Supreme Court No. _____
COA No. 39421-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YASIR DARRAJI,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

A. INTRODUCTION

Following September 11th, this country was gripped by Islamophobia. Muslim countries were portrayed on the nightly news as barbaric and backwards. Muslim men were stereotyped as terrorists and religious extremists; Muslim women were in turn seen as forcibly veiled and oppressed. By contrast, America was portrayed as a crusader of democracy and Christian values: the land of the "free."[1]

These tropes are now entrenched in the national consciousness. During his campaign, President Barack Obama combated rumors that he was secretly Muslim and therefore "anti-American."[2] President Trump was elected in 2016 in part due to his promotion of a so-called "Muslim Ban."[3]

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[1] *See generally*, Khaled A. Beydoun, "Acting Muslim," 53 Harv. C.R.-C.L. L. Rev 1, 20–23 (2018).

[2] CBC, "Obama campaign says New Yorker cartoon goes too far" (July 14, 2008), *available at* https://www.cbc.ca/news/entertainment/obama-campaign-says-new-yorker-cartoon-goes-too-far-1.724065.

[3] Jessica Taylor, "Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.," NPR (Dec. 7. 2015).

In the case at bar, anti-Muslim sentiment infected the proceedings from start to finish.

Authorities investigated Ibtihal Darraji's death as an "honor killing" based on her association with Spokane's Iraqi Muslim refugee community and a detective's reading of a Wikipedia entry.

At trial, the prosecution remained wedded to this theory, asserting Ms. Darraji was murdered by her ex-husband, Yasir Darraji, because she converted to Christianity and embraced newfound "freedoms" like driving, drinking, and wearing shorts after the couple immigrated to the United States. As the prosecution repeatedly labeled it, Ms. Darraji had "Americanized."

But when the prosecution attempted to elicit evidence from its own witnesses to support this theory, it came up short. Undeterred, the prosecution argued to the jury in closing that Ms. Darraji's conversion to Christianity was "the beginning of

the end" and that she was given the Iraqi "death sentence" because her community viewed her as a "bad girl."

This was a flagrant and apparently intentional appeal to anti-Muslim bias. Despite this, the Court of Appeals affirmed in a published, split opinion. While the majority expressed skepticism that "the heightened scrutiny of race-based misconduct" applies to "cultural or religion-based stereotypes," *State v. Darraji*, 568 P.3d 1143, 1154 (2025), Judge Fearing correctly acknowledged that "Islamophobia has become a distinct form of racism." Dissent at 16 (Slip Op.).

This Court should take review to clarify that Islamophobia is just as harmful to precepts of justice as other forms of racial and ethnic discrimination, and that the prosecutorial misconduct in Mr. Darraji's case was per se prejudicial.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Yasir Darraji, the petitioner, asks this Court to review the opinion of the Court of Appeals in *State v. Darraji*, 568 P.3d 1143 (May 22, 2025), which was published in part.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a fair trial includes the right to an impartial jury. U.S. Const. amend. VI, XIV; Const. art. I, § 22; *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017). In *State v. Zamora*, 199 Wn.2d 698, 512 P.3d 512 (2022) and *State v. Bagby*, 200 Wn.2d 777, 522 P.3d 932 (2023), this Court held that the right to an impartial jury is violated when an objective observer could view a prosecutor's conduct as an appeal to racial or ethnic stereotypes, and that such misconduct is per se prejudicial. Ethnic identity can include nationality, religion, culture, and language, and can also intersect with racial

identity.[4] Here, the prosecutor associated Mr. Darraji with stereotypes about Iraqi Islamic fundamentalism, and argued he murdered his ex-wife to preserve his honor after she converted to Christianity and "Americanized." This gratuitous injection of an ethnic divide—rooted in themes of nationalism and Islamophobia—was not supported by the State's evidence. This Court should take review and hold that *Zamora* and *Bagby's* objective observer standard extends to a prosecutor's improper appeals to Islamophobia, and to all other forms of discrimination that intersect with race and ethnicity. RAP 13.4(b)(3).

2. Hearsay not subject to any exception is inadmissible, as is evidence that is too prejudicial to outweigh its probative value. Here, the court allowed inflammatory hearsay that Ms. Darraji feared the Iraqi "death penalty" as evidence of

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[4] *See* Merriam-Webster, "Ethnic," available at https://www.merriam-webster.com/dictionary/ethnic (last accessed June 20, 2025).

harassment—a charge the Court of Appeals reversed for insufficient evidence—even though these statements were both hearsay and extremely prejudicial to the second-degree murder charge. This inadmissible, prejudicial evidence deprived Mr. Darraji of a fair trial, and warrants review under RAP 13.4(b)(2).

3. Pursuant to CrR 3.3, the State's requests for trial continuances over a jailed defendant's objection must be supported by a documented need, and proof the State will provide a trial within a reasonable time. Here, the court granted the State's requests for lengthy continuances over Mr. Darraji's objections and without showing a specific need for the additional time or evidence his trial could be held within a reasonable time, in violation of his rule-based right to speedy trial. Review is warranted pursuant to RAP 13.4(b)(2).

4. A person has the constitutional right to a unanimous jury. *State v. Espinoza*, 14 Wn. App. 2d 810, 815, 474 P.3d 570 (2020); *Ramos v. Louisiana,* 590 U.S. 83, 90–93 (2020); *State*

v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); Const. art. 1, § 22; U.S. Const. amend. VI. Here, the State sought added punishment based on the aggravating factor that the murder had a "foreseeable and destructive impact on persons other than the victims." Without electing any specific conduct, the prosecutor told the jury this aggravator could be based on Mr. Darraji's children, firefighters, the deceased's friends, and unidentified persons in the decedent's "community." Whether the prosecutor's failure to elect the conduct supporting the aggravating factor violates Mr. Darraji's right to a unanimous jury verdict presents a significant question of constitutional law that warrants this Court's review. RAP 13.4(b)(3).

5. The State violates the constitution by taking away "someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States,* 576 U.S. 591, 594 (2015); Const. art. I, § 3; U.S. Const. amend. XIV. The

aggravator alleging Mr. Darraji's conduct had a "destructive and foreseeable impact on persons other than the victim" is void for vagueness as applied to him because it encompassed a large swath of people that Mr. Darraji could not anticipate. Whether this aggravator is void for vagueness merits review as a significant question of constitutional law. RAP 13.4(b)(3).

6. The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment. *Erlinger v. United States*, 602 U.S. 821, 831–32 (2024); *Hurst v. Florida*, 577 U.S. 92, 97-98 (2016); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); U.S. Const. amend. VI, XIV; Const. art. I, §§ 21, 22. In accordance with these constitutional rights, courts may not impose a sentence above the standard range based on additional judicial fact-finding. Here, the court found that there were substantial and compelling reasons to impose an exceptional sentence based on facts not found by a jury. This included factual findings that Mr. Darraji had intended to "disfigure" and

"mutilat[e]" his ex-wife's body by setting it on fire. Mr. Darraji's constitutional rights to due process and trial by jury were violated by the court's judicial fact finding, warranting this Court's review. RAP 13.4(b)(3).

7. Accused persons have the constitutional right to know the charges against them. U.S. Const. amend. VI; Const. art. I, § 22; *Russell v. United States*, 369 U.S. 749 (1962). An information is constitutionally defective if it fails to list the essential elements of a crime. Here, the information failed to identify who constituted the "persons other than the victim" to support the aggravator. Whether this rendered the information deficient is a significant question of constitutional law that warrants this Court's review. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

1. Based on her association with the Iraqi Muslim community, police investigate Ibtihal Darraji's death as an "honor killing."

Yasir and Ibtihal Darraji were married in Iraq and immigrated to the United States in 2014 with their two young

children, T.D. and D.D. RP1139-40. Several years later, the Darrajis divorced. RP1141. Mr. Darraji started dating another woman with whom he lived and had a child. RP2096-97.

When Mr. and Ms. Darraji's oldest child, T.D., was 11 or 12 years old, she chose to live with Mr. Darraji because she did not get along with her mother. RP1867. T.D. remained close to her father and appreciated that he "took care of us. He listened to us. He gave us the freedom to make our own choices" and supported them in "every decision." RP1871. D.D. also primarily lived with his father but regularly saw his mother. 8/20/20 RP9. [5]

On January 30, 2020, Ms. Darraji was scheduled to pick up D.D. from Mr. Darraji's home. RP762. Around 6:00 p.m., when Ms. Darraji was supposed to pick up D.D., Mr. Darraji spoke on the phone to one of his closest friends, and then again at 7:17 p.m. RP1678-79, 1667. In the second call he told his

[5] Reference to the VRP that is not consecutively paginated will include a date.

friend that when Ms. Darraji arrived to pick up D.D., the inside of her car smelled like marijuana. RP1680. When Mr. Darraji asked her about it, she got angry, hit the steering wheel, and left without taking D.D. RP1680. Mr. Darraji told his friend that D.D. was staying with him that night and Mr. Darraji was going to bed early. RP1683-84.

That same evening, sometime between 9:00 and 10:00 p.m., a person reported a burning car in a parking lot of a nearby park. RP832. Firefighters responded and found Ms. Darraji. RP855-56. An autopsy revealed she had been strangled and was dead before the fire was set. RP932, 1044.

The next day, Mr. Darraji drove to work at his normal time. RP1684. When Mr. Darraji was at work, an acquaintance called and told him she heard Ms. Darraji was dead. RP1158.

Mr. Darraji hurriedly left work at the end of his shift, saying he had a family emergency. RP1126-29. Police stopped Mr. Darraji as he was driving away. RP1181. Mr. Darraji was calm and was cooperative. RP1195-96.

Mr. Darraji was taken to the police station and interrogated. He told police he met Ms. Darraji outside his apartment in the parking lot, that they had a dispute, and Ms. Darraji left. RP1567. Mr. Darraji told police afterwards he checked his mailbox and then he drove around the Spokane Valley and listened to some music for a couple hours. RP1568.

The detectives posited from the outset of their investigation that this was an "honor killing," a term they defined from a Wikipedia entry. CP179-80.

2. At trial, the prosecutor depicted the case as a conflict between American Christianity and Islamic fundamentalism.

The prosecutor adopted the detective's belief that this was an "honor killing," by focusing on Ms. Darraji's adherence to Christianity and her "freedoms" after her divorce, including whether she wore a headscarf, got a job, drove a car and went to nightclubs and started drinking. RP732-34; 805-06; 814-19; 1142-43; 1949. The witnesses attested to some changes after Ms. Darraji's divorce, but did not endorse the prosecutor's

theory that Ms. Darraji adopted an "Americanized" lifestyle or converted to Christianity after divorcing Mr. Darraji. RP734; 1147. Still, the prosecutor argued in closing that Ms. Darraji's adherence to Christianity was the "beginning of the end for [Ms. Darraji]." RP2174. The prosecutor argued Ms. Darraji's purported cultural and religious changes were a "death sentence in Iraq; maybe here, too." RP2189.

3. Mr. Darraji is convicted and given an exceptionally high prison sentence.

The State alleged the aggravating factor that "persons other than the victim" suffered a "destructive and foreseeable impact" from the crime. CP132. The prosecutor first argued this aggravator applied to Mr. Darraji's children. RP2193. But the prosecutor also argued every witness who testified at trial could be considered in the State's allegation of the aggravator: "This death has impacted the entire community . . . her family, her friends, even the firefighters who pulled her out of the car. A destructive impact on these folks." RP2194.

The jury convicted Mr. Darraji of harassment and felony murder with the aggravator. CP408-12.

The court imposed an exceptional sentence after making additional findings. CP441-42. The court found the aggravator applied to all the people the prosecutor identified. CP442. The court also found "the defendant did not set [Ms. Darraji] on fire to destroy evidence, but instead to disfigure the victim." CP442. In addition, the court found this "mutilation" to be "incredible brutal and cold [sic]." CP442. The court also found Mr. Darraji "has never shown any remorse," and that he "poses a danger to the community." CP442. The court entered an exceptional sentence of 300 months, 56 months above the top of the standard range. CP430-31; CP442.

Mr. Darraji appealed. In the published portion of its opinion, the Court of Appeals rejected Mr. Darraji's argument that the prosecutor engaged in misconduct by invoking Islamophobic tropes. Slip Op. at 20–30. In the unpublished portion, the Court reversed the felony harassment charge for

insufficient evidence, rejected Mr. Darraji's other arguments, and remanded for resentencing. *Id.* at 31–57.

Judge Fearing filed a dissent, stating that the prosecutor "gratuitously painted victim Ibtihal Darraji as Christian and American and defendant Yasir Darraji as Muslim and un-American." Dissent at 22–23. Accordingly, Judge Fearing stated he would reverse the conviction due to the "infection of racial, ethnic, and religious bias" at trial. *Id.* at 22.

E. ARGUMENT

1. This Court should take review to resolve any doubt the *Zamora*/*Bagby* standard applies to prosecutorial misconduct rooted in Islamophobia and all other forms of discrimination that intersect with race and ethnicity.

The Islamic religion has long served as a proxy for racial discrimination and conjures deep seated religious and cultural biases, particularly against Muslim men. Here, the prosecutor gratuitously interjected evidence of Ms. Darraji's Christianity and supposed "Americanization," and contrasted it with

harmful tropes about Islam's oppression of women that were unsupported by the record. As Judge Fearing noted in his dissent, "[t]he incessant reference to Christianity and Americanization served no purpose other than to arouse the jurors." Dissent at 21. The State's misconduct denied Mr. Darraji of a fair trial and requires this Court's review.

a. It is misconduct for a prosecutor to infuse race, nationalism, and religion into the trial.

A prosecutor's arguments based on racial, ethnic, and other stereotypes are antithetical to and impermissible in a fair and impartial trial. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017). Courts must be "vigilant of conduct that appears to appeal to racial or ethnic bias even when not expressly referencing race or ethnicity." *State v. Zamora*, 199 Wn.2d 698, 714, 512 P.3d 512 (2022).

