No. 103875-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MONTE TYSON PAYNE, Petitioner.

ANSWER TO PETITION FOR REVIEW

ERIC J. RICHEY,
Whatcom County Prosecuting Attorney
By KELLEN KOOISTRA
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #39288
311 Grand Avenue, Suite 201
Bellingham, WA 98225
KKooistr@co.whatcom.wa.us
(360) 778-5710

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Kellen Kooistra, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. DECISION AND RELIEF REQUESTED

Respondent asks this Court to deny Petitioner Monte Payne's Petition for Review of the Court of Appeals decision in State v. Monte Tyson Payne, Court of Appeals Division One No. 85525-5-I (2025).

C. ISSUE PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision finding no misconduct where a prosecutor, in voir dire, inquires about prospective jurors' opinions regarding drug enforcement policy in a case involving the possession of controlled substances should be accepted for review.

D. STATEMENT OF THE CASE

On June 28, 2019, Monte Payne was stopped by Bellingham Police in a vehicle for failure to signal and making a wide turn. CP 4. When he was contacted, officers observed

him place an item under the steering column. CP 4. Officers searched the car and found a case containing a substance believed to be heroin, a substance believed to be methamphetamine, and indicia of drug trafficking. CP 4. Mr. Payne was arrested and on July 3, 2019, was charged with two counts of possession with intent to deliver and one count of driving while license suspended in the third degree. CP 1-2. The case proceeded to trial on March 14, 2023. CP 73-79.

During a portion of jury selection, the deputy prosecutor asked the panel their opinions on various aspects of drug law enforcement. RP 76. He began by asking whether anyone thought we'd "lost" the war on drugs and whether enforcement should be scaled back. RP 78-79. This question generated a discussion with several jurors about ways in which enforcement could be scaled back. RP 79-80. Juror No 3 indicated that it was a "hard question" to which the prosecutor responded "it's meant to be." RP 79. The prosecutor followed up with jurors who thought that enforcement should be scaled back by asking

clarifying questions about specific types of enforcement actions such as breaking up drug rings or combating cartels in Mexico. RP 80. Payne did not object to any of the prosecutor's questions or discussion prompts. RP 76-110.

After the prosecutor had been asking questions for around fifteen minutes, he turned over questioning to the defense while reserving what remained of the thirty minutes allotted to him by the trial judge. RP 81. The defense attorney took over questioning by asking the venire panel about their views on drug addicts and their trustworthiness. RP 88-93.

After the defense attorney questioned the panel for thirty minutes, the court took a recess and the prosecutor resumed his questioning asking about juror's feelings on safe injection sites. RP 102-103. This question elicited a diverse range of opinions about their utility. RP 103-110. Many jurors expressed that they felt safe injection sites made people safer, whereas some expressed reservations. RP 102-107. Juror 21 in particular expressed concerns about safe injections sites. This response

was the only time Juror 21 answered any questions during voir dire. RP 107. After the State concluded their thirty minutes of time, defense counsel was allowed additional time to inquire of the jury panel. RP 112.

The case proceeded to trial and, after procedural dismissals of counts II and III, the jury returned a guilty verdict as to one count of possession with intent to deliver. CP 36. The defendant was sentenced to a Drug Offender Sentencing Alternative on June 6, 2023. CP 37-48.

On appeal, Mr. Payne argued that the prosecutor's inquiries to the jury during voir dire amounted to misconduct. Mr. Payne asserted that this court's decision in State v. Loughbom, 196 Wn.2d 64, 470 P.3d 499 (2020) presented a bright line rule that mentioning the "war of drugs" was misconduct. Brief of Appellant at 21. Payne also cited State v. Zamora, 199 Wn.2d 698, 512 P.3d 512 (2022), a case involving voir dire questioning implicating racial biases. Brief of Appellant at 24. The Court of Appeals rejected Mr. Payne's

interpretation of Loughbom and his reliance on Zamora and affirmed the conviction. Opinion at 7.

The Court of Appeals found that Mr. Payne failed to establish that the prosecutor's questions were "so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice". Opinion at 8. The Court of Appeals specifically differentiated the conduct of the prosecutor here from that presented in Loughbom. "[T]he prosecutor posed questions to jurors to discern beliefs on drug enforcement in general. Such questions are not analogous to the specific and persistent characterization of the war on drugs that occurred in Loughbom where the prosecutor connected the war on drugs to the locality, the community, and the crime charged." Opinion at 5-6. The Court of Appeals also rejected Payne's reliance on Zamora to argue the standard described in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) should apply to this case. "Payne has not alleged race-based misconduct so we do not use the standard established in Monday." Opinion at 4. The Court

concluded "Payne fails to establish that the prosecutor's questions about the war on drugs were so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice." Opinion at 6.

