dynamic in its questioning of juror 22 when it asked, "So, we do have police and we have an African American defendant. How does that make you feel?" The State's explanation offered on appeal about its framing of the challenge to juror 22 strengthens the conclusion that the race of the accused could have been a factor therein.

> When asked at oral argument whether the State would have made these peremptory challenges if the defendant was White, the attorney for the State responded that they "can't say about juror 22 as the reading did seem to be associated with juror 22's views on police themselves and their dealings with people of color." Wash. Ct. of Appeals oral argument, *supra,* at 17 min. 46 sec.
>
> Under GR 37 h(ii), the State's reasoning for this challenge was presumptively invalid and it remains so regardless of the color of the juror; Walton is a Black man and the juror expressed a distrust of police based on the "*police brutality that's gone on with the Black Lives Matter.*"

Id. at 806 n.13 (emphasis in original).

Given the context, it should not have been a surprise that the prosecutor's use of a peremptory against juror 40, who expressed concerns about policing and racial injustice, implicated race and GR 37. 1RP 802; Ex. 104. Defense counsel's stating for the record that juror 40 appeared to be transgender was relevant for the record because that fact was not otherwise present in the record. The other relevant facts about race and the juror were already in the record.

The prosecution's decision to exercise a peremptory against juror 40 was based not merely on juror 40's views, but on the fact of *Mr. Hogan being a person of color*. This implicates not only GR 37, but the state and federal constitutions. This Court has held that where there is race-based misconduct, the lack of an objection will not shield the prosecution on appeal. *State v. Bagby*, 200 Wn.2d 777, 788-89, 522 P.3d 982 (2023). GR 37 is a tool to effectuate the constitutional right to due process and equal protection, so narrowly reading that rule in a manner that nullifies GR 37 objections is contrary to its purpose.

The appellate court's published decision that Mr. Hogan's GR 37 objection did not preserve his GR 37 claim for review is contrary to precedent. RAP 13.4(b)(1), (2). And the issue of what is necessary to lodge a valid GR 37 objection and preserve that claim for review is an issue of substantial public interest, meriting review. RAP 13.4(b)(4).

The Court should also grant review of the issue of whether there was a GR 37 violation and whether review is de novo. The Court of Appeals held there was no violation and review is not de novo. Slip op. at 12-15. These determinations are contrary to precedent and involve matters of substantial public interest meriting review. RAP 13.4(1), (2), (4).

The Court of Appeals assumed that even if Mr. Hogan's objection had been proper, there was no GR 37 violation. In so reasoning, the appellate court focused entirely on whether the record shows a nexus between juror 40's gender identity and juror 40's views on race (i.e., that gender was a proxy for striking the juror based on the juror's views about race). And that because Mr. Hogan did not show a connection, he failed to show the State used a peremptory based on the juror's gender identity.

This is not the analysis. On review, the standard of review for a GR 37 objection is *de novo*, meaning the reviewing court "stand[s] in the same position as the trial court" and "must

determine whether an 'objective observer could view race or ethnicity as a factor' in the State's peremptory challenge[]." *Walton*, 29 Wn. App. 2d at 803 (quoting GR 37(e)).

This case is essentially the *Walton* case, where the appellate court found GR 37 violations in the State using peremptory challenges against two white jurors. In that case, the defendant was also Black and the jurors expressed concerns about racial injustice and police misconduct. The prosecutor in *Walton* struck those jurors based on those facts. 29 Wn. App. 2d. at 803-11. The same GR 37 violation occurred in this case.

The prosecutor's vague explanation that it was striking juror 40 based on the juror appearing "uncomfortable" also implicated GR 37. GR 37 recognizes that an allegation that a prospective juror "provided unintelligent or confused answers" as a reason for a peremptory challenge has "historically been associated with improper discrimination in jury selection in Washington State." GR 37(i). The prosecutor's reasons for striking juror 40 falls into the category of reasons historically

associated with improper usage of a peremptory challenge. And the prosecutor did not give reasonable notice that this was the basis of the peremptory challenge so that Mr. Hogan and the court could verify the behavior and address it in a timely manner. GR 37(i). In this case, the Court of Appeals ignored this argument. Br. of App. at 30-32. But on similar facts, the Court of Appeals held there was a GR 37 because GR 37(i) was not followed. *State v. Bell,*, noted at 30 Wn. App. 2d 1043 (2024) (unpublished), 2024 WL 1620866 at * 3, *review granted*, 554 P.3d 1226 (Wash. 2024). This Court has granted review in *Bell* on that issue.

2. Review should be granted to overrule the Court of Appeals' published holding that limits statements of additional authorities to "new" authorities that come into existence after submission of the briefing.

Before oral argument, Mr. Hogan submitted a statement of additional authorities, as permitted by RAP 10.8. RAP 10.8(b) instructs that "[t]he statement must include argument explaining the reasons for the additional authorities."

The prosecution moved to strike the statement asserting it was an improper "supplemental brief" rather than a statement of additional authorities.

In the published portion of its decision, the Court of Appeals struck the statement on the grounds that the authorities cited *predated* the submission of the briefing, making it improper. Slip op. 15 n.7, citing *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014).

As pointed out in the motion to reconsider, this Court has held otherwise in *Futurewise v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 242, 248 n.2, 189 P.3d 161 (2008) (denying a motion to strike statement on grounds "that it cites to legal authorities that are not new" "because nothing in the rule limits its application to newly created law."). The conflict in the precedent merits review. RAP 13.4(b)(1). It is also an issue of substantial public interest meriting review. RAP 13.4(b)(4).