The objective observer standard controls when analyzing claims of prosecutorial misconduct involving racial bias. *State*

v. Bagby, 200 Wn.2d 777, 792-93, 522 P.3d 982 (2023). This stringent test applies due to concern about "the impact of racial bias" at trial, regardless of a prosecutor's intent. *Id.*

To determine whether a prosecutor "flagrantly or apparently intentionally appealed to jurors' potential racial bias," this Court asks whether "an objective observer could view the prosecutor's questions and comments as an appeal to jurors' potential prejudice, bias, or stereotypes in a manner that undermined the defendant's credibility or the presumption of innocence." *Id.* at 793. This standard presumes that the "objective observer" is a person who is "aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in additional to purposeful discrimination." *Zamora*, 199 Wn.2d at 718; *accord Bagby*, 200 Wn.2d at 801.

This Court recently reversed a conviction based upon the prosecutor's injection of racial bias in *Bagby*. There, the prosecutor's irrelevant, baseless focus on the Black defendant's

"nationality" created an "us-them" distinction that "prime[d] the jury to consider the incident through that lens." *Bagby*, 200 Wn.2d at 795. Similarly, in *Zamora*, the prosecutor's questions during voir dire concerning "unlawful immigration, border security, undocumented immigrants, and crimes committed by undocumented immigrants" amounted to race-based prosecutorial misconduct where the defendant was Latino. *Zamora*, 199 Wn. 2d at 701.

b. This Court should hold that the *Bagby* and *Zamora* objective observer standard applies when the prosecutor appeals to jurors' Islamophobia.

"Just as racism produced anti-Blackness, which then produced Blacks as a racial group and Black as a race, racism produced Islamophobia, which then produced the Muslim as a racial group and Islam as a race." Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. Cin. L. Rev. 1, 17 (2022). Anti-Muslim "racism or differential treatment is based on the understanding that Islam is categorically different from and often opposed to Christian

European civilization." *Id.* at 50. The markers of the Islamic faith are what invokes the racial "othering"; for instance, even "a white woman in hijab becomes raced through Islam." *Id*. at 51.

Since the September 11, 2001 attacks, "the suspicion of Islam as a faith is central to the War on Terror political discourse and racialization of Arab and Middle Eastern Americans as terrorists." Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion As Racial Expression*, 105 Iowa L. Rev. 1475, 1490-91 (2020).

In a recent study of criminal stereotypes of Muslim Americans, participants' top choices of adjectives to describe Muslim Americans were religious (71 percent) and radical (61 percent), followed by hostile (32 percent), fundamentalist (30 percent), and criminal (25 percent). Joseph J. Avery, et. al, *Criminal Stereotypes of Muslim and Arab Americans and the Impact on Evaluations of Ambiguous Criminal Evidence*, 51 J. Legal Stud. 177, 183 (2022). In this study, people were more

likely to convict Muslim-American defendants when accused of a "stereotype-consistent crime of terrorism" than one that did not draw on the stereotypes associated with religious fundamentalism. *Id.* at 201-02.

Bias against and distrust of Muslims has currency in the Spokane community were Mr. Darraji was tried; in 2015, the elected Spokane prosecutor had to apologize for his wife posting the on-line comment, "I do not trust Muzlims no matter what." The Columbian*, Spokane prosecutor apologizes for wife's Muslim comments*," March 4, 2015.[6]

Yet the majority below expressed doubt that *Zamora* and *Bagby*'s standard for racial and ethnic prosecutorial misconduct applied to the anti-Muslim rhetoric employed in Mr. Darraji's trial. Specifically, the Court of Appeals stated that "[w]hile religion and culture are closely tied to ethnicity, they are not the

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[6] https://www.columbian.com/news/2015/mar/04/spokane-prosecutor-apologizes-for-wife-musli/

same and there may be reasons to apply a different standard." Slip Op. at 21. While the majority applied the *Bagby* standard, it noted that it was not "foreclosing further debate on the issue." *Id.* at 22.

Review is required to foreclose any "further debate." As this Court explicitly held, the *Zamora* and *Bagby* standard applies to ethnicity, which "is concerned with a group's *cultural* identity." *Bagby*, 200 Wn.2d at 796 n.9 (emphasis added). Similarly, Meriam-Webster defines "ethnic" as "of or relating to large groups of people classed according to common racial, national, tribal, *religious*, linguistic, or *cultural* origin or background."[7] (emphasis added). Further, an "objective observer," "aware of the history of race and ethnic discrimination in the United States," would understand the implications of injecting anti-Muslim bias into a criminal trial. This is particularly true where, as here, the defendant has brown

[7] *See* note 4, *supra.*

skin, hails from a country embroiled in the "War on Terror," and requires a translator at trial.

As Judge Fearing correctly acknowledged, "Islamophobia has become a distinct form of racism." Dissent at 16. Pursuant to RAP 13.4(b)(3), this Court should take review to foreclose "further debate" and clarify that the *Zamora*/*Bagby* standard applies to Islamophobia and all other forms of discrimination that intersect with race and ethnicity.

c. The prosecutor improperly argued Ms. Darraji was murdered because of her conversion to Christianity and her purported embrace of American "freedoms."

In *Bagby*, this Court adopted a framework to determine whether a prosecutor improperly appealed to racial or ethnic bias in violation of the defendant's right to a fair trial. This Court considers: (1) the content and subject of the questions and comments, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in

the record. *Bagby*, 200 Wn.2d at 794 (citing *Zamora*, 199 Wn.2d at 718-19). Here, the prosecutor's injection of religion, nationality, and culture impermissibly appealed to ethnic and racial bias. As in *Zamora* and *Bagby*, the prosecutor's focus on Ms. Darraji's "American" Christian values and Mr. Darraji's purported adherence to a fundamentalist, patriarchal religion and culture created an "us-them" divide.

The prosecutor's opening statement announced its theory that Ms. Darraji was punished for violating Iraqi cultural norms by becoming "more Americanized." RP705.

The prosecutor manufactured this theme based on a statement Mr. Darraji made to police in which he stated Ms. Darraji "took the freedoms wrong." RP1285. The detective testified Mr. Darraji was referring to his ex-wife's belief "that if she divorced him, she could be a free woman, her house would be paid for, she would get custody of the kids." RP1285. The prosecutor turned Mr. Darraji's statement about economic

"freedoms" to mean freedom from Islam and patriarchal repression.

A friend of Ms. Darraji, Ms. Jameel, testified the couple divorced because of Mr. Darraji's infidelity. RP730. Ms. Jameel never said Mr. Darraji opposed Ms. Darraji's religion or the changes made after their divorce. The prosecutor nevertheless insinuated a cultural and religious divided existed, asking her whether in Iraq "attending a Christian church frowned upon . . ?" RP732. When Ms. Jameel stated, "I can't answer this," the prosecutor tried in elicit Ms. Darraji's adherence to Christianity:

> Q: That's okay. Ms. Jameel, when you were living in Iraq, were you attending a Christian church?
>
> A: Yes.
>
> Q: Was Yasir Darraji aware that Ibtihal was taking his children to church?
>
> A: Yes.
>
> Q: And how do you know that?
>
> A: She told me; Ibtihal.

Q: At any point did you and her stop going to church?

A: Yes.

Q: When was that?

A: 2018.

RP732.

Even though Mrs. Jameel testified the Darrajis' marriage ended because of infidelity, the prosecutor tried to depict their divorce as Ms. Darraji freeing herself from the repression associated with traditional Iraqi customs and religion. She proceeded to ask Ms. Jameel about Ms. Darraji's engagement in seemingly forbidden behavior after their divorce, including drinking, smoking, going to nightclubs, going to church, having a job, and driving. RP733–34. Yet Ms. Jameel did not endorse the prosecutor's question that Ms. Darraji "became more Americanized?" RP734. Ms. Jameel responded, "Not Americanized, but became aware, yeah." RP734.

The prosecutor again gratuitously injected the narrative of Christianity and religious difference in questioning several witnesses about Ms. Darraji's employment at the Union Gospel Mission thrift store. The prosecutor asked Lori Skillman, the assistant manager, to talk about how the whole team would read and discuss a "daily devotional" at work. RP814. The prosecutor focused on the Christian aspect of Ms. Darraji's employment:

> Q: Okay. Tell me a little bit about the devotion. Where did that devotion come from?
>
> A: We -- there are books that are put out and published that are yearly devotionals, and there's one each day. . .
>
> Q: So is that, like, a page a day or –
>
> A: Yes.
>
> Q: Are you reading -- a page a day. Okay. And is there Bible scriptures that are involved in that?
>
> A: Yes.
>
> Q: Okay. And you said you would pray over it. What do you mean by that?

A: Well, whatever the message was for the day, we would pray about that. We would take anything that anybody else had, we would ask if they had any sort of prayer requests, and we would go ahead and put those in our prayer. And we would discuss the message and just thank God for it.

Q: It sounds like the Christian faith was a fairly big part of UGM's Thrift Store, kind of employment, is that –

A: Correct.

Q: Does that sound right?

A: Uh-huh.

RP814-15.

Ms. Skillman agreed Ms. Darraji came to the daily devotionals and participated in prayer requests. RP818-19. The prosecutor continued to ask Ms. Skillman,

Q: Were you aware of Ibtihal's religion?

A: She was Christian.

Q: Did you ever see her wear a hijab or cover her hair?

A: No. But she'd show me a picture of herself, and she had -- I know that she had worn one.

RP819.

The prosecutor again elicited from the detective that in December 2019, "Ibtihal [Darraji] started working for a Christian organization" and attending a Christian church with Ms. Jameel. RP1949.

The prosecutor further emphasized Ms. Darraji's Christian religion and embrace of American "freedoms" in questioning Sajida Nelson, asking whether prior to Ms. Darraji's divorce, she smoked, drank, went to nightclubs, went to a Christian church, had a job, a car, or covered her hair. RP1142-43.

Ms. Nelson, like Ms. Jameel, did not agree Ms. Darraji's divorce related to religious or cultural issues. And Ms. Nelson testified Ms. Darraji went to a Christian church and wore her hair uncovered her hair *prior* to her divorce. *Id.*

Ms. Nelson, like Ms. Jameel, rejected the prosecutor's effort to draw a cultural divide between American freedom and Iraqi repression in responding "No" to the prosecutor's question whether she heard gossip about Ms. Darraji becoming

"Americanized." RP1147. Ms. Nelson clarified that the gossip was about "drinking, smoking, and boyfriends." RP1147.

Mr. Darraji's daughter testified with her hair uncovered and told the jury that her father gave his children "the freedom to make our own choices." RP1871, 1954. Apparently recognizing the danger of this testimony to prosecution's theory, the State introduced a photograph from Mr. Darraji's phone of the daughter praying in a headscarf. RP 1954. Ex. P-83. As the Court of Appeals correctly noted, this photograph had no relevance to the charges. Slip. Op. at 30. Rather, the detective claimed he seized this photo because it was "unusual." RP1954. But as Judge Fearing emphasized, this picture served to inflame the jurors' prejudices against a faith that is seen as oppressing women. Dissent Slip Op. at 13.

Ex. P-83.

In closing, the prosecutor centered its narrative with Ms. Darraji on the side of Christianity and freedom, and Mr. Darraji

on the side of Islamic repression, mischaracterizing Mr. Darraji's statements to support this manufactured theme:

> Yasir told you that Ibtihal understood the freedoms in the United States incorrectly. She misunderstood. She started drinking. She started driving. She started working. She started wearing the clothes she wanted to wear. She wore shorts. She wore skirts. She misunderstood the freedoms.

RP2173.

The prosecutor insisted Ms. Darraji's Christianity caused the rift leading to her death:

> [S]he started a job October 31st of 2019 for the Union Gospel Mission, another religious organization, an organization that required their employees to have daily devotionals, daily prayer time, that Ibtihal involved herself in, that Ibtihal participated in, that Ibtihal attended. **That was the beginning of the end.**

RP2174 (emphasis added). The prosecutor continued that Mr. Darraji acted out of a need to show his ex-wife was "a bad girl, she's a bad girl, she doesn't follow God anymore." RP2175.

The prosecutor insisted the evidence that Mr. Darraji was upset that Ms. Darraji may be doing drugs, drinking alcohol, staying out late and night, and dating other men was about

much more than an acrimonious divorce or Mr. Darraji's concern for his children's welfare, but rather gave Mr. Darraji a religious and cultural reason for exacting the Iraqi "death sentence":

> You heard from Hamid Nahi. He told you the last time he saw Ibtihal, she was terrified. She was terrified of Yasir. And he said things that she was doing, the rumors that were spreading about her drinking, dancing, nightclubs, driving, jobs, Christianity, all of that is a death sentence in Iraq; maybe here, too.

RP2189.

Applying an objective observer standard, this constituted misconduct because the gratuitous injection of Ms. Darraji's Christianity was frequent; it served no purpose other than to arouse anti-Muslim sentiment; and the prosecutor's insistence that Ms. Darraji's adherence of Christianity was the "beginning of the end" was not a reasonable inference from the record. *Bagby,* 200 Wn.2d at 794. Courts "analyze these factors with an understanding about the nature of racial bias as it pertains to nationality and race." *Id.*

Although there was certainly evidence of animosity between Mr. and Ms. Darraji, there was *no* evidence her employment with a Christian organization or her decision to attend a Christian church was a source of conflict. There was similarly no evidence that Ms. Darraji's decision to cease wearing a headscarf, drive a car, or any of the other "freedoms" the prosecutor claimed divided them had anything to do with their animosity. RP2063. In fact, Mr. Darraji testified he bought Ms. Darraji a car and taught her how to drive. RP2038.

The prosecutor did not need to provide a reason for Mr. Darraji to kill his ex-wife, but baselessly argued that Mr. Darraji was driven by his desire to exact the "death sentence" for his ex-wife's rebuke of his religion and patriarchal control over her. The prosecutor's injection of the "us-them" divide was a baseless, inflammatory dog whistle invoking anti-Muslim bias and tainting the jury's assessment of the evidence. *See Bagby*, 200 Wn.2d at 794. Pursuant to RAP 13.4(b)(3), this Court should take review and hold the prosecutor committed

misconduct under the *Zamora* and *Bagby* standard and that a new trial is required.