E. PETION FOR REVIEW

Mr. Payne requests this Court accept review of the Court of Appeals' opinion finding that the prosecutor did not commit misconduct by neutral inquiries about the jurors' feelings and preconceptions around various aspects of drug enforcement during jury selection without referencing these themes or topics in the presentation of evidence or during argument. Payne fails to show in his petition that this opinion is contrary to decisions of this court, nor does he show that there is a significant question of constitutional law or an issue of substantial public interest such that review should be accepted by this court.

1. The Court of Appeals' decision determining that Payne did not meet his burden to show prosecutorial misconduct is not in conflict with this Court's decisions in Zamora or Loughbom such that review by this Court is warranted under RAP 13.4(b)(1).

Review by the Washington State Supreme Court is only to be accepted if the conditions listed in RAP 13.4(b) are present. Payne alleges that the decision of the Court of Appeals is in conflict with this Court's decisions in State v. Loughbom and State v. Zamora. Petition for Review at 21-22. This is incorrect.

Loughbom concerns a case where the prosecutor asked in voir dire if anyone thought there was a drug problem and then proceeded to use the rhetoric of the "war on drugs" in opening, closing, and rebuttal statements, describing *the case* as "another battle in the "war on drugs". Loughbom at 67-68. (emphasis added). The issue in Loughbom was that the "framing of Loughbom's prosecution as *representing* the war on drugs, and his reinforcing of this theme throughout, caused incurable

prejudice." Id. at 75. (emphasis in original). The court found the prosecutor's rhetoric was "practiced and strategically employed at both ends of Loughbom's trial." The court noted that the "war on drugs" was the prosecutor's "theme". Id. at 76. Here, the prosecutor was simply prompting a discussion during jury selection to flush out potential biases and preconceived ideas held by the panel in order to make informed challenges, peremptory or for cause. Unlike the prosecutor in Loughbom, this prosecutor did not rely on this discussion to improperly appeal to the jury during trial or closing arguments. He did not claim this trial was part of the war on drugs, nor enlist the jury to protect their community by referencing local drug issues or enforcement. A review of the questions in context, shows a good faith effort to spark an informative dialogue among the panel about drugs and drug enforcement.

Mr. Payne urges this court to ignore the context in which "the war on drugs" was used in this case and simply conclude that because this prosecutor said "war on drugs" more times

than that in the Loughbom case, it is prejudicial. This argument ignores the way the prosecutor in Loughbom referenced the "war on drugs", using it "at the beginning of the prosecutor's opening statement, closing argument, *and* rebuttal argument." Loughbom at 77 (emphasis in original). The rationale of the court in Loughbom focused on how the prosecutor was using the "war on drugs" rhetoric, not how often. The prosecutor there was not making a good faith inquiry as to the beliefs of the jurors during jury selection, but instead priming "the jury to view Loughbom's prosecution through this prism by raising the specter of the 'drug problem in Lincoln County'" and representing the trial as "yet another battle in the ongoing war on drugs" Id. The pervasiveness of this rhetoric through multiple phases of this trial was central to the Loughbom court finding misconduct.

The Court of Appeals correctly recognized that this case presented a very different scenario than Loughbom. Here, the prosecutor "did not use war on drugs rhetoric during opening

statements or closing arguments" but rather "posed questions to jurors to discern beliefs on drug enforcement in general." Opinion at 5. The Court of Appeals recognized that Loughbom did not create a bright line rule where "a single inadvertent reference to the war on drugs during a longer trial would require reversal." Opinion at 4. Mr. Payne asks this court to reduce the holding in Loughbom to a counting exercise. This is contrary to the reasoning in Loughbom which clearly requires an examination of the context and intent of the prosecutor's statements and where the finding of misconduct relied on the "prosecutor's improper framing of Loughbom's prosecution as representing the war on drugs, and his reinforcing of this theme throughout." Loughbom at 75. The Court of Appeals followed the holding in Loughbom in examining the whole context of the trial and finding no misconduct so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice.

In his argument, Mr. Payne misconstrues the record and mischaracterizes the comments made by the prosecutor. For

example, Mr. Payne cites the Opinion's statement that the prosecutor "did not reference drug problems in any specific locations, in the county, or connect the war on drugs to Payne's case as 'another battle'" and indicates that this statement was "Wrong again." Petition for Review at 24. As evidence of this, Mr. Payne points to a question asked by the prosecutor that does not reference any locations in the county nor connect the war on drugs to Payne's case as 'another battle.' Petition for Review at 24. The assertion that the opinion was "Wrong again." is plainly false. Mr. Payne presents arguments that the Prosecutor's questions were designed to invariably push the jury towards a particular conclusion, such an argument is not supported by an examination of the record below.