Besides being contrary to precedent, *O'Neill* is questionable authority because the rule has been amended since and it does not state a requirement that cited authorities must be new. RAP 10.8.

It also creates potential ethical problems for counsel. A lawyer must not knowingly fail to disclose to the appellate court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party." RPC 3.3(a)(3). If counsel should discover, after completion of the briefing and oral argument, directly adverse legal authority in Washington, the lawyer will be unable to disclose it.

3. Review should be granted to decide whether the heightened *Batson* standard adopted by this Court in *Jefferson* to race-based claims is also applicable to sex or gender based claims.

Mr. Hogan refers this Court to his briefing on the related issue of whether the prosecutor's use of a peremptory challenge against juror 40 violated the state and federal constitutions. Br.

of App. at 33-43; Reply Br. of App. at 12-17. He argues that under this's modification of the *Batson* framework in *Jefferson*, the strike was invalid.

In the published portion of its decision, the Court of Appeals held that framework in *Jefferson* applies only to race based claims, and not to claims based on sex or gender. Slip op. at 15-19. This Court should grant review and answer whether the *Jefferson* framework applies equally to claims of sex or gender. This presents a significant constitutional question. RAP 13.4(b)(3). It also concerns an issue of substantial public interest. RAP 13.4(b)(4). Review is merited on this related issue.

4. Review should be granted on Mr. Hogan's claims that the trial court violated his constitutional right to present a complete defense and the rules of evidence by excluding highly probative medical records.

Mr. Hogan refers this Court to his briefing on the issue of whether the trial court's exclusion of probative medical records that corroborated and supported Mr. Hogan's defense was a

misapplication of the rules of evidence and a violation of Mr. Hogan's constitutional right to present a complete defense. Br. of App. at 43-55; Reply Br. of App. at 17-20. The appellate court rejected his arguments. Slip op. at 19-24. Review is warranted because these issues concern a significant constitutional question and a matter of substantial public interest. RAP 13.4(b)(3), (4).

5. Review should be granted to decide whether the charging document for felony murder predicated on second degree assault was invalid where it did not state the elements of the predicate assault.

Mr. Hogan refers this Court to his briefing on the issue of whether the charge of felony murder in the information was constitutionally deficient. Br. of App. at 55-64; Reply Br. of App. at 20-23. Based on incorrectly decided Washington precedent that is contrary to federal precedent, the appellate court rejected Mr. Hogan's argument. Slip op. at 25-26.

Review should be granted to overrule that precedent. Review is warranted on this constitutional issue which is also a matter of substantial public interest. RAP 13.4(b)(3), (4).

E. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Hogan's petition for review.

This document contains 4,973 words and complies with RAP 18.17.

Respectfully submitted this 24th day of January, 2025.

Richard W. Lechich,
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Appendix

FILED
1/7/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NIGEL SINCLAIR HOGAN, SR, Appellant.	No. 84796-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Nigel Sinclair Hogan, Sr., filed a motion for reconsideration of the opinion filed on December 2, 2024 in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

FILED
12/2/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NIGEL SINCLAIR HOGAN, SR, Appellant.	No. 84796-1-I DIVISION ONE OPINION PUBLISHED IN PART

DÍAZ, J. — A jury convicted Nigel Sinclair Hogan, Sr., of murder in the second degree. Hogan now argues the State violated GR 37 and other constitutional rights when it struck a prospective juror, whom Hogan's lawyer thought was transgender and who had expressed generalized misgivings about the criminal justice system. As we review in the unpublished portion of this opinion, Hogan also claims that the trial court wrongly denied the admission of medical evidence supporting his defense and that his charging document was deficient. We affirm.

I. BACKGROUND

Former friends, Hogan and Terence Jackson had a falling out in 2008 related to the failure to repay an informal loan between them. For years thereafter, the animosity between the two men escalated and led to regular violent interactions involving them, their relatives and friends.

On the evening of October 24, 2015, Terence's younger brother Jerome Jackson happened to walk by Hogan and his partner, Elenise Falo, who were sitting in their car, and this chance interaction led to a physical fight between Hogan and Jerome.[1] Jerome then left.

Later that night, as Hogan and Falo remained in their car, they heard a car pull up, and inside were Terence, Jerome, and three other men. Terence confronted Hogan about the fight earlier that evening with Jerome. Hogan pulled out a firearm and fired at least ten shots, killing Jerome and seriously wounding Paul Carter, one of the men who arrived with Terence.

Hogan has maintained that he acted legally in self-defense, claiming that Jerome was attacking Falo and that Carter lunged at him despite multiple warnings to back up.

Following the incident, Falo went to the hospital for injuries she and Hogan alleged resulted from Jerome's attack.

Hogan was arrested not long after the incident. Three years later, the State charged him with murder in the second degree for Jerome's death and assault in

[1] We refer to Terrance Jackson and Jerome Jackson by their first names as they share a surname. No disrespect is intended.

the first degree for Carter's injuries.

Following trial in 2022, a jury convicted Hogan of felony murder in the second degree predicated on assault in the second degree, with a firearm enhancement, and manslaughter in the first degree. The jury was unable to agree on a verdict on the assault charge. The court vacated the manslaughter conviction as violating double jeopardy. It sentenced him to 222 months of confinement.

II. ANALYSIS

A. Peremptory Strike of Juror 40

1. Additional Factual Background

During jury selection, the State made a peremptory challenge to strike juror 40. Hogan's counsel objected, stating the "defense would like to raise a GR 37 argument to that. This individual is one of the only trans persons on the jury. In the entire panel."