2. Hearsay testimony about the decedent's fear—purportedly relevant to the legally baseless harassment charge—was extraordinarily prejudicial and should have been excluded, warranting this Court's review.

a. The court should have excluded Mr. Nahi's testimony about Ibtihal's hearsay statements and her fear.

Mr. Darraji objected to the State's effort to introduce Ms. Darraji's hearsay statements alleging Mr. Darraji's prior bad acts through Mr. Nahi. Mr. Darraji based his objection on *State v. Parr*, which clarified that, "[i]n a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant." *State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). *Parr* thus limits hearsay statements of the accused, made by the decedent, particularly where there is a question that they could be self-serving, or motivated by relationship

acrimony such as existed between Ms. Darraji and Mr. Darraji. *Id.* at 106. *Parr* ruled:

> . . . the trial court should allow the State to prove the victim's declarations about his or her own state of mind, where *relevant,* but should *not permit it to introduce testimony which describes conduct or words of the defendant.*

Id. at 104.

Based on *Parr,* Mr. Darraji's objection specifically encompassed Ms. Darraji's hearsay statements that were not relevant to the charge of felony murder.

The Court of Appeals misconstrued Mr. Darraji's objection as only relevant to the harassment conviction, which it reversed for insufficient evidence. Slip Op. 38–39. However, while Mr. Darraji conceded Mr. Nahi's testimony about Ibtihal's fear would be relevant if the *only* charge was harassment, he argued it became unduly prejudicial and minimally relevant in light of the murder charge. RP 1523 (what Ms. Darraji told others "is so remote and so prejudicial, I don't see how the Court could even consider that").

The trial court agreed and excluded Ms. Darraji's statements to Mr. Nahi about Mr. Darraji under both theories: "I'm going to deny the [the State's] motion for 404(b) evidence as it relates to all the statements that she might have made to others." RP 265; RP 1523.

Mr. Nahi nonetheless recounted Ibtihal's hearsay statements:

> [S]he told me that there is a rumors been throwing about her converted to Christianity. Another rumor is that she's basically smoking meth, going dancing in the nightclubs, drinking alcohol, and but -- dating, all of that stuff.

RP 1536. He said she "stated that *Yasir was telling* him and other group of his friends were saying those rumors against her." RP 1536 (emphasis added). Mr. Nahi claimed Ms. Darraji expressed her fear to him, "that basically justifying the -- you know, that's a death penalty for me." RP 1536.

Mr. Darraji objected immediately after Mr. Nahi's testimony, outside the presence of the jury so as to not draw attention to it. RP 1540. Mr. Darraji restated his objection

under *Parr*, which had been litigated on hearsay, relevance, and prejudice grounds. Contrary to the Court of Appeals' conclusion this issue was not preserved, Mr. Darraji's objection was adequate to preserve his challenges to this testimony, both as hearsay and under ER 403. *Compare* Slip Op. at 38–41 *with City of Seattle v. Levesque*, 12 Wn. App. 2d 687, 695, 460 P.3d 205 (2020) (objection made "at one of the earliest opportunities outside of the jury, i.e., at the next recess" was timely, and "specific" where the defendant "provided the trial court with the grounds for his objection.").

The hearsay testimony about what Ms. Darraji told Mr. Nahi should have been excluded under *Parr* because it was hearsay and minimally relevant in light of its extreme prejudice.

b. Ms. Darraji's statements and purported evidence of her fear were deeply prejudicial.

This irrelevant evidence about Ms. Darraji's fear of cultural retribution attributed to Mr. Darraji preyed upon the inflammatory "idea that Muslim women are particularly

oppressed," which appears "in U.S. discourse as a kind of common sense." Leti Volpp, *Protecting the Nation from "Honor Killings": The Construction of A Problem*, 34 Const. Comment. 133, 137 (2019). The idea of "saving women" from cultural and religious patriarchy "is knitted into Islamophobia in the United States." *Id.*

This is apparent in the media construct of "the violent Muslim male," which "is replete with examples from wife-beating husbands, to honor-killing fathers, jihadist terrorists, and Islamist politicians who seek to control women's bodies and lives." Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice*, 30 Berkeley J. Gender L. & Just. 226, 246 (2015). Muslim men in particular are assumed to have patriarchal beliefs that compel them to control and dominate women. *Id.* at 246-47.

Indeed, the prosecutor argued Mr. Darraji wanted to punish Ms. Darraji for her "freedoms" and was the person

responsible for this "death sentence" in closing argument. RP2262. The prosecutor rested this argument on cultural assumptions about religious oppression, arguing, "in that culture, you could get away with killing your wife as long as you didn't do it in public. That's the violence the victim fled from, that Ibtihal [Darraji] fled from Iraq, but it followed her to America in the form of Yasir Darraji." RP2262.

The enduring prejudice of testimony attributing the patriarchal, repressive, violent cultural mores on Mr. Darraji—unrelated to any reasonable fear of the threat the State alleged Mr. Darraji made—necessarily overcame any possibility consider it for a limited purpose. CP368.

It should also be noted that the jury convicted Mr. Darraji of harassment, a charge Court of Appeals concluded was not supported by sufficient evidence. The fact that the jury convicted despite a lack of evidence underscores the inflammatory impact of this prejudicial evidence, which would

have also infected the jury's decision on the felony murder charge and the aggravator.

Because the admission of this evidence violated this Court's decision in *Parr*, and because this evidence was prejudicial on the felony murder conviction and aggravator, this Court should take review pursuant to RAP 13.4(b)(1) and reverse.

3. This Court should take review to clarify that a court abuses its discretion in continuing trial past the rule-based deadline absent convincing and valid reasons.

A court abuses its discretion in continuing the accused's trial "[a]bsent convincing and valid reasons for the continuances." *State v. Saunders*, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009). When a trial court abuses its discretion "in granting further delays in commencing" the trial, the Court of Appeals has held it must reverse and remand for entry of an order dismissing the charges under CrR 3.3(h)). *Id*; *see also State v. Nguyen*, 131 Wn. App. 815, 821, 129 P.3d 821 (2006) (court's abuse of discretion in granting a continuance resulted

in defendant not being brought to trial within applicable time limits, requiring reversal and dismissal).

Mr. Darraji objected to the court refusing to hold his trial on the previously agreed-upon date of January 25, 2021. Mr. Darraji put on the record that the reason for the State's request to continue was ongoing investigation that made it impossible for him to prepare for trial. 11/19/20 RP 27; *see also* 4/8/21 RP 10. This resulted in a time for trial well beyond the 30 day excluded period and requires reversal under the speedy trial rules. CrR 3.3(h).

The same is true for Mr. Darraji's objection to the State's requested continuance from May to July 2021. Mr. Darraji argued this would allow the State to continue its discovery production, which would make the requested trial date impossible. 4/8/2021 RP 9-10. This objection was "specific enough to alert the court to the type of error involved." *Saunders,* 153 Wn. App. at 221. The court's grant of the

State's continuances was an abuse of discretion requiring dismissal under CrR 3.3(h). *Nguyen*, 131 Wn. App. at 821.

The court's refusal to hold Mr. Darraji's trial in January, and then again refusing to hold his trial in May, without requiring the State provide a reasonable time for trial far exceeds the short, brief continuances contemplated in even unusual cases.

Mr. Darraji's case is much like *State v. Denton,* where the State sought nine months of delay due to routine and expected delays in the crime lab. *Denton*, 23 Wn. App. 2d 437, 457-58, 516 P.3d 422 (2022). The Court of Appeals ruled that absent "detailed, admissible evidence of the reasons for the backup, efforts taken to get around it, or a reasonably short time frame within which trial could be held was offered by the prosecutor or demanded by the court," the trial delay violated Mr. Denton's speedy trial right. *Id*. at 458.

This Court should accept review and hold that the unsupported continuances violated Mr. Darraji's speedy trial right as articulated in *Denton.* RAP 13.4(b)(2).

4. Mr. Darraji was deprived of his constitutional right to jury unanimity on the aggravating factor, warranting review.

The prosecutor's argument that the jury could convict Mr. Darraji of an aggravated crime based on an array of different allegations without requiring the jury unanimously agree on any single act violated Mr. Darraji's right to a unanimous jury.

The accused has the right to a unanimous jury verdict. *State v. Espinoza*, 14 Wn. App. 2d 810, 815, 474 P.3d 570 (2020); *Ramos v. Louisiana,* 590 U.S. 83, 90–93 (2020); *State v. Petrich,* 101 Wn.2d 566, 569, 683 P.2d 173 (1984); Const. art. 1, § 22; U.S. Const. amend. VI.

To protect this right, where the evidence permits the jury to base its verdict on distinct acts, either (1) the State must elect the act upon which it will rely on for the conviction or (2) jurors

must be instructed they must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 572).

Aggravating factors are elements of the offense the State must prove beyond a reasonable doubt. *State v. Allen*, 192 Wn.2d 526, 538, 431 P.3d 117 (2018) (citing *Alleyne v. United States*, 570 U.S. 99, 103 (2013)). The jury's verdict on the aggravating factor must be unanimous. RCW 9.94A.537(6).

In a multiple acts case, the failure to instruct the jury it must unanimously agree on the basis for each charge is an error of constitutional magnitude which may be raised for the first time on appeal. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

The prosecutor alleged multiple acts to establish the offense "involved a destructive and foreseeable impact on persons other than the victim," including that it:

> impacted the entire community, not just Ibtihal. This impacted her family, her friends, even the firefighters who pulled her out of the car. A destructive impact on these folks.

RP2194. Some jurors could have disagreed on any of these proposed "other persons," but still found guilt, "resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411.

Courts presume that a failure to provide a unanimity instruction is prejudicial—a presumption that can be overcome "only if no rational juror could have a reasonable doubt as to any one of the incidents alleged." *Kitchen*, 110 Wn.2d at 411. In this analysis, courts "do not grant the State the benefit of disputed evidence, disputed witness credibility, and the like." *Espinoza*, 14 Wn. App. at 817.

The jury could have a reasonable doubt that this offense had a "destructive and foreseeable impact" on any of the various people the prosecutor identified. Only one of Mr. Darraji's children, T.D., testified. She focused on her love for

her father and lack of connection with her mother. RP1867. Jurors may have disagreed the aggravator applied to both or either child. Jurors could have similarly disagreed the State met its burden as to the various other people alleged including her friends, or the "community" in general, particularly since the prosecutor did not define who constituted this "community."

This error is not harmless when viewing he evidence in Mr. Darraji's favor. *Espinoza,* 14 Wn. App. at 817. Mr. Darraji's conviction for aggravated second-degree murder violates his right to jury unanimity and warrants this Court's review. RAP 13.4(b)(3).

5. This Court should take review to determine if the aggravating factor "foreseeable and destructive impact on persons other than the victim" is unconstitutionally vague.

a. <u>The void for vagueness doctrine applies to aggravating factors.</u>

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process. Const. art. I, § 3; U.S. Const. amend. XIV. The State violates

this guarantee by taking away "someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States,* 576 U.S. 591, 594 (2015).

These principles apply not only to statutes defining elements of crimes but also to sentencing statutes. *Id.* at 596. In *Johnson,* the U.S. Supreme Court invalidated a sentencing statute that allowed a court to increase a sentence to a minimum of 15 years violated the prohibition against vague laws. *Id*. at 253.

Then in *Beckles v. United States*, 580 U.S. 256, 263 (2017), the Court rejected a due process vagueness challenge to the federal guidelines, which are advisory and "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Beckles* reiterated that "void for vagueness" applies to "laws that *define* criminal

offenses and laws that *fix the permissible sentences* for criminal offenses." *Id.*

Unlike the provision in *Beckles*, which if satisfied resulted in an advisory sentence, *id.* at 263, an aggravator in Washington's mandatory sentencing scheme is the functional equivalent to elements of a criminal offense that must be found by a jury and is necessary to impose a sentence outside the standard range. RCW 9.94A.537; *Allen,* 192 Wn.2d at 535.

In *State v. Baldwin*, this Court reached the opposite conclusion, determining the void-for-vagueness doctrine did not apply to aggravating factors. 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). However, *Baldwin* is contrary to the evolving interpretation of aggravating factors in Washington's mandatory sentence scheme since *Blakely*, as are the Court of Appeals' recent decisions that rely on *Baldwin* and *Beckles* to deny vagueness challenges to statutory aggravating factors. *State v. DeVore,* 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); *State v. Brush*, 5 Wn. App. 2d 40, 59 425 P.3d 545 (2019).

These decisions' continued reliance on *Baldwin* is misguided. *State v. Santos*, 13 Wn. App. 2d 1045, 2020 WL 2079271 (2020) (J. Pennell, dissenting) (GR 14.1). Federal guidelines, unlike Washington's are "purely advisory." *Id*. at *19. Because in Washington aggravating factors are legally analogous to elements, "Washington's sentencing statutes should be judged under the vagueness standard generally applicable to statutory sentencing enhancements." *Id*.

Here, though the aggravating factor does not mandate a minimum penalty, it alters the range of punishment. Consistent with U.S. Supreme Court precedent and this Court's decision in *Allen*, this Court should conclude that the statutory aggravators set out in RCW 9.94A.535(3) are subject to void for vagueness challenges.

b. The statutory aggravator is vague as applied to Mr. Darraji.

A statute is vague if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can

understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf,* 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal citations and quotation marks omitted). If a person of reasonable understanding is unable to guess at the meaning of the statute and whether their conduct is at risk, the statute is vague. *Id.* at 297; *Maynard v. Cartwright,* 486 U.S. 356, 361 (1988). A vagueness challenge to a statute is evaluated as applied, using the facts of the particular case. *State v. Russell*, 69 Wn. App. 237, 245, 848 P.2d 743 (1993).

The allegation that the crime "involved a destructive and foreseeable impact on persons other than the victim" is vague as applied to Mr. Darraji. RCW 9.94A.535(3)(r); CP 132. A reasonable person could not foresee that this would include everyone from his own children, Ms. Darraji's friends, unidentified community members, and the individual first responders that Mr. Darraji did not know. RP2194. Under these facts, Mr. Darraji cannot have known his act would have

this far reaching impact on unidentified people. The statute is unconstitutionally vague and warrants this Court's review. RAP 13.4(b)(3).