In addition to following the holding in Loughbom, the Court of Appeals also correctly found that the standard elucidated by State v. Zamora, originally established in State v. Monday, was not applicable to this case. Opinion at 4. Zamora concerned the prosecution of a Latino defendant for two counts

of Assault in the Third Degree. Zamora at 702. During voir dire, the prosecutor brought up topics of illegal immigration, crimes committed by immigrants, drug smuggling, and border security. The court held that this improperly appealed to juror's potential racial bias by asking questions wholly unrelated to the charge at hand but designed to reinforce racial stereotypes. Id. at 719. Throughout the opinion, the court reiterates the unique and singular perniciousness of racial bias, and states that the standard the court is using applies to appeals to racial bias in particular. The "rule announced in Monday is a distinct rule that applies to allegations of race-based prosecutorial misconduct." Id. at 709 (*citing* State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).

The court went on to say "the unmistakable principle underlying these precedents is that discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Id. at 710 (*quoting* Pena-Rodriguez v. Colorado, 580 U.S. 206, 137 S. Ct. 855, 868, 197 L. Ed. 2d

107 (2017) (internal quotations omitted). The court acknowledged that a jury can be tainted in voir dire, and also noted the particular threat of race-based appeals as distinct from other misconduct. Id. at 712. This focus and the use of special standards and rules when it comes to appeals to racial bias, make the holding in Zamora of limited use in other contexts.

Mr. Payne does not assert that he is, or was perceived as, a member of any group, race, or ethnicity disproportionately affected by state or national drug policy. As such, the Court of Appeals correctly concluded that the race-based misconduct standard established in Monday is not applicable here. Opinion at 4. The portion of the Zamora opinion that is relevant to this case, that misconduct can occur in voir dire itself, even if not carried over to the trial, was noted and considered by the Court of Appeals. Opinion at 4. The Court of Appeals did not opine that there was not a possibility of misconduct where the objected to questions were only presented in voir dire, rather they looked at the context of the prosecutor's statements to

determine if they were so flagrant and ill-intentioned as to constitute reversable misconduct. The Court of Appeals correctly followed the holdings of both Zamora and Loughbom in its opinion. As such, there is no conflict with cases decided by this court and review should not be accepted under RAP 13.4(b)(1).

2. The issues presented in this case are not novel, nor do they present a significant question of constitutional law such that review by this Court is warranted under RAP 13.4(b)(3).

Mr. Payne claims that this case presents a novel constitutional issue and therefore review is warranted under RAP 13.4(b)(3). He does not identify any new or unanswered question of constitutional law that requires an answer from this court. This case concerns whether Mr. Payne was prejudiced by improper conduct of the prosecutor. There is a clearly established standard used to determine whether statements made by a prosecutor constitute misconduct. This standard places the burden on the defendant to prove that the statements

were both improper and prejudicial, that is, that they had a substantial likelihood of affecting the jury's verdict. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 269 (2015) (citing State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)). Furthermore, where the statements were not objected to at the time, the appellant must show that the remarks were so flagrant and ill-intentioned that they caused an enduring prejudice that could not have been neutralized by a curative instruction. State v. Slater, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). The Court of Appeals rightly held that Mr. Payne had not met this burden. There is no significant constitutional question presented in this case that warrants review under RAP 13.4(b)(3).

Mr. Payne failed to meet even the first element of his burden, that the statements were improper at all. The purpose of voir dire "is to enable the parties to learn the state of mind of the prospective jurors so that they can know whether or not any of them may be subject to a challenge for cause and determine the advisability of interposing their peremptory challenges."

State v. Frederiksen, 40 Wn. App 749, 751-752, 700 P.2d 369 (1985) (*quoting* State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889(1984)). "A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges." CrR 6.4(b).

The prosecuting attorney's questions to the panel in this case did exactly that. The questions Payne now objects to were designed to elicit opinions and biases of potential jurors that were relevant to this case and that could inform both parties in their exercise of for cause and peremptory challenges. The prosecutor's questioning of the panel was brief, a half hour divided into two segments, during which time he inquired about the jurors' feelings on how resources were being used to combat the drug problem in our country. Specifically, the prosecutor asked for the juror's opinions on the war on drugs, on hypothetical enforcement actions, and safe injection sites. These issues were presented neutrally, and appeared poised to

elicit honest answers from the jurors to show any potential biases they brought with them to consideration of the issue of drug enforcement. The good faith of the prosecutor in seeking an open discussion about the issue is clear where Juror No. 3 responded to a question with "It's a hard question", to which the prosecutor responded "It's meant to be." RP at 79. The questioning was designed not to suggest an answer, but to spur a frank conversation among the panel.