In response, the court noted that juror 40, who identified as being 20 years old and Caucasian, had declined to identify their gender on the jury questionnaire. Specifically, having the options "Female," "Male," "Non-binary," and "Prefer not to answer," juror 40 had selected the last option. The court then asked for the response of the State, and it answered:

> I think counsel is making some assumptions. They are both based on probably appearance and "prefer not to answer" that this person is transgender. I don't think you can possibly say that you know if anyone else on this panel is or is not transgender. They might identify their gender specifically. They might decline to identify. And I don't think you can just go on appearances alone.
>
> Second of all, this juror was uncomfortable talking about their very significant political views in the group. And when we spoke with them privately, they struggled to sort of articulate their thoughts. They

> seemed very uncomfortable. This did not seem like someone from the State's perspective that was going to be able to -- in a -- in a jury room take a position and stand up for it and communicate with other jurors.
>
> They expressed significant concerns about the criminal justice system, which, of course, lots of people did, but it was hard to really get to the core of it. And so *we do not think . . . that there is any possibility that an objective person would believe that the State struck this person based on an outside possibility that they were transgender*.

(Emphasis added).

The court then reviewed juror 40's questionnaire again and noted it remembered they had been individually questioned earlier. Without seeking input from the defense, and without defense interjecting to make any further argument, the court ruled:

> All right. So the motion is denied. I don't think there is a basis for arguing that this person is being challenged because they're transgender. Primarily, *they have not identified as transgender*. *It was not apparent to me that they were transgender, it's not on the questionnaire* that their [sic] transgender, and, um -- and in addition, there is a basis for challenging them that is—that is not based on -- on their identity and that is their answers on the questionnaire which indicated that they have strong beliefs about when police use excessive use of force on arrestees, the protesters and historically onto represented [sic] groups.
>
> And also, *they were very reticent when answering questions* during voir dire. They -- they seemed to have a very difficult time, uh, responding to questions. And so, um, the motion is denied and Juror 40 is struck.

(Emphasis added). Hogan offered no further clarification or made any further record of his objection to the strike, and jury selection resumed.

2. Discussion

    a. Alleged GR 37 Violation

Hogan argues that the trial court erred when it overruled the GR 37 objection of his defense counsel. Specifically, he argues the court misapplied GR 37 by permitting the removal of a juror who was critical of the criminal justice system and its "treatment of historically underrepresented groups."

We find his arguments unavailing for two overarching reasons. First, Hogan's trial counsel expressly asserted nothing more than a facially improper basis (gender identity) for his GR 37 objection. Second, even if Hogan had explained to the trial court how that improper basis was related to a proper basis (race and ethnicity), he has not shown that juror 40 was in fact transgender or that that their gender identity implicated their views on race or ethnicity so as to establish that the State sought, implicitly or explicitly, to strike the juror for improper reasons.

i. Providing a Facially Invalid Basis for a GR 37 Objection

The "purpose of [GR 37] is to eliminate the unfair exclusion of potential jurors *based on race or ethnicity*." GR 37(a) (emphasis added); State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018)) ("The evil of racial discrimination is still the evil this rule seeks to eradicate."). Procedurally, the rule specifies that a "party may object to the use of a peremptory challenge to raise [an] issue" for "further discussion . . . outside the presence of the panel," before a potential juror is excused, "by simple citation to this rule." GR 37(c).

"The court will apply canons of statutory interpretation when construing a court rule." State v. Robinson, 153 Wn.2d 689, 692, 107 P.3d 90 (2005). "We review construction of a court rule de novo because it is a question of law." Id. at

693. "While the plain language of a court rule controls where it is unambiguous, under our court rule interpretation guidelines we must examine [such rules] in context with the entire rule in which it is contained as well as all related rules." Id.

Here, when the State moved to strike juror 40, Hogan's counsel objected and cited to the rule, which initiated the "further discussion . . . outside the presence of the panel." GR 37(c). Hogan's counsel then immediately stated sua sponte—as the sole basis of the objection—that "[t]his individual is one of the only trans persons on the jury. In the entire panel." The entirety of the "further discussion" between parties and the court that followed made no mention of race or ethnicity, whether as the "basis" of the purported "unfair exclusion" of juror 40 or otherwise. GR 37(a). Indeed, Hogan's counsel made no further argument of any kind, including no explanation about how juror 40's purported gender identity is related to any issue touching on race or ethnicity. The only and explicit basis of the objection was juror 40's purported gender identity as transgender.[2]

We hold that, by affirmatively asserting a facially improper basis for a GR

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[2] Nothing inherent in the definition or cultural understanding of "transgender" incorporates race. Merriam-Webster defines "transgender" as "of, relating to, or being a person whose gender identity differs from the sex the person was identified as having at birth"—"*especially*: of, relating to, or being a person whose gender identity is opposite the sex the person was identified as having at birth[.]" MERRIAM-WEBSTER ONLINE DICTIONARY (last visited Sep. 09, 2024), https://www.merriam-webster.com/dictionary/transgender; see also BLACK'S LAW DICTIONARY 1810 (12th ed. 2024) (defining "transgender" to concern a person "whose physical sex at birth differs from the sex with which the person later identifies."); see also Transgender and Non-Binary People FAQ, HUM. RTS. CAMPAIGN (Apr. 26, 2024) (defining "transgender, or trans" as "an umbrella term for people whose gender identity is different from the sex assigned to them at birth"), https://www.hrc.org/resources/transgender-and-non-binary-faq [https://perma.cc/G9FY-VX2C]

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.