6. The court's exceptional sentence rests on judicial fact-finding, violating Mr. Darraji's jury trial right and due process.

The court's additional fact finding in support of the exceptional sentence also violated Mr. Darraji's due process and jury trial right.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is labeled an "element" or a sentencing "factor." *Erlinger v. United States*, 602 U.S. 821, 831–32 (2024); *Hurst v. Florida*, 577 U.S. 92, 97-98 (2016); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); U.S. Const. amend. VI, XIV; Const. art. I, §§ 21, 22.

To impose an exceptional sentence, a unanimous jury must first find an aggravating factor set forth in RCW

9.94A.535(3) beyond a reasonable doubt. RCW 9.94A.537(3). Second, a court must find this aggravating factor constitutes a "substantial and compelling reason justifying an exceptional sentence." RCW 9.94A.535, RCW 9.94A.537(6).

This Court has previously held that the determination that substantial and compelling reasons justify an exceptional sentence was "a legal judgment," not a "factual determination[]," and that the SRA scheme requiring the court to make that assessment did not violate *Blakely*. *State v. Hughes,* 154 Wn.2d 118, 137, 110 P.3d 192 (2005). This conclusion cannot stand after the U.S. Supreme Court's decisions in *Hurst v. Florida* and *Erglinger v. United States.*

In *Hurst*, the Supreme Court reviewed Florida's sentencing scheme that permitted a sentence of death where a jury found a factual basis justified this penalty, and then required "judge-made findings," that it was the appropriate sentence. 577 U.S. at 99. *Hurst* held this scheme violated the Sixth Amendment. *Id.* at 102-03. The jury's finding was

merely "advisory" because it did not alone not result in the death penalty. *Id.* at 100.

In *Erlinger*, the defendant argued the trial court engaged in fact-finding that violated his constitutional jury trial right where the court found the Armed Career Criminal Act (ACCA)'s increased mandatory minimum sentence provisions applied because he had prior convictions that occurred on "separate occasions." 602 U.S. at 1846. The Supreme Court held that because "virtually 'any fact' that 'increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury,'" Erlinger was "entitled to have a jury resolve" the "ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835 (citing *Apprendi v. New Jersey,* 530 U.S. 466, 487 (2000) (cleaned up)).

The same is true for the Sentencing Reform Act's requirement that the court find aggravating circumstances "are a substantial and compelling reason justifying an exceptional

sentence." RCW 9.94A.537(6). Here, the court imposed an exceptional sentence based on "judge-made findings," that it was appropriate. *Hurst,* 577 U.S. at 99. Without any clear guidance from the jury on the basis of the aggravating factor, the court engaged in its own factual analysis. The court found: "The impact of this death is seen with her friends, the community, first responders, but most significantly with her children." CP442.

It further justified the exceptional sentence based on unrelated factual findings, such as that Ms. Darraji "came to this country to find a better life, but instead her life was ended here." CP442. The court also found Mr. Darraji set the fire "to disfigure the victim," and that the "mutilation of the victim's body was incredible [sic] brutal and cold." CP442. The court also found "the defendant poses a danger to the community." CP442.

The judge's consideration of additional facts in imposing an exceptional sentence violates the right to a jury trial and due

process of law. *Hurst*, 577 U.S. 92; *Erlinger*, 602 U.S. 821. This Court should take review of this significant constitutional question. RAP 13.4(b)(3).

7. Review is warranted to determine if the information was defective for not naming the "persons other than the victim" that supported the aggravator.

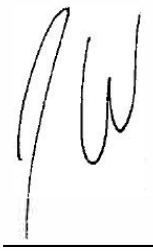
Accused persons have the constitutional right to know the charges against them. U.S. Const. amend. VI; Const. art. I, § 22; *Russell v. United States*, 369 U.S. 749 (1962). An information is constitutional defective if it fails to list the essential elements of a crime. Here, the information failed to identify who constituted the "persons other than the victim" to support the aggravator. CP 132. Whether this rendered the information deficient is a significant question of constitutional law that warrants this Court's review. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should take review.

In compliance with RAP 18.17, this document contains 8,458 words. A motion to file an overlength petition for review is filed simultaneously with this petition.

Respectfully submitted this 23rd day of June, 2025.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. YASIR DARRAJI, Appellant.	)	No. 39421-2-III OPINION PUBLISHED IN PART

STAAB, J. — Prosecutors are prohibited from injecting improper bias into a trial by playing into religious or cultural prejudices. But not all references to religion or culture play into improper bias. When relevant and grounded in the evidence, it is not improper for a prosecutor to present testimony or argument related to religion and culture. Indeed, such evidence may be necessary to prove a fact at issue, such as motive. That is what happened in this case.

The State charged Yasir Darraji with second degree felony murder and felony harassment. The State's evidence was that Yasir,[1] an Iraqi immigrant, was upset that his former wife, Ibtihal Darraji, had changed her behavior and beliefs in ways that did not

[1] Because Ibtihal and Yasir have the same last name, we refer to Ibtihal and Yasir using their first names to avoid confusion. No disrespect is intended.

conform to Iraqi culture. Yasir himself framed his concerns about Ibtihal in terms of his Iraqi culture and Islamic beliefs. After police found Ibtihal's murdered body inside a burning vehicle, the investigation focused on Yasir, largely due to evidence of his admitted disapproval of Ibtihal's behavior, which he described as culturally and religiously motivated. Given this specific factual circumstance, Yasir's religious beliefs and cultural affiliation were relevant to the State's case. It therefore was not improper for the State to present evidence and arguments pertaining to religion and culture to the jury.

We affirm Yasir's conviction for second degree murder but reverse his conviction for felony harassment based on insufficient evidence. Otherwise, we find no error and remand with instructions to dismiss the harassment charge with prejudice and resentence Yasir on the remaining conviction. On remand, Yasir can raise any remaining sentencing issues.

BACKGROUND

In February 2020, the State charged Yasir with second degree murder against an intimate partner, committed during the course of a second degree assault by strangulation. Approximately one month before trial, the State moved to amend the information by adding one count of felony harassment based on a threat to kill with a domestic violence enhancement. The prosecutor argued that the State's witnesses would testify that Yasir made several threats to kill Ibtihal. The court granted the motion and permitted the State to file an amended information.

At trial, the State's theory was that Ibtihal's rejection of traditional Iraqi culture and Islamic beliefs, and her embrace of American culture and Christianity, was the source of conflict between the former spouses. Their fighting and insults escalated until Yasir strangled Ibtihal to death in her car, drove the vehicle to a different location, and lit the car on fire with Ibtihal's body inside.

On appeal, Yasir argues that the State committed prosecutorial misconduct by introducing irrelevant and inflammatory evidence of Islamic beliefs to invoke anti-Muslim bias with jurors. He asserts that the State's theory of conflict between the couple was manufactured when the couple simply disrespected each other. Yasir maintains that the State's evidence of Iraqi culture, Islamic beliefs, and Ibtihal's non-conforming behavior was irrelevant. He points to specific evidence and comments as particularly inflammatory, including evidence of Ibtihal's decision to convert to Christianity and stop wearing a hijab, and evidence of their daughter wearing traditional Islamic attire and praying. Along with the prosecutor's use of the term "Americanized," he contends these comments and evidence amounted to prosecutorial misconduct. While acknowledging that he failed to raise this issue at trial, Yasir argues that we should apply the standard for race-based misconduct to his arguments based on culture and religious bias.

With this background in mind, we turn to the evidence produced at trial.

Yasir and Ibtihal Darraji married in Iraq in 2006 and had two children, a daughter, T.D., and a son, D.D. The family immigrated to Spokane in 2014. The couple separated in 2015 and divorced around two years later.

Initially, Yasir and Ibtihal shared custody of their children. Several years after their separation, their oldest child, T.D., chose to live with Yasir full time because she did not get along with her mother. D.D. continued to split time between his parents.

On January 30, 2020, firefighters pulled Ibtihal's body from her burning vehicle on the South Hill in Spokane. An autopsy determined that the cause of death was manual strangulation and that Ibtihal was not alive when the fire began.

The State's theory at trial was that Yasir killed Ibtihal because he felt disrespected by Ibtihal's nonconforming behavior after the divorce—both true and rumored—as well as the insults she directed toward him. During opening statements, the prosecutor began by explaining that the Darrajis immigrated to America from Iraq as refugees, seeking a good life, but divorced a few years later. The prosecutor then told the jury that the Darrajis began to fight over Ibtihal's behavior:

> You're also going to hear that starting in late 2019, trouble began to emerge between the two of them. Fights started happening again and rumors were being spread about Ibtihal Darraji that this good life she'd come here to live suddenly wasn't looking right anymore. There were a lot of disputes about how she was becoming more Americanized. She'd spend time with friends and go dancing. She'd go drinking sometimes. These are things that were seen as unacceptable in her culture.

> You're going to hear that rumors spread that she was having sex outside of wedlock, that she was pregnant with somebody's child. And, ultimately, this came to a head in late 2019, and she confronted one of [Yasir's] friends who had been spreading rumors about her being pregnant.

Rep. of Proc. (RP) (Nov. 2, 2022) at 705.

Yasir's Interview

The State introduced evidence of Yasir's interview with police the day after Ibtihal's body was found. Yasir was provided an interpreter and agreed to waive his *Miranda*[2] rights and answer questions.

Detectives began the interview by asking Yasir why he and Ibtihal had divorced. Yasir described how the couple had argued one evening and then explained to detectives that Ibtihal believed she would be free if she divorced Yasir. According to Yasir, an unnamed person had told Ibtihal that if she divorced Yasir, "you [are] gonna be free and you[are] gonna be [a] free woman and nobody [is] gonna be in judge of you, and you [are] gonna have a full custody of kids and he gonna pay you, and you [are] gonna have [a] free house, and he [is] gonna pay you child support." Ex. P121 at 18 min. 39 sec. to 19 min. 17 sec. Yasir told the detectives that Ibtihal was "like [a] child," and did not understand what she was being told. Ex. P122 at 16.

Yasir continued by saying that another day after the initial argument, when he returned home, Ibtihal continued the fight, telling Yasir, "your father [is] gay," and "your

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

sister [is a] bitch.'" Yasir then explained to the detectives that "we" did not accept that, and by "we" he meant his culture, clarifying that "our culture is different." Ex. P122 at 17. Yasir then told detectives that he believed Ibtihal was insulting his family because "she want me [to] hit her, . . . to punish her, to piss me off," but he did not retaliate because he did not want to go to jail. P121 at 21 min., 38 sec. to 21 min., 45 sec.

The interview then shifted to questions about Yasir's last contact with Ibtihal on the preceding evening (the night she was murdered). Yasir told detectives that Ibtihal arrived outside his apartment just before 6:00 p.m. to pick up their son, D.D. Once there, she sent him rude messages and told him to send D.D. out wearing nicer clothes because Yasir was not homeless.

Yasir went down to the parking lot to speak with Ibtihal in her car. She opened her window, and asked Yasir if he thought he was a "real man." Ex. P121 at 33 min. Yasir smelled marijuana smoke coming from the vehicle and began to argue with Ibtihal. Yasir told detectives that when Ibtihal was married to him, she did not drink or smoke cigarettes, hookah, or marijuana. At one point, he described her as "an amazing wife before the divorce." P122 at 36 min., 24 sec. "But after me, she do[es] everything, I don't know what she do[es]." P122 at 33 min., 51 sec. to 33 min., 55 sec.

When detectives asked Yasir what Ibtihal was doing after the divorce, he said he knew about her use of alcohol and marijuana and having sex with people. While Yasir indicated that Ibtihal's family would not like her behavior, he denied that her actions

brought him shame or embarrassed him. He admitted, however, that Ibtihal had hurt him a lot. When a detective asked whether Yasir thought Ibtihal moving to the U.S. was good or bad for her, Yasir replied that "she takes the freedoms wrong" and used her freedom to hurt or fight people "because she know[s] the law[s] with the woman." Ex. P121 at 39 min., 31 sec. to 39 min., 34 sec.

Yasir explained that as he and Ibtihal began to argue about Ibtihal's use of marijuana, she opened the car door, and when D.D. came outside, Yasir and Ibtihal both told him to go back inside. Ibtihal then asked Yasir if he was gossiping about her. Yasir said that she was upset and began to cry and hit the steering wheel twice causing the horn to honk. T.D. then came outside curious about her "mama drama." Ex. P121 at 43 min. But Yasir told her to go back inside and close the door.

Yasir said that as Ibtihal sat in the car, she tried to push Yasir as he got close to her. At first Yasir said he did not touch her but later indicated that he touched her very softly to stop her from leaving. Ibtihal became upset and drove away crying without D.D.

Yasir told detectives that he went inside his apartment and told D.D. to message Ibtihal to return and pick up D.D., who would be waiting outside for her. Ibtihal did not respond to those messages, and they never saw her again.

Yasir gave different answers when asked about what he did the rest of that evening. At first, he told detectives that he stayed home that night and went to bed early.

Later, he explained that after checking his mail, he drove around Spokane Valley, returning home about 7:30 p.m. While acknowledging that Yasir's friend who lived on the South Hill had called and told Yasir a package arrived for him, Yasir denied driving on the South Hill that night, but did mention that he drove downtown and returned home at 9:30 p.m. When the detective continued to press Yasir on whether he drove near his friend's house the prior night, Yasir said he could not recall.

Forensic Evidence

Forensic testing of Ibtihal's car turned up Yasir's DNA on the non-melted side of her steering wheel and on the driver's side interior door control panel buttons.

Law enforcement obtained and analyzed the cell phone data for Yasir and Ibtihal's cell phones. Contrary to Yasir's explanation during his interview, data from his cell phone placed it on Spokane's South Hill several times the night Ibtihal was murdered. Cellular data showed that Yasir's phone and Ibtihal's phone traveled together, back and forth, around Spokane and Spokane Valley.

Evidence of Ibtihal's Non-Conforming Behavior

The State produced evidence that following the couples' divorce, friends and family members in the local Iraqi community began to notice and gossip about changes in Ibtihal's behavior and lifestyle.