Mr. Payne also failed to meet his burden that these statements were prejudicial. In his petition for review, Mr. Payne makes broad assumptions as to what conclusions the jurors would draw from particular questions. He claims that the prosecutor acknowledging that illicit drug use was not a good thing would inevitably lead jurors to believe they would be enabling narcotics use by failing to convict Mr. Payne. Petition for Review at 26. He claims that the questions regarding a wide variety of drug enforcement actions would suggest Mr. Payne was part of a drug-trafficking ring. Petition for Review at 25.

These conclusions simply don't follow rationally from the questions asked. There is no reason to believe that simply asking general questions about juror's feelings on drug enforcement policies would cause them to completely disregard the evidence presented, the instructions from the court, and their own common sense.

It is clear that Mr. Payne's counsel was also informed by the answers to these questions and used them in his own jury selection process. The defense used five peremptory challenges against Jurors 8, 9, 14, 21, and 24. Of those, three jurors provided responses to the prosecutor's questions at issue in this appeal. CP 80, RP 102-110. In fact, for Juror No. 21, the only response they gave for the entirety of voir dire was to share a negative opinion about safe injection sites. RP 107-108. The defense struck this juror, presumably based on this information. Far from prejudicing Mr. Payne, the discussion of topics around drug enforcement aided his attorney in his trial strategy. The Court of Appeals was clearly correct in holding that Mr. Payne

failed to meet his burden to show any prejudice at all, much less prejudice so "ill-intentioned and flagrant" it could not be cured by an instruction.

Far from presenting a novel significant constitutional question, Mr. Payne's allegations of prosecutorial misconduct are addressed and decided by existing case law. The standard of review and burden of proof are clear and well-established. This issue does not merit review under RAP 13.4(b)(3).

3. The issues presented in this case do not involve substantial public interest such that review by this Court is warranted under RAP 13.4(b)(4).

Mr. Payne argues that this case involves substantial public interest due to the disproportionate impact the "war on drugs" had on communities of color, particularly Black and Latinx communities. Petition for Review at 18. The disproportionate impact federal drug policy has had on communities of color is pernicious, well-documented, and wholly irrelevant to the question of whether the jury was

prejudiced in this case. Mr. Payne does not claim to be a person of color, and there is no indication in the record that anyone thought he was a person of color, nor any indication race or ethnicity were implicated in any way during voir dire or the rest of the trial. The petition offers no rationale for how the racist drug policies enacted in our nation's history would have any effect at all in this trial. There may be a substantial public interest in combatting racism present in our justice system, but it has nothing to do with Mr. Payne or this case. Review of this Court of Appeals decision is not an appropriate vehicle to address the public interest in combating racism. There is no substantial public interest in this case that would warrant review under RAP 13.4(b)(4).

F. CONCLUSION

The Court of Appeals correctly ruled that Mr. Payne failed to meet his burden to show he was prejudiced by improper statements from the prosecutor. This conclusion is

fully in accord with this Court's rulings in State v. Loughbom and State v. Zamora. There are no novel constitutional issues that call for review, nor a substantial public interest involved.

This document contains 3,455 words, excluding parts of the document exempted from the word count by RAP 18.17(b).

DATED this 13th day of May, 2025.

Respectfully submitted,

Kellen Kooistra, WSBA No. #39288
Deputy Prosecutor
Attorney for Respondent

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

May 13, 2025 - 7:20 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,875-5
Appellate Court Case Title:	State of Washington v. Monte Tyson Payne
Superior Court Case Number:	19-1-00783-7

The following documents have been uploaded:

- 1038755_Answer_Reply_20250513071859SC003650_6020.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 25.05.13 Answer Pet Rev.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- hthomas@co.whatcom.wa.us
- swiftm@nwattorney.net

Comments:

Sender Name: Anna Webb - Email: awebb@co.whatcom.wa.us
Filing on Behalf of: Kellen Kooistra - Email: kkooistr@co.whatcom.wa.us (Alternate Email: appellate_division@co.whatcom.wa.us)

Address:
311 Grand Ave Suite 201
Bellingham, WA, 98225
Phone: (360) 778-5710

Note: The Filing Id is 20250513071859SC003650