This court's decision in State v. Brown, 21 Wn. App. 2d 541, 506 P.3d 1258 (2022), is instructive here. There, the State used "six of its seven peremptories to remove female jurors," to which defense counsel objected. Id. at 549. The preliminary issue the parties presented was "which test to apply": GR 37 or the three-step test announced in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which "was developed to determine whether the peremptory strike of a venireperson was impermissibly motivated by race." Id. at 549 & 551. This court accepted Brown's concession "that GR *37 does not apply to an objection based on gender discrimination*" and addressed Brown's "assert[ion] that the trial court should have applied the modified Batson test as declared in Jefferson"—which incorporated "GR 37's structure" into the third step of the Batson test"—to claims of gender discrimination. Id. at 549-50 & 553 (emphasis added).

We held that "Jefferson's test was explicitly limited to race and ethnicity." Id. at 554. We observed that, although "gender . . . was a consideration in the drafting and adoption of GR 37," simply put, "*GR 37 does not apply to gender or any other protected status* covered by the equal protection clause and our state constitution." Id. (emphasis added). We explained that "GR 37 and the holding in Jefferson are based on a demonstrated history of Batson's inability to move the needle on racial and ethnic bias in jury selection." Id. We further concluded, "Ms. Brown fails to demonstrate that racial and gender bias are so similar that they are

merely interchangeable. If such were the case, gender would likely have been included in GR 37's inaugural version." Id. (emphasis added).

For the first time on appeal, Hogan attempts to conflate gender and racial and ethnic biases, arguing that "[j]uror 40 . . . had a heightened understanding of [the] reality" that, "[l]ike people of color, people who do not conform to traditional sex or gender norms have suffered disparately in society and our justice systems." This argument—tying juror 40's purported gender identity to their possible views on racial and ethnic justice issues—however, was simply not before the trial court. And this argument is essentially making the same claim we rejected in Brown; namely, that race and gender or gender identity are "interchangeable" in some way. 21 Wn. App. 2d at 554.

Even if we chose to look beyond the words of Hogan's counsel's objection and consider the full exchange between the juror, the parties and the court—both in group and individual questioning, including about juror 40's "concerns about the criminal justice system"—race or ethnicity is never mentioned. In the entirety of the dialogue, 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.

In response, also for the first time on appeal, Hogan next reaches farther back in jury selection, to juror 40's questionnaire where they "expressed awareness of racial justice issues," to argue that "an objective observer could conclude that race was a factor in the prosecution's strike." Hogan first points to juror 40's assertion that they have a "strong opinion" about the criminal justice system. However, those answers contained no mention of race or ethnic identity

either; instead they broadly reference challenges that "historically underrepresented" or "poor [people]" have with the justice system generically.

The only mention of race or ethnicity was in a separate portion of the questionnaire where juror 40 agreed that "[w]e sometimes make judgments and have preconceptions about other people based on their race or ethnic background." They explained such biases can develop because "racial biases are deeply rooted in our country and its history" and they noted biases can manifest in a person's beliefs and actions.[3]

These statements pertain to issues of race or ethnicity, but only at the highest level of generality. Regardless, Hogan neither presented the court with any of juror 40's answers to the questionnaire as the basis for objecting to the State's strike, nor tied them in any way to racial and ethnic discrimination, even as the court expressly stated that the "basis for challenging [juror 40] . . . is not based on . . . their answers on the questionnaire."

Finally, Hogan offers the conclusory argument that, because he literally cited to the rule number, his claim that the State violated GR 37 was properly raised and is "preserved for review." It is certainly true, on a plain language reading of that provision of the rule, that one can "make" an objection "to raise the issue of improper bias" for "further discussion" by simply citing the rule. GR 37(c). But, the sole, express purpose of the rule as stated in GR37(a) "is to eliminate the unfair

[3] During group questioning, the State also asked for juror 40 to explain their understanding of unconscious bias, and they answered that "implicit bias can affect how decisions are made, especially in court." None of the venirepersons disagreed with this anodyne statement.

exclusion of potential jurors *based on race or ethnicity*." (Emphasis added.) In other words, even though GR 37(c)'s phrasing—"the issue of improper bias"—is stated in inchoate terms, the plain language of the "entire rule" makes clear that its sole target is improper bias *based on race or ethnicity*. Robinson, 153 Wn.2d at 693.

During oral argument, Hogan conceded "[c]ounsel's objection certainly could have been better and arguably deficient." Wash. Ct. of Appeals oral argument, State of Washington v. Nigel Sinclair Hogan, Sr., No. 84796-1-I (September 13, 2024), at 4 min., 20 sec. through 4 min., 25 sec. video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024091210/?eventID=2024091210. That concession understates the gravity of adopting Hogan's argument.

If we were to be persuaded by his conclusory argument, we would effectively deem any objection that simply cites to GR 37 as creating a basis upon which to lodge a proper appeal. Taken to its logical conclusion, Hogan would ask this court to consider claims of possible race discrimination even if an objecting party offered nonsense reasons for the objection; e.g., if counsel lodged a GR 37 objection and explained the State was discriminating against short jurors or explained that counsel always objected on a given day of the week. We refuse to countenance such an interpretation or its results. State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) ("We avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording.") (citation omitted).