Several witnesses testified that prior to her divorce, Ibtihal's behavior reflected traditional Iraqi culture. She was covering her hair, and was not driving, working,

drinking, smoking, going to bars, or dating. After her divorce, there were rumors that she was doing all of these things, which witnesses described as not comporting with their traditions as Muslims and customs, not common things for a woman in their community, and a big deal in their culture. There was evidence that Yasir was aware of the rumors and did not approve.

Two friends of Ibtihal, Zainab Jameel and Sajida Nelson both testified that part of Ibtihal's changing behavior included attending a Christian church. Both witnesses were also asked if Ibtihal was becoming more "Americanized."

Jameel testified that Ibtihal was attending her church in 2017 with her children but stopped attending in 2018. When asked if attending a Christian church was "frowned upon" in Iraq, Jameel said, "I can't answer this." RP (Nov. 2, 2022) at 732. She also indicated that Yasir was aware that Ibtihal was attending church.

Jameel recalled that, prior to the divorce, Ibtihal generally covered her hair and did not smoke, drink alcohol, go to nightclubs, go to a Christian church, have a job, or drive a car. After the divorce, Ibtihal's behavior changed dramatically. Ibtihal began drinking, smoking, driving, and working. When asked if she ever went to a nightclub with Ibtihal, Jameel said, "I cannot answer this question," but acknowledged that Ibtihal was going to bars after the divorce. RP (Nov. 2, 2022) at 734. Jameel also acknowledged that there were rumors in the local Iraqi community that Ibtihal was pregnant, and such rumors would impact the reputations of both Ibtihal and Yasir. When asked if Ibtihal was

becoming more "Americanized," Jameel responded, "[n]ot Americanized, but became aware, yeah." RP (Nov. 2, 2022) at 734.

Sajida Nelson testified that the reason for the Darrajis' divorce was Yasir's new girlfriend. Like other witnesses, she testified that Ibtihal's behavior changed after the couple separated, including Ibtihal's decision to attend a Christian church, stop covering her hair, and driving a car. Nelson confirmed that the Darrajis were the subject of gossip in the local Iraqi community. Specifically, she heard gossip about Ibtihal's behavioral changes, "about her drinking, smoking more, and even, like, going to nightclubs and—and also having boyfriends as well." RP (Nov. 7, 2022) at 1146-47.

At one point the prosecutor asked Nelson:

> Q You mentioned she kind of had stopped covering her hair and some other things. Was that part of the—the gossip that you were hearing, that she was becoming Americanized?
>
> A No.
>
> Q What was it—so specifically to the drinking, smoking, and boyfriends?
>
> A Correct.

RP (Nov. 7, 2022) at 1147.

The State introduced evidence of Iraqi culture in general and as it related to Ibtihal's behavior. Hamid Nahi was a fellow immigrant from Iraq and met the Darrajis in 2014. He testified that he would see them occasionally. He testified that when he first met Ibtihal she was covering her hair, but when he last saw her in January 2020, she did not have her hair covered.

During his last contact with Ibtihal shortly before her murder, Ibtihal mentioned to Nahi that she was concerned about rumors that she had converted to Christianity, and that she was smoking methamphetamine, dancing in nightclubs, drinking alcohol, and dating.[3] Nahi testified that the nature of these rumors caused Ibtihal to fear for her safety, explaining that in Iraq:

> It will be—basically will be a death penalty. In Iraq, that—it's a law. Law goes on females only, and basically you—you can murder your wife, your daughter, whoever, if they went and dated somebody or if they had alcohol or something. They call it wash of shame, and it—you can—you don't even go to jail for it. You probably will go for like maybe one or six months if you did it in public.

RP (Nov. 9, 2022) at 1536.

Nahi continued to testify that his conversation with Ibtihal turned to her conversion to Christianity. He testified that he explained to Ibtihal that since she was separated from Yasir, and was living in the United States, she had the right to convert. Nahi then told Ibtihal that if she felt threatened, she should call "Crime Check" and make a report.

[3] Yasir accurately points out in his reply brief that Ibtihal's hearsay statements that certain rumors were making her fearful were introduced for the limited purpose of proving her state of mind for the harassment charge and could not be used for other purposes. Nahi's testimony on Iraqi culture and law were not part of this limitation.

Events Leading Up to Ibtihal's Murder

The State introduced evidence of several events in the months leading up to Ibtihal's murder to show why tensions between the two were escalating. In late October 2019, Ibtihal began working for the Union Gospel Mission (UGM), a Christin-based thrift store. Lorie Skillman, one of the assistant managers at this store, testified that Ibtihal participated with other employees in daily devotionals and prayers and described her as a Christian.

Khulood Ameri testified that following Yasir and Ibtihal's divorce, she tried to reunite the couple. In November 2019, the couple's mutual friend, Galbahar "Gabby" Suwaed arranged a meeting between Yasir and Ibtihal at a hookah bar. Suwaed went with Ibtihal to the meeting. Yasir testified that he set up the meeting because Ibtihal insisted on seeing him, so he asked Suwaed "to be a witness in case something happened" between Yasir and Ibtihal. RP (Nov. 16, 2022) at 2065. However, shortly after they arrived, Ibtihal and Yasir began arguing.

After the meeting, Yasir was happy that Suwaed heard the information he wanted her to hear, pointing out that Ibtihal had become an "unbeliever of God." RP (Nov. 16, 2022) at 2066. Later that month, Yasir told Suwaed to tell Ibtihal to respect him, that she had no reason to be mad at him, and that he gets "really mad" when someone ignores him or disrespects him.

In December 2019, Yasir met with Zinah Shaker, one of Ibtihal's friends and a fellow Iraqi refugee. Shaker mentioned to Yasir that Ibtihal was drinking because she was sad over the situation. Yasir responded that her changes did not "fit with his rituals and culture." RP (Nov. 14, 2022) at 165-66.

Suwaed testified that on January 3, 2020, Yasir drove her to a hookah bar. On the way there, they began to discuss Ibtihal and Yasir's relationship, and Yasir told Suwaed, "[b]elieve me, she's the one who cheated on me, and I will kill her, even if it takes me ten years." RP (Nov. 15, 2022) at 1777. As Yasir said this, he got "really mad" and drove so fast that he almost rear ended a truck.[4]

The rumors about Ibtihal continued. Several friends testified that they heard that Ibtihal was having extramarital sex and was pregnant, which were serious accusations in Iraqi culture that would negatively impact her reputation. These rumors got back to Ibtihal and made her very upset. She thought that one of Yasir's friends, Saad al-Karawi, was behind the rumors.

Ibtihal contacted al-Karawi and asked to meet him. On January 9, 2020, Ibtihal and Suwaed met al-Karawi in a parking lot. As he pulled into the parking lot, al-Karawi called Yasir and Yasir remained on the phone line during al-Karawi's interaction with

[4] This threat formed the basis for the felony harassment charge. The State believed that Suwaed would testify that she conveyed this threat to Ibtihal. However, when Suwaed testified, she indicated that she did not tell Ibtihal about Yasir's threat because she said Ibtihal "already knew" he was threatening her. RP at 1847.

Ibtihal and Suwaed. When Ibtihal approached al-Karawi, she slapped him and insulted him while accusing him of spreading rumors about her. Suwaed and Ibtihal proceeded to hit al-Karawi in the face and kick him. Ibtihal also hit al-Karawi with her slippers. He did not hit them back.

Unbeknownst to Ibtihal, Yasir was listening and recording her interaction with al-Karawi. As al-Karawi drove home, Yasir called the police. Al-Karawi then filed a police report with Yasir's assistance and recording. The police later contacted Suwaed and Ibtihal but did not arrest them.

After the police left al-Karawi's apartment, Yasir offered to "hire two sheikhs back in Iraq" to hold a "tribal trial" and teach Ibtihal a lesson, however al-Karawi declined the offer. RP (Nov. 10, 2022) at 1718-19. Al-Karawi testified that he thought that Yasir was the one who wanted to teach Ibtihal a lesson and was trying to use the incident as an excuse to do so.

Almost immediately after the parking lot incident, Yasir and Suwaed began exchanging accusations and insults through recorded voice messages. Yasir accused Suwaed of trying to set al-Karawi up, and Suwaed accused Yasir of calling the police to get Ibtihal in trouble. Within 14 minutes of the incident in the parking lot, Yasir started forwarding Suwaed's recorded voice messages to her mother in Iraq. At one point, Suwaed accused Yasir of becoming "Americanized" for calling the police.

A few days later, Yasir sent two voice messages[5] to Ibtihal's parents in Iraq. The first message warned Ibtihal's parents to call their daughter off or "I am going to do things and she is going to lose things she doesn't know she'll lose." Ex. P95, 96. In the second message, Yasir warned them that "[Ibtihal] shouldn't play with the lion's tail, because she'll lose a lot of things that she doesn't know she'll lose. She'll lose a lot of things and she doesn't know yet. So, warn her not to play with me." Ex. P97, 98.

On Monday, January 27, after Ibtihal learned that her family in Iraq heard rumors about her, she sent Yasir an insulting voice message:[6]

> From your nose—I will draw you from your nose. (Unintelligible) you'll get back to Iraq and I won't. I'm not leaving here. I will be a heavy load on your chest—a load on your chest because I have nothing else better to do. I'll just sit here. Right, what was about (unintelligible) in America? I will destroy you, and you'll say nothing. I will humiliate you, and you'll say nothing. I will shove my shoe down your throat, and you'll say nothing. This is what you deserve, okay? I used to not shame you. Not say anything wrong in front of anyone; your friends and mine. No. Now I will control when you can stand up and when you can sit down. Humiliate you in front of anyone. I will emasculate you with my shoe and not say (unintelligible). With my shoe, you trash. My old shoe is worth your life when I divorce you. Worth your life—worth your life. There's no one (unintelligible) divorced by his wife. What I did—Your wife (unintelligible). Not a single woman paid attention to you after me, and no one took you in. You used to go to her and feed each other trash. That bitch. My shoe is worth your life—worth your life and I'll humiliate you (unintelligible) and you'll say nothing, and you should be grateful. My dear, I will burden you. (Unintelligible), I will burden you, and I will break

[5] The original voice messages are in Arabic, so the State had them translated and transcribed.

[6] Again, the original voice message was in Arabic, so the State had it translated into English.

> your dignity. You were broken before, so why say anything else? Okay? I will break your dignity and have you walking with your tail tucked in, (unintelligible). You're the one who benefitted. Walking while (unintelligible). Just wait—you just wait.

Ex. P101

Ibtihal's message was particularly insulting because her reference to a shoe in Arabic is considered "the ultimate insult" in Iraq. RP (Nov. 15, 2022) at 1922. Ibtihal forwarded her message to a friend, along with laughing emojis and stated "[t]his is not even enough." RP (Nov. 14, 2022) at 169; Ex. P104

Yasir later testified that he was not upset by Ibtihal's message because she had sent similar messages to him before. After Yasir received Ibtihal's message, he forwarded the insult to a friend and then called the friend crying.

The following day, Tuesday, January 28, Ibtihal showed the message to Jameel. Ibtihal told Jameel that she was afraid of Yasir because he had not responded to the message, which was unusual for him. Ibtihal also showed the message to Suwaed, who noticed that Ibtihal was scared. Jameel saw Ibtihal one day later and noticed that Ibtihal looked pale and was scared because of the message she sent to Yasir.

The Day of the Murder

Three days after sending Yasir the insulting message, Ibtihal had contact with him. On Thursday, January 30, Jameel and Suwaed had planned to have dinner with Ibtihal after she finished work. Ibtihal was supposed to pick up her son, D.D., from Yasir's

apartment, then pick up Suwaed, who lived close to Yasir in the same apartment complex.

Ibtihal left work at 5:34 p.m. She confirmed to Jameel and Shaker her plan to pick up D.D. and Suwaed at Yasir's apartment complex, then drive to Jameel's house.

At 5:40 p.m., Ibtihal exchanged messages with Suwaed, who was still at work. Since Suwaed was not home yet, Ibtihal told her that she would leave a hookah at Suwaed's door after picking up D.D. from Yasir. While driving to Yasir's apartment complex, Ibtihal called Jameel from her car at 5:45 p.m.

Suwaed, Jameel, and Shaker did not hear from Ibtihal again. Ibtihal also never left the hookah outside Suwaed's door as she had promised.

At 9:19 p.m., a person noticed a car filled with smoke on 27th Avenue, near a park on Spokane's South Hill, and called 911. When firefighters arrived, they saw a white Prius, full of smoke, with the doors shut and rear windows opened slightly. When the firefighters opened the car's door, the fire flared up and they saw a severely burned body, which was later identified as Ibtihal.

Forensic Analysis of Yasir's Phone and Social Media

As part of the investigation, Detective Cory Turman reviewed Yasir's phone and social media records. Detective Turman concluded that Yasir saved a substantial number of screenshots that seemed to center around his problems with Ibtihal.

In preparation for trial, Detective Turman created a timeline of events as a slide presentation. When questioned about the phone records from January 9, the day of the parking lot incident with Ibtihal and al-Karawi, Detective Turman included a photograph taken from Yasir's phone that showed his daughter, T.D., dressed in a black robe and head scarf on her knees on a rug. When asked why he documented this photograph, Detective Turman testified:

> A Well, it appeared out of [the] ordinary from all the photos that I had seen prior that were saved of [T.D.]. [T.D.] was—what she wore in court yesterday was very consistent with her dress and style on social media. There was one time in one interview, I believe the very first interview, she was wearing—had her head covered. But those are all the only two times in all of her pictures that—and I—I thought it was unusual.
>
> Q So you documented this because it stood out to you and its abnormality, I suppose?
>
> A Yes.
>
> Q Okay.
>
> And that—remind me, when was that photo taken, as far as you could tell, from the iCloud count?
>
> A On the 9th and 8:14 p.m.

RP (Nov. 16, 2022) at 1954.