Moreover, reviewing the rule as a whole, its structure makes clear that uttering the name of the rule simply serves as a tool to interrupt ongoing jury selection in order to engage in "further discussion" to address possible racial or ethnic discrimination. But here, Hogan misdirected the court for purposes of that further discussion, by volunteering solely a facially invalid basis for its GR 37 objection, i.e., juror 40's gender identity, and by staying silent as the court considered the juror's gender identity. Where Hogan simply did not argue that the State was striking juror 40 for racial or ethnic reasons or explain how their gender identity was related thereto, he left the court no chance to consider his newfound argument, on appeal, that objecting that juror 40 was transgender actually encompassed a claim of racial or ethnic bias.[4]

In this sense, our opinion is a narrow one. We need not and do not reach further hypotheticals about what, if anything, must affirmatively be said by an objecting party to require further discussion under GR37 or preserve the issue of possible racial or ethnic bias. We conclude only that a litigant may not volunteer solely an *improper* basis for a GR 37 objection as it cites the rule, and then rely on that objection to trigger our review.[5]

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[4] On reply, Hogan also conflates the idea of *whether* an objection was properly asserted with *how* to review the issue, assuming it was properly asserted. At oral argument, his counsel confirmed this conflation when stating "the rule is that we have de novo review of GR 37 *objections*, like, GR 37—it still requires an analysis of the rule." Wash. Ct. of Appeals oral argument, supra at 4 min., 31 sec. through 4 min., 41 sec. (emphasis added). This is putting the proverbial cart (how to review an issue) before the horse (whether to review an issue (properly asserted)).

[5] This holding is also consistent with a long-held principle of judicial economy. Namely, our Supreme Court has long held that "an 'appellate court may refuse to review any claim of error which was not raised in the trial court,'" based on the

ii. Insufficient Factual Predicate for Appellate Claim as to Race

Even if this court were to assume arguendo that Hogan properly made a GR 37 objection simply by naming the rule, there was no GR 37 violation here. First, as the court found, there was no showing that juror 40 was actually transgender and, second, no indication that juror 40's gender identity affected their views on race or ethnicity, for which the State then allegedly excluded them.

Our Supreme Court has observed that when reviewing GR 37 claims, "most courts have effectively applied de novo review because the appellate court 'stand[s] in the same position as does the trial court' in determining whether an objective observer could conclude that race was a factor in the peremptory strike." State v. Tesfasilasye, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022) (quoting Jefferson, 192 Wn.2d at 250). The court "agree[d][,] in [Tesfasilasye's] case," that this standard was appropriate since "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." Id. at 356. However, the court left open for "further refinement" what "the standard of review" should be "for a case that squarely presents the question based on a well-developed record." Id.

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policy "to 'encourage the efficient use of judicial resources.'" State v. O'Hara, 167 Wn. 2d 91, 97-98, 217 P.3d 756, (2009) (quoting RAP 2.5(a)). It further explained that "'appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" Id. at 98 (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)); see also State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) ("[p]roper and timely objections provide the trial court an opportunity to correct" error). In conducting the analysis of exceptions to this rule, "the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." O'Hara, 167 Wn.2d at 100. We hold the court could not.

This case is one such candidate for further refinement because the trial court's decision did involve factfinding. The court reviewed juror 40's election of the choice "prefer not to answer" on the questionnaire. It then stated in pertinent part, "[i]t was not apparent to me that they were transgender," and "they have not identified as transgender," adding "it's not on the questionnaire that their [sic] transgender." The court concluded that neither the questionnaire response nor defense counsel's opinion about their appearance duly supported the conclusion they were transgender. In turn, the court held that there was no "basis for arguing that this person is being challenged because they're transgender."

At our Supreme Court's suggestion, we defer to the court's findings of fact. Tesfasilasye, 200 Wn.2d at 356. To do otherwise would be to read into a non-answer (declining to select any gender identity) facts not in evidence or, without any basis, to credit defense counsel's perceptions over the court's. The non-answer on the questionnaire shows only that juror 40 opted not to disclose their gender identity to the court. There was no actual indication anywhere in the record that, as Hogan contends on appeal, juror 40 presented in a "feminine" way, despite having a name typically associated with a male gender identity. State v. Bunner, 86 Wn. App. 158, 161, 936 P.2d 419 (1997) ("This court may generally affirm the lower court on any basis supported by the record."). Moreover, the trial judge considered the totality of the evidence before it and personally observed juror 40 during voir dire. It is, therefore, appropriate to accept the court's comment that "it was not apparent" that juror 40 was transgender. It was particularly appropriate for the court to decline to use its governmental authority to assign a gender identity

to a juror who chose not to disclose it, and where gender had no apparent relevance to the case.

In turn, Hogan's primary argument—that juror 40 displayed, because of their gender identity, a "heightened understanding" to the plight of racial and ethnic minorities—also fails because this factual predicate is unfounded.

Apparently sensing the import of the court's finding that juror 40 did not appear to be transgender, Hogan argues in reply that "[w]hether juror 40 was trans or not, the point is that juror 40 was *gender non-conforming*—unlike all the other potential jurors, and striking juror 40 implicated the juror's sex." But there is similarly no evidence, and Hogan cites to none in the record, that juror 40 was "gender non-conforming," or was the sole such person in the venire.[6] Thus, that argument is equally unavailing.