Yasir's Testimony

Yasir testified in his defense. Yasir first explained that he was a member of the Darraji tribe in Iraq, which is governed by a leader similar to a president of a country or governor of a state. He testified that he bought Ibtihal a car and taught her to drive. Yasir acknowledged that although Ibtihal had a permit before they separated, "[s]he

wasn't really driving" and that "she didn't know how." RP (Nov. 16, 2022) at 2063-64. When asked about why he and Ibtihal divorced, he explained, "Ibtihal understood the freedom here incorrectly. Why would she need freedom if I didn't even put boundaries around her. We go out. She has her own car. Even her family back home, I would spend on them." RP (Nov. 16, 2022) at 2040. He claimed the reason they divorced was because she was upset that he came home late after going to a bar. He claimed he met another woman 15 days after this argument, while he and Ibtihal were separated but had not yet finalized the divorce. He denied spreading rumors about Ibtihal and denied hearing rumors in the local Iraqi community. He acknowledged crying to his friend, Khulood Ameri after receiving Ibtihal's voice message, and he "told her that [Ibtihal's] acts weren't good." RP (Nov. 16, 2022) at 2060-61.

When asked if it bothered him that Ibtihal went to nightclubs, Yasir said no. When asked if it bothered him that Ibtihal was looking into becoming a Christian, Yasir replied, "It didn't bother me for her. But when she took the kids to the church I told her, [d]o not take the kids with you to church." RP (Nov. 16, 2022) at 2063. Yasir denied telling Suwaed that he would kill Ibtihal. Yasir also denied strangling and killing Ibtihal.

Verdict and Sentencing

Following trial, the jury found Yasir guilty of second degree murder and felony harassment. The jury also entered a special verdict finding the aggravating circumstance

that the murder involved a destructive and foreseeable impact on persons other than the victim.

The trial court sentenced Yasir to an exceptional sentence of 300 months (56 months above the top of the standard range of 244 months) for the murder conviction based on aggravating circumstance found by the jury and entered written findings in support of the sentence. The court also imposed the mandatory victim penalty assessment (VPA) and DNA collection fee.

Yasir timely appeals.

ANALYSIS

1. PROSECUTORIAL MISCONDUCT

Yasir contends that the prosecutor committed misconduct by introducing irrelevant and inflammatory evidence of Iraqi culture and Islamic beliefs based on a "manufactured" theory of the dispute between Yasir and Ibtihal. The State maintains that there was significant evidence supporting its theory that Yasir considered Ibtihal's changing behaviors to be non-conforming and disrespectful toward him. The tensions between the couple culminated when Ibtihal left Yasir a message that could only be fully appreciated by understanding the former couple's cultural and religious differences.

A. Prosecutorial Misconduct Standards

As a preliminary matter, we must determine the standard of review. Yasir contends that the prosecutor committed race-based misconduct by introducing irrelevant

and inflammatory evidence of Islamic beliefs and Iraqi culture, and argues that we should apply the heightened scrutiny for race-based misconduct to his claims.

A criminal defendant is guaranteed the right to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, section 22 of the Washington Constitution. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). The promise of an impartial jury requires that the jury be unbiased and unprejudiced. *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019). "A defendant's right to an impartial jury under article I, section 22 of the Washington State Constitution is 'gravely violate[d] . . . when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions'—such convictions undermine the integrity of our entire criminal justice system." *State v. Bagby*, 200 Wn.2d 777, 788, 522 P.3d 982 (2023) (alteration in original) (quoting *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)). The scrutiny of race-based prosecutorial misconduct is heightened to ensure against such a constitutional violation. *See Monday*, 171 Wn.2d at 680.

While the Supreme Court has applied the heightened scrutiny of race-based misconduct to allegations of nationality and ethnicity-based misconduct, it has not expanded the heightened scrutiny to cultural or religion-based stereotypes. *See Zamora*, 199 Wn.2d at 715; *Bagby*, 200 Wn.2d at 790. While religion and culture are closely tied to ethnicity, they are not the same and there may be reasons to apply a different standard.

See State v. Kovalenko, 30 Wn. App. 2d 729, 546 P.3d 514 (2024) (applying non-race-based standard to claim of religion-based prosecutorial misconduct). On the other hand, there are valid reasons to expand the heightened scrutiny to these areas. *See* Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1 (2022). In this case, the State does not contest application of the heightened standard. We therefore apply it without foreclosing further debate on the issue.

"[T]o prevail on a claim of race-based prosecutorial misconduct, the defendant must demonstrate that the prosecutor's conduct was both improper and prejudicial by showing that [the prosecutor] *flagrantly or apparently intentionally* appealed to racial bias in a manner that undermined the defendant's credibility or the presumption of innocence." *Bagby*, 200 Wn.2d at 790 (emphasis in original). If the prosecutor's conduct flagrantly or apparently intentionally appealed to racial or ethnic bias, then their improper conduct is considered per se prejudicial and reversal is required. *Zamora*, 199 Wn.2d at 715.

We analyze race-based misconduct using an objective observer standard and do not consider the prosecutor's subjective intent. *Id.* at 717, 716. "[W]e ask whether an objective observer could view the prosecutor's questions and comments as an appeal to jurors' potential prejudice, bias, or stereotypes in a manner that undermined the defendant's credibility or the presumption of innocence." *Bagby*, 200 Wn.2d at 793 (footnote omitted). The "'objective observer' is an individual who is aware of the history

of race and ethnic discrimination in the United States and [aware of] implicit, institutional, and unconscious biases, in addition to purposeful discrimination." *Id.* at n.7.

When applying this objective observer standard to the prosecutor's remarks, "we consider (1) the content and subject of the questions and comments, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in the record." *Bagby*, 200 Wn.2d at 794.

Despite the heightened scrutiny applied to allegations of race-based misconduct, not every mention of race or ethnicity will be viewed as an effort to appeal to implicit racial bias. *Zamora*, 199 Wn.2d at 715. "In some cases, race or ethnicity may be relevant or even necessary to discuss within the context of trial, e.g., to discuss motive for committing race-based hate crime." *Id.* But even when race and ethnicity are relevant to the criminal charges, a prosecutor can cross the line by making assertions based on stereotypes instead of evidence. *See In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 834, 408 P.3d 675 (2018). In addition, irrelevant comments or coded language that play on stereotypes can trigger unconscious biases. *Bagby*, 200 Wn.2d at 794. "Coded language often involves themes or euphemisms that evoke a conception of 'us' versus 'them.'" *Id.*

B. Application

With respect to the first two *Bagby* factors, there is no question that Iraqi culture and religion, both Islamic and Christianity, were frequently discussed during trial. If these comments were not based on evidence that Yasir adhered to these customs and beliefs, then the comments would be improper and prejudicial. Similarly, if the comments and evidence were introduced to discredit Yasir then they would likewise be inadmissible.[7]

Yasir contends that application of the next two *Bagby* factors support his claim of misconduct. He focuses on evidence of the couple's religious differences and asserts that Ibtihal's conversion to Christianity and her decision to stop covering her hair were not points of tension between the couple but were nevertheless interjected by the prosecutor to play into anti-Muslim bias. We disagree.

The comments and questions by the prosecutor were based on evidence and introduced to show motive. The State maintained that Yasir believed Ibtihal's changing behaviors failed to conform to Iraqi culture and Islamic beliefs and were disrespectful, insulting, and reflected poorly on him. The prosecutor's comments and questions throughout the trial about Iraqi culture were based on evidence that Ibtihal's behaviors

[7] Under ER 610, "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

were viewed by Yasir and others close to him as failing to conform to Iraqi culture. These behaviors became the topic of rumors and gossip. The non-conforming behavior included drinking, smoking, going to bars, dating, driving, working, not covering her hair, and attending a Christian church. While Yasir's appeal focuses primarily on evidence of the couples' religious differences, the State maintained that Ibtihal's conversion to Christianity and decision to wear her hair uncovered was part of the larger picture.

Yasir himself made it clear that his beliefs and actions were influenced by his culture and religion. The day after Ibtihal's murder, Yasir explained to police that Ibtihal's outburst and name calling was unacceptable because "our culture is different." Ex. P122 at 17. He further explained both in his interview and while testifying at trial that Ibtihal's perception of freedom following divorce was incorrect and childlike, testifying rhetorically "Why would she need freedom if I didn't even put boundaries around her?" RP (Nov. 16, 2022) at 2040.

Yasir was aware of and disapproved of Ibtihal's changing behavior, including her conversion to Christianity. He told Ibtihal's friend, Shaker, that Ibtihal's changes did not "fit with his rituals and culture." RP (Nov. 14, 2022) at 165-66. He exclaimed to his friend, Suwaed, that Ibtihal had become an "unbeliever of God." RP (Nov. 16, 2022) at 2066. Jameel testified that Ibtihal was attending church with her in 2017 but stopped attending in 2018. She explained that Yasir knew Ibtihal was attending a Christian church. Yasir testified that he told Ibtihal to stop taking their children to church.

Despite this evidence, Yasir contends that the prosecutor's theory was not based on the evidence but instead was manufactured. He argues that the prosecutor took Yasir's comments to police out of context to support its theory, pointing to Yasir's testimony at trial that his comments about Ibtihal's childlike understanding of freedoms was a reference to her misconception of financial freedoms, not religious or cultural freedom. We disagree. While Yasir provided this explanation during trial, the State's interpretation of his comments to police, as a reference to more than economic freedom, was objectively reasonable.

Next, Yasir argues that the prosecutor over-emphasized the couple's religious differences, improperly used the term "Americanized" when referring to Ibtihal's behavior, made improper references to Iraqi law, and introduced irrelevant evidence. We consider these arguments in turn.

Yasir argues that the prosecutor's focus on Ibtihal's employment at UGM was irrelevant and the subsequent argument in closing that this job was "the beginning of the end" was inflammatory. RP at 2174. In closing, the prosecutor began by summarizing a timeline of events. She referenced Yasir's statements during his interview and argued that Ibtihal misunderstood her freedoms by drinking, driving, working, and wearing the clothes she wanted to wear. The prosecutor then summarized evidence that Ibtihal began working in late October at a "religious organization" and participated in daily prayers and devotions at work. The prosecutor characterized Ibtihal's new job as "the beginning of

the end," noting that tensions between Ibtihal and Yasir began to escalate quickly thereafter. RP at 2174. She pointed out that within weeks of Ibtihal's new job, the couple fought at a hookah bar and Yasir declared to Suwaed that Ibtihal "no longer followed God." RP at 2175. The evidence of Ibtihal's employment was relevant and the inference during closing argument was reasonable and based on the evidence. An objective observer could not view the prosecutor's focus on Ibtihal's employment with a Christian organization as an appeal to bias or prejudice against Muslims or persons from Iraq.

Next, Yasir contends that the prosecutor's use of the term "Americanized" was improper. Throughout the course of the trial, the prosecutor used the term three times. Once during opening argument when describing the evidence of motive and twice during questioning of witnesses. When the witnesses were asked if they would characterize Ibtihal as becoming more "Americanized," both witnesses disagreed, although one witness suggested that Ibtihal was "becoming more aware." On both occasions, the prosecutor moved on with questioning.[8] The term was not used in closing argument. We agree that under different circumstances, the term "Americanized" could be used

[8] While the term "Americanized" has recognized dictionary definitions as "to make American," "to cause to acquire traits or characteristics distinctively or conceived as distinctively American," and "to bring into close conformity with American national customs and institutions" (*Webster's Third New International Dictionary* 69 (1993)), it may have different meaning for different people. At one point during Suwaed's disagreement with Yasir, she insulted him by telling him that he is becoming more Americanized for calling the police.

improperly to interject an "'us' versus 'them'" bias. *See Bagby*, 200 Wn.2d at 794. In this case, however, the term was used to summarize relevant evidence of motive, and particularly whether the couple disagreed on the freedoms available to Ibtihal in the United States. An objective observer could not view the use of this term as an appeal to bias or prejudice against Muslims or persons from Iraq.

Yasir contends that evidence that Ibtihal's nonconforming behavior would have serious consequences in Iraq was irrelevant. Several of the couple's friends testified that Ibtihal's actions could have consequences based on Iraqi culture. Nahi testified that daughters and wives could be murdered in Iraq for dating and drinking alcohol. Zainab testified that the pregnancy rumor would impact Ibtihal's reputation. Suwaed testified that the rumors were serious in her culture. Husamuldeen Suwaed testified that the rumors would be a big deal in his culture and in Iraq and could result in tribal consequences in Iraq.

These consequences were tied directly to the escalating tensions between Ibtihal and Yasir. After Ibtihal confronted Yasir's friend, al-Karawi, in the parking lot and slapped him with her slipper, Yasir offered to hire sheikhs in Iraq to hold a tribal trial and teach Ibtihal a lesson. He then left two messages with Ibtihal's parents in Iraq, telling them to call off their daughter or else Yasir would "do things and she is going to lose things she doesn't know she'll lose." Ex. P96 at 2. When Ibtihal learned of these

messages, she left an angry message for Yasir, threatening to humiliate and emasculate him with her shoe.

The foregoing questions and comments were based on relevant evidence and reasonable inferences, were not generalized statements but rather tied directly to Yasir and were introduced to show motive. An objective observer could not view these questions and comments as an appeal to bias or prejudice against Muslims or persons from Iraq.

Finally, Yasir contends that the prosecutor's introduction of a picture from Yasir's phone, of the couple's daughter, T.D., wearing a traditional Islamic dress and praying, was irrelevant and introduced for improper purposes. We agree that the photograph was irrelevant. The photograph was part of a demonstrative slide show created by Detective Turman to show a timeline of events from the time Yasir and Ibtihal were married up to Ibtihal's death. The slide show consisted of 108 slides and included records gathered from Yasir's social media accounts, cell phone, and iCloud account. Eight slides contained records from January 9, 2020, the day Ibtihal confronted al-Karawi in the parking lot. The photograph of T.D. was taken on this date and pulled from Yasir's phone. When asked to explain the significance of the photograph, Detective Turman indicated his opinion would be speculation which drew an objection from Yasir's attorney that was sustained. Otherwise, the State failed to tie this evidence to anything relevant at the trial. Instead, the detective's only explanation for the photo was that "it

appeared out of [the] ordinary" from other pictures of T.D. and from the way she presented herself in court. RP (Nov. 16, 2022) at 1954.

As we noted above, even when evidence of culture and religion is generally relevant to show motive, a prosecutor can still cross the line by introducing evidence that plays into stereotypes or biases. *See Sandoval*, 189 Wn.2d at 834. While the photograph of T.D. was irrelevant, we do not find that it was an attempt to "appeal to [the] jurors' potential prejudice, bias, or stereotypes in a manner that undermined [Yasir's] credibility or the presumption of innocence." *Bagby*, 200 Wn.2d at 793. The introduction of the photograph is more concerning than the other evidence of culture and religion because it was irrelevant. Still the photograph was shown once, was based on evidence, and was introduced as part of several other relevant records created on Yasir's phone at the same time.

After applying an objective observer standard to the comments and evidence, we hold that Yasir did not meet his burden of showing that the prosecutor engaged in ethnic or religious based misconduct.

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, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

In the unpublished portion of the opinion, we address Yasir's remaining arguments.

2. SPEEDY TRIAL

Yasir contends the trial court violated CrR 3.3 by granting two motions for continuances brought by the State over his oral objections. He argues the State did not make a sufficient record to support its requests and that reversal is required. We decline to review this issue because Yasir did not preserve a rule-based speedy trial objection below and fails to provide this court with calculations showing that his trial was set beyond the speedy trial period.

A. Additional Background

Yasir was arraigned on March 2, 2020. On that day, the parties filed a stipulated agreement setting trial for August 17, 2020. On July 31, 2020, the parties filed an agreed motion to continue trial to January 25, 2021, citing COVID-19 and the parties' needing more time to prepare for trial.

In November 2020, the State moved for a continuance to April 2021. In support of its motion, the State cited the fact that the prosecutor who had been assigned to the case was on leave due to COVID-19 exposure, the complexity of the case, outstanding additional investigation related to cell phone data and voice identification, pending work to identify expert witnesses with cell phone data and Iraqi culture dynamics, the fact that no witness list had been filed by either party, and the fact that no defense witness

interviews had been requested or conducted. Defense counsel objected, arguing that he had not provided a witness list because he was waiting for the State's list and that the State had ample time to conduct its investigation and find expert witnesses. Defense counsel requested that trial start in January, or that Yasir be released from jail. The court granted the State's motion, but continued trial only to February 1, 2021 (a continuance of 11 days), based on its finding of good cause due to the reassignment of prosecutors and the COVID-19 exposure.

On January 14, 2021, the court signed an agreed scheduling order continuing trial to May 24, 2021, finding good cause based on the ongoing investigation of a homicide case as well as exposure to COVID-19.

On April 8, 2021, the State again moved to continue trial from May 24 to July 12, 2021. In support of the request, the prosecutor cited a family funeral, an additional search warrant that was recently served, the complexity of the ongoing investigation into the cell phone data, and working with the FBI to translate the majority of the evidence, which was in Arabic. Again, defense counsel objected on the record, arguing that the State should have been ready by that time, the State's additional discovery would likely require more continuances, and a July trial date created a scheduling conflict for defense counsel. Defense counsel asked the court to maintain the May trial date and to impose a discovery deadline. The court granted the continuance, finding good cause based on the complex nature of the case and the vast discovery in a foreign language. The court

ordered the parties to confer on an agreeable trial date, which was ultimately continued to September 20, 2021.[9]

B. CrR 3.3 standards

The decision to grant or deny a continuance is reviewed for an abuse of discretion. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). "Violations of CrR 3.3 are not constitutionally based and cannot be raised for the first time on appeal." *State v. MacNeven*, 173 Wn. App. 265, 268, 293 P.3d 1241 (2013); *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); RAP 2.5(a). We review alleged violations of CrR 3.3 de novo. *Kenyon*, 167 Wn.2d at 135; *State v. Walker*, 199 Wn.2d 796, 800, 513 P.3d 111 (2022).

Under Washington's time-for-trial rule, CrR 3.3, a defendant who is detained in jail must be brought to trial within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). Certain time periods are excluded when computing the time for trial. Continuances granted by the court are excluded from the time for trial. CrR 3.3(e)(3), (f). The court may grant a continuance on its own motion or the motion of a party when the administration of justice so requires and the defendant will not be prejudiced in the

[9] The parties requested additional continuances that were granted and are not challenged on appeal. RP (Sept. 2, 2021) at 20-31 (court grants defense counsel's motion for a continuance to March 21, 2022); Clerk's Papers (CP) at 457. RP (Oct. 7, 2021) at 4-14 (court grants defense counsel's motion for a continuance to July 5, 2022); CP at 458. RP (June 17, 2022) at 3-14 (court continues trial to October 31, 2022); CP at 460.

presentation of their defense. CrR 3.3(f)(2). "The court must state on the record or in writing the reasons for the continuance." *Id.* "Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties" are also excluded in calculating the time for trial. CrR 3.3(e)(8).

If a defendant is not brought to trial within the applicable time period, the court must dismiss the charges with prejudice, provided the defendant takes specific steps to preserve the issue. CrR 3.3(h), (d)(3). Specifically,

> [a] party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. *Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule*.

CrR 3.3(d)(3) (emphasis added). The objection to the trial date must be made in writing. *See State v. Chavez-Romero*, 170 Wn. App. 568, 581, 285 P.3d 195 (2012).

C. Analysis

Though Yasir contends the trial court violated his time-for-trial right on appeal, he does not provide any analysis or calculation showing that the challenged continuances resulted in his trial being set outside the CrR 3.3 time-for-trial period. We will not perform these calculations for him. His briefing is therefore insufficient for this court to determine whether the trial court actually set his trial outside the time-for-trial period. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit

judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

Additionally, Yasir failed to preserve this issue and lost the right to object by failing to comply with CrR 3.3(d)(3). While Yasir objected to the reasons for the State's continuances, he did not object on the basis that a continuance would place the trial outside the time for trial prescribed by CrR 3.3. He raises this CrR 3.3 violation for the first time on appeal, but we generally decline review of issues raised for the first time on appeal. *See* RAP 2.5. Moreover, Yasir fails to argue or show that he complied with CrR 3.3(d)(3) by filing written motions within 10 days of his oral objections and noting those motions for hearing. Because he fails to show he complied with CrR 3.3(d)(3), he lost the right to object on the basis that trial was set outside of the time-for-trial period.

3. SUFFICIENCY OF EVIDENCE ON HARASSMENT CONVICTION

Yasir contends insufficient evidence supported the harassment conviction because the State failed to provide evidence showing that Ibtihal knew about his threat to kill her. The State concedes. We agree with the parties' position.

Due process mandates that the State must prove every element of a crime beyond a reasonable doubt to secure a conviction. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. When reviewing a challenge to the sufficiency of the evidence, we ask "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt

beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Additionally, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* If evidence is insufficient to prove an element of the crime, the remedy is reversal of the conviction and dismissal of the charge with prejudice. *State v. Smith*, 155 Wn.2d 496, 505-06, 120 P.3d 559 (2005). "The sufficiency of the evidence is a question of constitutional law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A person is guilty of felony harassment if, without lawful authority, the person knowingly communicates a threat to kill another person, the person making the threat consciously disregards a substantial risk that the communication will be viewed as threatening violence, and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a), (b), (2)(b)(ii); *State v. Calloway*, 31 Wn. App. 2d 405, 416-17, 550 P.3d 77 (2024). Our Supreme Court has interpreted this statute, in part, to require that the person threatened knows/knew about the threat. *State v. Trey M.*, 186 Wn.2d 884, 906, 383 P.3d 474 (2016).

The parties acknowledge our Supreme Court's interpretation of the harassment statute as requiring the victim to know about the threat that forms the basis of the harassment charge. The parties also agree that the harassment charge was based on the

threat Yasir made when he told Suwaed that he would kill Ibtihal even if it took him ten years. RP (Nov. 15, 2022) at 1777 (Suwaed testified that Yasir threatened to kill Ibtihal); RP (Nov. 2, 2022) at 715-18; RP (Nov. 17, 2022) at 2192 (prosecutor states in closing, "[s]o that threat to kill Ibtihal made to [Suwaed] is the harassment, threat to kill."). Finally, the parties agree that at trial Suwaed denied telling Ibtihal of this threat, and that as a result, there is no evidence that Ibtihal knew or found out about the threat Yasir made in the presence of Suwaed. Accordingly, insufficient evidence supported the harassment conviction.

We reverse the felony harassment conviction and remand with directions for the trial court to vacate Yasir's conviction and dismiss the charge with prejudice.

Because we reverse the conviction for harassment with prejudice, we decline to address Yasir's alternate argument that the jury instructions failed to properly instruct the jury on the elements of felony harassment following the United States Supreme Court's decision in *Counterman v. Colorado*.[10]

4. EVIDENTIARY RULINGS ON IBTIHAL'S FEAR

Yasir challenges the admission of certain evidence introduced to show Ibtihal's fear, arguing it was irrelevant and prejudicial. Specifically, he points to evidence that Ibtihal feared Yasir based on rumors about Ibtihal's behaviors and the message Ibtihal

[10] 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

sent to Yasir three days before her death. Yasir also challenges Nahi's testimony about the possible consequences of the rumored behavior in Iraq. For various reasons we decline to address these arguments.

A. Ibtihal's Fear from Rumors

The evidence of Ibtihal's fear was introduced to support the harassment charge, which required the State to prove that Yasir not only threatened Ibtihal, but she feared that he would carry out the threat.

In his opening brief, Yasir argues that Nahi's testimony, that Ibtihal told him she feared Yasir because of rumors Yasir was spreading about her behavior, was irrelevant to the harassment charge. Yet, when the issue was raised at trial, Yasir's attorney acknowledged that the evidence was relevant to the harassment charge. His objection was that the evidence was hearsay and prejudicial. The court determined that the statements by Ibtihal about her subjective fear were relevant and fell within a hearsay exception. With respect to prejudice, the court noted that if counsel believed the evidence was unduly prejudicial it could move to sever the trial, but otherwise the evidence had already come in through another witness. Additionally, the court noted that the jury would be instructed that it could consider evidence of Ibtihal's fear for the purpose of evaluating only the harassment charge.

Despite the State's concession on appeal that the harassment conviction must be reversed for insufficient evidence, Yasir's reply brief maintains that the evidence of

Ibtihal's fear was irrelevant and prejudicial. For two reasons, we decline to review this issue. First, the relevance argument he raises on appeal was not raised or preserved below. RAP 2.5(a). In addition, as to prejudice, Yasir fails to articulate why we should review the prejudicial effect of evidence that was limited to charges that will be dismissed on remand.

B. Ibtihal's Message to Yasir

Yasir challenges the trial court's admission of Ibtihal's insulting message to Yasir, claiming that it was likewise irrelevant to the harassment charge. We also decline to address this argument. The trial court admitted Ibtihal's message to Yasir for two reasons: to show her fear and to show the effect on Yasir relevant to the murder charge. Yasir fails to address the second reason for introducing the message.

During pretrial motions, the State moved to admit the voice message Ibtihal sent to Yasir three days before her death. The prosecutor argued the message was admissible under two theories. First, it was not hearsay because it was offered under ER 801 to show the effect it had on the listener—Yasir. The prosecutor also asserted that the message was relevant to the harassment charge because prior to the message, Yasir made threats to kill Ibtihal and that, therefore, "her fear that this voice mail took him over the edge and will result in her death is highly relevant to her state of mind." RP (Oct. 20, 2022) at 211. Defense counsel objected, and the court reserved ruling on the motion.

Just before opening statements, the court addressed the State's motion to admit evidence of Ibtihal's insulting voice message to Yasir. The court ruled that Ibtihal's message could be introduced to show the effect on the listener, Yasir, because there was testimony from Yasir's friend that Yasir appeared very upset about the message. However, the court ruled that a portion of the voice message, in which Ibtihal referred to her being assaulted by Yasir, needed to be redacted because the prejudicial effect of that portion outweighed its probative value.

On appeal, Yasir contends that the message was not relevant to show Ibtihal's fear but fails to argue why the court's alternative reason for admitting the message was an abuse of discretion. Because the alternative reason is unchallenged and supports the court's decision, we decline to address this evidentiary challenge.

C. Hamid Nahi's Testimony About Iraqi Consequences

Yasir also challenges Nahi's testimony about Iraqi culture and laws. We decline to address this challenge because it was not preserved below. *See* RAP 2.5(a).

During pretrial motions, the State moved in limine to permit lay witness testimony about Iraqi culture under ER 701. The prosecutor asserted that the lay witnesses, including Nahi, a friend of the Darraji's and a fellow refugee from Iraq, would testify about Iraqi culture and how the Spokane Iraqi community would perceive certain facts and statements at issue in this case. Defense counsel responded that a foundation would need to be laid because different witnesses came from different tribes and "[d]ifferent

tribes have different cultural beliefs." RP (Oct. 20, 2022) at 208. Defense counsel next stated, "[s]o I'm not objecting and saying they can't do that because I—I don't think that's a proper objection," then seemed to object on foundational and procedural grounds, explaining the problem with determining how each witness had knowledge of Iraqi culture or the Darrajis' tribe.

The trial court granted the State's motion, reasoning "there's huge cultural differences between the United States and Iraq, and a jury may not understand why someone from Iraq would respond a certain way or do something by certain means. So information from someone from that culture may assist the jury." RP (Oct. 20, 2022) at 209. The court limited the testimony to someone who could demonstrate familiarity with the general culture that Yasir was from and the evidence could not be cumulative.

During trial, Nahi testified about his contact with Ibtihal and also about Iraqi laws and culture:

> Q Okay.
>
> Did [Ibtihal] tell you about any rumors she was concerned about that day?
>
> A Yes.
>
> Q What specific rumors was she worried about?
>
> A So when I asked her about her life, she says she's really concerned this time, and she told me that there is a rumors [sic] been throwing about her converted to Christianity. Another rumor is that she's basically smoking meth, going dancing in the nightclubs, drinking alcohol, and but—dating, all of that stuff.
>
> Q Okay.

And did she tell you where she heard these rumors about herself?

A She says—she stated that Yasir was telling him and other group of his friends were saying those rumors against her.

Q Okay.

So in Iraq would rumors like this be a big deal about Christianity, drug usage, dancing, things like that?