Even assuming juror 40 *was* transgender, Hogan points to nothing in the record that ties their gender identity to their views on racial or ethnic bias that allegedly served as a factor in the State's strike. In other words, Hogan identifies no actual connection between juror 40's gender identity and their view on racial or ethnic bias to even allow the possibility that the State inexcusably relied on such a nexus. Juror 40 neither stated nor implied a connection between their identity and views on race that could have then factored into the State's strike, such as disclosing, for example, that as a transgender or gender-nonconforming person,

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[6] Merriam-Webster defines "gender nonconforming" as "exhibiting behavioral, cultural, or psychological traits that do not correspond with the traits typically associated with one's sex: having a gender expression that does not conform to gender norms." MERRIAM-WEBSTER ONLINE DICTIONARY (last visited Sep. 09, 2024), https://www.merriam-webster.com/dictionary/gender%20nonconforming.

they were more likely to be reluctant to convict a black defendant. The idea that juror 40's gender nonconformity inherently meant they held heightened sympathy toward to Hogan, as a racial minority, and that this tendency was a factor in the State's choice to strike them, only appears in Hogan's appellate brief. It is based, not on evidence in the record, but on the observation of Hogan's appellate counsel that there is some similarity in the kind of oppression both have suffered historically. Without more particularized facts, we cannot reward such speculation with a remedy under GR 37.

In summary, even if Hogan properly raised GR 37 objection by simply naming the rule, there is not a sufficient showing that juror 40 was actually transgender or that, because of their gender identity, they held sympathetic racial or ethnically beliefs which caused the State to use their peremptory against them.[7]

b. Alleged Constitutional Violation

Distinctly, though somewhat entangled with his GR 37 claim, Hogan argues that the prosecution's strike unconstitutionally removed juror 40 based on their sex or gender, under Batson. We disagree.

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[7] Hogan submitted a Statements of Additional Authorities (SAA) offering additional caselaw supporting his argument that his counsel properly raised the issue of alleged race based discrimination to the trial court by naming GR 37 and the State filed a motion to strike the SAA. However, this court has explained that the RAP (10.8) addressing SAAs was "intended to provide parties an opportunity to cite *authority decided after the completion of briefing*. We do not view it as being intended to permit parties to submit to the court cases that they failed to timely identify when preparing their briefs." O'Neill v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014) (emphasis added). As none of the authority Hogan offers was decided after the completion of the briefing, we need not and do not consider them. Thus, the motion to strike is granted.

Critical to his argument is the proposition that recent modification to Batson's traditional analysis for claims of racial discrimination applies "with equal force" to gender discrimination challenges. In making his argument that the State's strike unconstitutionally relied on juror 40's sex or gender, Hogan expressly relies on GR 37's objective observer standard in lieu of the typical analysis for evaluating constitutional violations in jury selection. But, as Hogan concedes, no Washington court has ever applied the GR 37 standard to a claim of discrimination in jury selection with regard to sex or gender.[8] We decline to be the first and, as such, apply the analysis laid out in Batson to claims of gender-based discrimination in the use of a peremptory challenge. State v. Burch, 65 Wn. App. 828, 839, 830 P.2d 357 (1992) (stating "that the principles enunciated in Batson apply to gender-based discrimination[.]"). We hold that the court properly rejected his claim that striking juror 40 was unconstitutional gender discrimination under Batson.

Courts must engage in a three-step analysis as outlined in Batson when considering claims of gender-based discrimination in the use of peremptory challenges. First, the party challenging the strike must make a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. The parties apparently concede that Hogan's Batson claim does not fail at step 1

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[8] Hogan argues that it is "not an excuse" that no Washington Court has applied GR 37's objective observer standard to Batson gender claims, because that is "what Washington's Constitution demands." In support, he briefly refers to Washington's Equal Rights Amendment, but does not elaborate further on state constitutional obligations. WASH. CONST. art. XXXI § 1 (amend. 61). This court need not consider this claim. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) ("This court will not consider claims insufficiently argued by the parties.").

because the State essentially skipped this step by immediately arguing a gender-neutral reason for the strike.[9]

At the second step, the striking party takes on the burden of disproving discrimination, as it is required to provide a justification for the strike that is neutral from the protected status at issue. City of Seattle v. Erickson, 188 Wn.2d 721, 726-27, 398 P.3d 1124 (2017). Here, as reviewed above, the State provided a non-gendered reason for striking juror 40, namely their inability to answer questions clearly. Hogan concedes the burden then shifted back to him once the State provided the court with "facially non-gender-identity reasons."

As the third step, the court must weigh all the relevant circumstances to decide if the proffered reasons are actually pretextual and give rise to an inference of discriminatory intent. Batson, 476 U.S. at 97-98; Flowers v. Mississippi, 588 U.S. 284, 302, 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019). "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding [prohibited, discriminatory] motivation rests with, and never shifts from, the opponent of the strike.'" Rice v. Collins, 546

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[9] However, should we consider Step 1 in further detail, there was not a sufficient indication that the totality of the facts gave rise to an inference of discriminatory purpose. The burden of proof was on the defense at this stage. State v. Orozco, 19 Wn. App. 2d 367, 373, 496 P.3d 1215 (2021). And although appellant claims the strike "smack[ed] of gender discrimination against a feminine presenting person," and cites to studies about LGBTQ people's disproportionate representation in the legal system, there is no evidence in the record, let alone any evidence offered by defense below, that there was any reason for the State to strike someone "feminine presenting." And otherwise, there was no indication that gender identity had anything to do with Hogan's case. Thus, with nothing in the record to suggest that gender as a protected class was relevant, Hogan's Batson claim might fail even at the first step. But, because the parties omit argument on this point, we proceed.

U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (quoting Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)). This court affords "a high level of deference to the trial court's determination of discrimination" at this juncture, and the trial court's decision will only be reversed if the appellant can show it was clearly erroneous. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008); Erickson, 188 Wn.2d at 727.

The U.S. Supreme Court has explained such deference is appropriate because:

> The trial judge's assessment of the prosecutor's credibility is often important. . . . [T]he best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province. The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of [the prohibited classification]. The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent.

Flowers v. Mississippi, 588 U.S. at 302-03 (citations omitted) (internal quotation marks omitted).

As already noted, Hogan acknowledges that our Supreme Court has incorporated the objective observer standard into the Batson test only for race related claims. In fact, Hogan concedes that for both the second and third steps of the test, "the analysis and outcome hinge on whether [the] modified approach to Batson applies to gender or sex, and not just race." As such, it is clear, regardless of whether Hogan's claim would succeed under an objective observer standard, it fails without it.

But, to complete our analysis, the court flatly found at least three reasons

unrelated to juror 40's gender that explained the State's strike: (a) they did not appear to be transgender; (b) their answers on the questionnaire indicated strong beliefs about "when police use excessive use of force on arrestees, the protesters and historically onto represented [sic] groups"; and (c) "they were very reticent when answering questions during voir dire" or "seemed to have a very difficult time . . . responding to questions." Affording the court a "high level of deference," Hogan has not shown any of these decisions are "clearly erroneous." Hicks, 163 Wn.2d at 493-94. Thus, this assignment of error fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

B. Exclusion of Medical Records

1. Additional Factual Background

Hogan's principle defense at trial was that he acted in self-defense in killing Jerome, as well as in the defense of his girlfriend and mother of his children, Elenise Falo. Falo testified at trial that Jerome had attacked her before Hogan shot him, hitting her repeatedly while she was inside Hogan's car. As a consequence, Falo testified, she experienced shoulder, neck, and head pain for which she sought medical treatment at a hospital.

Over the course of her trial, both parties presented their case with liberal use and reference to the medical records documenting Falo's hospital visit; namely, information about the injuries she reported, what tests were conducted,

any diagnoses she received, and what medication she was prescribed.

Following her examination, Hogan moved to admit her medical records and the State objected. The State had not contested that they were admissible under the business records exception to the hearsay rule and Hogan had a custodian to testify to their authenticity, but the State objected on the grounds that the records would confuse the jury, invite speculation, and unduly highlight matters not at issue. Hogan argued they were not confusing because their contents were "well within a layperson's understanding of what happens when one goes to the hospital."

In his discussion of why the court should admit the records, Hogan stated that the records were "pretty much what the witness testified to" and further argued:

> There aren't particularly difficult terms used, and in case the jury would like to refer back to it--because we did so much jumping around with pages, that this could actually be useful to them to see how it all fits together. And I'd ask under the rules of evidence that all the foundation has been laid and this is merely like completing that record.

The court sustained the State's objection under ER 403. It concluded that the records would be confusing to the jury without testimony from a medical provider. In making its ruling, the court expressly noted that both sides had been permitted to elicit testimony about the records.

2. Discussion

Arguing the exclusion was error, Hogan asserts that the record was "plainly relevant. It documented Ms. Falo's injuries and corroborated her testimony. This in turn tended to show that Jerome attacked Ms. Falo and Mr. Hogan acted in defense of Ms. Falo." He avers that by excluding this relevant evidence, the court

both abused its discretion under the rules of evidence and violated Hogan's constitutional right to present the evidence in support of his defense. We hold it did neither.

When a trial court's evidentiary ruling is challenged and a defendant claims a violation of his Sixth Amendment right [under the United States Constitution] to present a defense, we apply a two-part test. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022) (citing State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019)). First, we analyze the lower court's ruling for an abuse of discretion, applying the evidentiary rule or evidentiary statute at issue. Id. at 58-59. Second, if we find no abuse of discretion, we then consider de novo whether the ruling violated the defendant's Sixth Amendment right to present a defense. Id.

Hogan's claim implicates several evidence rules, for purposes of analysis at the first step. First, for evidence to be admitted at trial, it must be relevant. ER 402. And evidence is relevant if it tends to prove or disprove the existence of a fact of consequence to the outcome of the case. State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). But also, even evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

We review a trial court's ER 403 ruling for abuse of discretion. State v. Caril, 23 Wn. App. 2d 416, 427, 515 P.3d 1036 (2022). A trial court abuses its discretion if no reasonable person would take the view it adopted. State v. Atsbeha, 142

Wn.2d 904, 913-14, 16 P.3d 626 (2001). Stated differently, it abuses its discretion if "its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A decision that is contrary to law or based on an incorrect application of an evidentiary rule is also an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Here, assuming Falo's medical records were relevant, and even accepting Hogan's position that they would not have confused the jury, it was not an abuse of discretion for the trial court to choose to exclude them because both parties already "had an opportunity to really ask what each side believes is the relevant portion of those records, and so that information, at least, is before the jury in testimony." In other words, the trial court did not abuse its discretion in reasoning that they would have been a "needless presentation of cumulative evidence." ER 403. Indeed, Hogan's counsel herself acknowledged that the medical records are "pretty much what the witness testified to, that she made complaints, that she did X-rays, what parts of her body they x-rayed." Having heard this concession, the court's exercise of discretion was based on tenable reasons. Hogan has not shown that no reasonable person would have weighed the repetitiveness of the evidence the same way that court did pursuant to ER 403. Atsbeha, 142 Wn.2d at 913-14.

Similarly, moving to the second step in reviewing Hogan's evidentiary claim, we note that while the right to present a defense to a criminal charge is constitutionally guaranteed, it is not "without limitation." State v. Orn, 197 Wn.2d

343, 352, 482 P.3d 913 (2021) (citing State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 576 (2010)). Specifically, our Supreme Court has held that "the Constitution permits judges to exclude evidence that is repetitive." Id. (quoting Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). Moreover, our Supreme Court has held that there is an important and "clear distinction" between "merely bolstering" a defense and "evidence that is necessary to present a defense." Jennings, 199 Wn.2d at 66-67. That distinction is dispositive here.

While it may have been helpful for Hogan's defense case to admit the records because, as he asserts, the records would have "significantly buttressed the account the jury ultimately rejected," this very argument demonstrates that Hogan simply sought to admit the records in order to bolster Falo's credibility by repeating the account relayed in her testimony.

The relevance of the excluded evidence at stake here is, thus, fundamentally different from the evidence that a defendant was denied the ability to admit in State v. Broussard, a case in which this court held the defendant's right to present a defense *was* violated. 25 Wn. App. 2d 781, 792, 525 P.3d 615 (2023). There, the trial court did not allow *any* testimony from a witness that would have provided the jury with an alternative defense theory of the case. Id. at 788-89. Hogan's claim is clearly distinguishable.

Here, the evidence excluded did not prevent the jury from being presented with Hogan's defense theory. The exclusion of the records did not prevent the jury from hearing Falo's account, nor did it prevent the jury from finding Falo's

testimony about the source of her injuries to be credible, given that several other witnesses' testimony corroborated her claims. For example, Hogan does not argue that the State contested Falo went to the hospital seeking treatment.[10] Had the State done so, the medical record itself might have been necessary to address the verity of that fact, central to his theory. But here, the only purpose the records served was for the information within them to reiterate the specifics Falo already testified to.

This court has emphasized that "phrasing an evidentiary ruling as a constitutional claim [does not] provide[] a means for an end run around the Rules of Evidence. Nor is the second step analysis merely a repetition of the analysis undertaken at step one." State v. Ritchie, 24 Wn. App. 2d 618, 628-29, 520 P.3d 1105 (2022) (citation omitted). Moreover, this court has characterized Rule 403 as one of those "well-established, commonly utilized rule[s] that ha[ve] been applied time and again without any demonstrated detriment to the fairness of proceedings." Id. at 634-35.

The court excluded, under this commonly utilized rule, this evidence which Hogan chiefly offered to strengthen the theory already in play and to bolster Falo's credibility. Consequently, we conclude that there was no abuse of discretion at the evidentiary level, nor a violation of Hogan's constitutional rights.

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[10] At oral argument, Hogan ultimately agreed that there was no "suggestion, argument, innuendo, that the witness who was testifying as to going to the hospital didn't actually go to the hospital, didn't actually get treated[.]" Wash. Ct. of Appeals oral argument, supra at 21 min., 45 sec. through 22 min., 35 sec. In other words, Hogan acknowledged the State never disputed that fact, but rather, had implied Falo went to the hospital "to make a record" "for false reasons." Id.

C. Sufficiency of the Charging Document

The information charged Hogan, in count 1, with murder in the second degree, stating:

> That the defendant NIGEL SINCLAIR HOGAN SR in King County, Washington, on or about October 24, 2015, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Jerome Jackson, a human being, who was not a participant in said crime, and who died on or about October 24, 2015;
>
> Contrary to RCW 9A.32.050(1)(a), (b), and against the peace and dignity of the State of Washington.
>
> And further do allege the defendant, Nigel Sinclair Hogan SR at said time of being armed with a .40 caliber handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

Hogan argues this charge was constitutionally deficient because it omitted an essential element of the crime and, thus, violated his constitutional right of proper notice. Specifically, he claims the charge failed to specify the means of that alleged assault.

It has been long held, however, that, although a predicate offense is an element of a felony murder charge, an information need not include the elements of the predicate offense itself. State v. Kosewicz, 174 Wn.2d 683, 692, 278 P.3d 184 (2012); State v. Fillpot, 51 Wn. 223, 228, 98 P. 659 (1908). Because a defendant is not actually charged with the predicate crime, its elements are not deemed essential elements. Kosewicz, 174 Wn.2d at 691-92. Even recently, our Supreme Court has rejected the conflation of what must be proven at trial to convict someone of a crime with the requirements of a charging document. State v.

Canela, 199 Wn.2d 321, 335-36, 505 P.3d 1166 (2022).

In response, Hogan argues this long held precedent is wrongly decided and asks us instead to rely on nonbinding case law, namely Kreck v. Spalding, 721 F.2d 1229, 1233 (9th Cir. 1983). As we must, this court follows binding case law. We conclude the charging document was not constitutionally deficient and reach no further issues as to this assignment of error.

D. Fees

Hogan also seeks to strike the DNA and Victim Penalty Assessment (VPA) fees from his sentence, which relief the State rightly does not oppose. See RCW 7.68.035(4); RCW 43.43.7541; LAWS OF 2023, ch. 449, §§ 1, 4; State v. Ellis, 27 Wn. App. 3d 1, 16-17, 530 P.3d 1048 (2023). Accepting the State's concession, we remand this matter to the trial court to strike both the VPA and DNA fees.

III. CONCLUSION

We affirm, with the exception that we remand the matter for the trial court strike the VPA and DNA fees.

Díaz, J.

WE CONCUR:

Coburn, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84796-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 24, 2025

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