A Yes, sir. It will be—basically will be a death penalty. In Iraq . . . it's a law. Law goes on females only, and basically you—you can murder your wife, your daughter, whoever, if they went and dated somebody or if they had alcohol or something. They call it wash of shame, and it—you can—you don't even go to jail for it. You probably will go for like maybe one or six months if you did it in public.

Q And was she worried about these rumors going back to Iraq specifically?

A Correct. Yes, sir. So in the beginning, you know, she was telling me previously, and it was kind of more like she thought it was a bluff, but then that day, when we met in January at WinCo, she felt more threatened. And the reason she says, because now these rumors is added and it wasn't just like I'm going to punch you in the face or something. It was more like I'm doing meth, I'm drinking alcohol, dancing in the nightclubs. So that basically justifying the—you know, that's a death penalty for me.

Q So based on these rumors, did Ibtihal express fear to you that Yasir Darraji was going to kill her?

A Yes, sir.

RP (Nov. 9, 2022) at 1535-37.

Following this testimony Yasir objected on the grounds that Nahi's testimony attributed statements to Yasir in violation of the court's earlier ruling. The court overruled the objection, noting that it had precluded Nahi from repeating any direct threats made by Yasir. Yasir did not object to Nahi's comments about Iraqi culture or

Ibtihal's fears based on that culture. *See* ER 103(a)(1); RAP 2.5(a). Thus, the issue raised on appeal was not preserved below.

5. JURY UNANIMITY ON AGGRAVATING SENTENCING FACTORS

Yasir contends that he was deprived his right to jury unanimity on the "destructive and foreseeable impact" aggravating sentencing factor. He argues that the jury could have convicted him of the aggravating factor without unanimously agreeing on the persons who were impacted by his crime. He contends that the prosecutor first argued that the aggravating factor applied only to Yasir's children, but later argued that the factor applied to the community, Ibtihal's family and friends, and the firefighters who pulled her body out of the car.

As a threshold issue, Yasir acknowledges that he raises this issue for the first time on appeal. However, he cites to *State v. Crane*,[11] for the proposition that this error is one of constitutional magnitude that may be raised for the first time on appeal. The State contends that Yasir fails to demonstrate that this error is reviewable under RAP 2.5[(a)(3)] as a manifest error affecting a constitutional right. We agree with the State and decline review of this issue; Yasir fails to show the error is one of constitutional dimension or manifest.

[11] 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

We generally decline to review claims of error not raised in the trial court. RAP 2.5. However, an exception to that rule permits a party to raise a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). "To meet RAP 2.5(a)[(3)] and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *See State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Yasir fails to meet his burden of showing either element.

"In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude." *Id.* "We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." *Id.*

Generally, the United States and Washington constitutions guarantee a criminal defendant the right to a unanimous verdict. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 21; *Ramos v. Louisiana*, 590 U.S. 83, 92-93, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020); *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). A unanimity instruction ensures that "a defendant may be convicted only when a unanimous jury concludes that the *criminal act* charged in the information has been committed." *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (emphasis added). In addition, "[t]he jury's verdict on the aggravating factor must be unanimous." RCW 9.94A.537(3).

However, Yasir's argument pertains to the facts underlying the aggravating factor—the other persons his crime had a destructive and foreseeable impact on. In support of his argument, he cites to RCW 9.94A.537(6) for the proposition that the jury's verdict on the aggravating factor must be unanimous. That statute provides:

> If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537(6).

Yasir provides no authority in support of the proposition that the above cited statute confers on him a constitutional right to jury unanimity on the facts underlying the aggravating factor charged and found. "Where no authorities are cited in support of a proposition, we are not required to search out authorities, but may assume that counsel, after [a] diligent search, has found none." *State v. Manajares*, 197 Wn. App. 798, 810, 391 P.3d 530 (2017). Thus, Yasir fails to show this issue is one of constitutional dimension.

Yasir also fails to show that the error is manifest. An error is manifest when a defendant shows actual prejudice, which requires a plausible showing of practical and identifiable consequences during trial. *State v. WWJ Corp.*, 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). "[T]he focus of the actual prejudice [prong] must be on whether the

error is so obvious on the record that the error warrants [our] review." *O'Hara*, 167 Wn.2d at 99-100. "[T]o determine whether an error is practical and identifiable, 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.

It is not obvious from the record that the trial court erred by failing to give a unanimity instruction on the facts underlying the aggravating factor. In addition, Yasir fails to cite any case that supports his argument that a jury unanimity instruction was required in this situation. The cases he does cite do not pertain to jury unanimity on the facts underlying an aggravating factor. *See*, *e.g.*, *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988) (concerning multiple acts cases and constitutional harmless error analysis); *State v. Espinoza*, 14 Wn. App. 2d 810, 815, 474 P.3d 570 (2020) (concerning two crimes charged in a single count using "and/or" to identify the victim); *Petrich*, 101 Wn.2d 566 (concerning a multiple acts case).

Yasir also cites to *State v. Allen*[12] for the proposition that aggravating factors are elements of the offense that the State must prove beyond a reasonable doubt. But that case is inapplicable to his argument about jury unanimity on the facts underlying aggravating factors under RCW 9.94A.535(3). In *Allen*, Washington's Supreme Court

[12] 192 Wn.2d 526, 538, 431 P.3d 117 (2018).

held that "RCW 10.95.020 aggravating circumstances are elements of the offense of aggravated first degree murder for double jeopardy purposes." *Id.* at 544. The *Allen* court's decision did not pertain to aggravating factors in RCW 9.94A.535(3), and the *Allen* court did not discuss jury unanimity, much less unanimity on the facts underlying a charged aggravating factor.

We decline review of this unpreserved issue because Yasir fails to show that this issue is a manifest error affecting a constitutional right.

6. VAGUENESS CHALLENGE TO AGGRAVATING SENTENCING FACTOR

Yasir contends that the "foreseeable and destructive impact" aggravating factor is unconstitutionally vague as applied to his case. He requests that we do not follow a Washington's Supreme Court case, *State v. Baldwin*,[13] where the Court held that the void-for-vagueness doctrine does not apply to aggravating factors. He contends that subsequent United States Supreme Court decisions render *Baldwin* obsolete. The State counters, arguing that all three divisions of this court have rejected void-for-vagueness challenges to the foreseeable and destructive impact aggravator. We continue to follow Washington precedent and reject Yasir's vagueness challenge.

The due process clause of the Fourteenth Amendment requires that statutes afford citizens a fair warning of prohibited conduct. *City of Spokane v. Douglass,* 115 Wn.2d

[13] 150 Wn.2d 448, 459, 78 P.3d 1005 (2003).

171, 178, 795 P.2d 693 (1990). A vagueness analysis encompasses two due process concerns: (1) criminal statutes must be specific enough to provide citizens with fair notice of what conduct is prohibited, and (2) statutes must provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). When assessing vagueness, we ask whether a person of reasonable understanding must guess at the statute's meaning. *State v. Murray*, 190 Wn.2d, 727, 736, 416 P.3d 1225 (2018).

In *Baldwin*, Washington's Supreme Court rejected a void for vagueness challenge to Washington's sentencing guideline statutes, reasoning that because "[s]entencing guidelines do not inform the public of the penalties attached to a criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature . . . the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." 150 Wn.2d at 459. As a result, the *Baldwin* court rejected the defendant's vagueness challenge to the two statutory aggravators charged in the case. *Id.* Under *Baldwin*, a defendant cannot bring vagueness challenges against aggravating factors in RCW 9.94A.535(3). *State v. Brush*, 5 Wn. App. 2d 40, 59, 425 P.3d 545 (2018).

Then, in 2004, the United States Supreme Court decided *Blakely v. Washington*, holding that Washington's Sentencing Reform Act of 1981, ch. 9.94A RCW, was unconstitutional. 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under

Blakely, a trial court's sentencing authority is limited to the maximum sentence the court could impose without making any additional findings and any fact that increases the sentence beyond the standard range must be found by a jury beyond a reasonable doubt. *Id*. at 303-04.

To comply with *Blakely*, Washington's legislature amended Former RCW 9.94A.120(2), recodified as RCW 9.94A.535. LAWS OF 2005, ch. 68, § 1. The revised statutes make clear that a defendant has a right to a sentence within the standard range corresponding with the crime of conviction, unless a jury finds one or more statutory aggravating factors beyond a reasonable doubt. RCW 9.94A.537(3).

In 2017, the United States Supreme Court rejected a vagueness challenge to advisory federal sentencing guidelines. *Beckles v. United States*, 580 U.S. 256, 265, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). The Court reaffirmed that a defendant is not permitted to bring a vagueness challenge against the sentencing guidelines because "they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 263. However, the Court noted that "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses" are "subject to vagueness challenges." *Id.* at 262, 261.

Washington's Supreme Court has not overturned *Baldwin* and the case remains good law. We are generally bound to follow Washington Supreme Court precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). And, as the State points out, all three divisions of this court still follow *Baldwin*. *See, e.g.*, *Brush*, 5 Wn. App. 2d 40 (holding that *Baldwin* remains good law because the aggravating factors in RCW 9.94A.535(3) do not limit a sentencing court's discretion, did not fix the sentence, or specify a sentence that had to be imposed, and accordingly, rejecting the defendant's vagueness challenge to the aggravator); *State v. DeVore*, 2 Wn. App. 2d 651, 660-66, 413 P.3d 58 (2018) (holding that aggravating factors in RCW 9.94A.535(3) do not fix sentences or the ranges of sentences for any crime and do not vary any statutory minimum or maximum sentence; thus, *Baldwin* remains good law and the defendant was precluded from challenging the aggravating factor as void for vagueness); *State v. Lloyd*, No. 75111-5-I, slip op. at 54-55 (Wash. Ct. App. May, 21, 2018), (unpublished), https://www.courts.wa.gov/opinions/pdf/751115.pdf (concluding that *Baldwin* is not overruled and rejecting a vagueness challenge to an aggravating factor because "aggravating factors merely guide the sentencing court's decision to impose an exceptional sentence").

Accordingly, in *State v. Santos*,[14] this court's recent case, the majority rejected a void for vagueness challenge to the same aggravating factor Yasir challenges in this case, relying on *State v. Baldwin*,[15] *State v. Brush*,[16] and *State v. DeVore*.[17] The *Santos* majority rejected the same arguments advanced by Yasir in this appeal. *Compare* Slip op. 32-36, *with* Br. of Appellant at 90-93.

Judge Pennell dissented on this issue and concluded that aggravating factors are amenable to vagueness challenges. Slip op. at 44-49 (Pennell, J. dissenting). She reasoned that, because post-*Blakely* a defendant now has a vested right to a standard range sentence unless an aggravating factor is proved beyond a reasonable doubt, "due process should require that aggravators presented to a jury not be vague." Slip op. at 47. Judge Pennell then proceeded to analyze whether the "destructive and foreseeable impact" aggravating factor was vague and concluded that it was not. Slip op. at 49-51.

Yasir requests that we follow Judge Pennell's dissent in *Santos*. While Judge Pennell's dissent is well reasoned, this court declines to follow it. We are bound by *Baldwin*. Thus, we conclude that Yasir is precluded from challenging the "destructive and foreseeable impact" aggravating factor as vague.

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[14] No. 36069-5-III (Wash. Ct. App. Apr. 30, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/360695_2_unp.pdf.

[15] 150 Wn.2d 448, 78 P.3d 1005 (2003).

[16] 5 Wn. App. 2d 40, 425 P.3d 545 (2018).

[17] 2 Wn. App. 2d 651, 413 P.3d 58 (2018).

7. SENTENCING ERRORS

Yasir raises several sentencing errors on appeal, including a challenge to the exceptional sentence imposed by the court and the imposition of legal financial obligations. Because we vacate his conviction for felony harassment and remand for resentencing, we decline to consider these arguments. Yasir is free to raise them at resentencing.

8. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

Yasir raises four additional arguments in his SAG. We address these in turn.

First, Yasir contends for the first time on appeal, that the information was defective, specifically with regard to the destructive and foreseeable impact on other persons aggravating factor under RCW 9.94A.535(3)(r). The amended information charged count I as follows:

> COUNT I: MURDER IN THE SECOND DEGREE, committed as follows: That the defendant, YASIR DARRAJI, in the State of Washington, on or about January 30, 2020, while committing or attempting to commit the crime of Second Degree Assault by strangulation, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of IBTIHAL S. DARRAJI, a human being, not a participant in such crime; and *the current offense was aggravated by the following circumstance: the offense involved a destructive and foreseeable impact on persons other than the victim, as provided by 9.94A.535(3)(r)*, and furthermore, the defendant did commit the above crime against an intimate partner, as defined by RCW 26.50.010(7) and 9A.36.041(3)(a).

Clerk's Papers at 132 (emphasis added).

Yasir contends the State's failure to identify who constituted the "persons other than the victim" affected rendered the information defective. We disagree.

Accused persons have the constitutional right to know the charges against them. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. An information is constitutionally defective if it fails to list the essential elements of a crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). "'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *Id.* (internal quotation marks omitted) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). Requiring the State to list the essential elements in the information protects the defendant's right to notice of the nature of the criminal accusation guaranteed by the Sixth Amendment and article I, section 22. *Id.* "We review the constitutional adequacy of charging documents de novo." *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016). "A defendant may raise an objection to [the] charging documents at any time, but [there is] a presumption in favor of the validity of charging documents when the challenge is made after [the] conclusion of the trial." *State v. Canela*, 199 Wn.2d 321, 328, 505 P.3d 1166 (2022).

Yasir cites several cases in support of his argument; however, none of these cases held that an information was defective for omitting facts supporting a charged aggravating factor under RCW 9.94A.535(3). *See, e.g., State v. Hugdahl*, 195 Wn.2d 319, 458 P.3d 760 (2020) (holding that the statutory language for sentencing

enhancements under RCW 69.50.435(1)(c) must be included in the charging document, and the omission of the word "stop" from the statutory language "school bus route stop" could not be implied from the information); *Zillyette*, 178 Wn.2d at 160-161, 163 (addressing an essential element of controlled substances homicide and holding that neither the identity of the controlled substance nor its schedule could be implied from an information alleging that the defendant "unlawfully deliver[ed] a controlled substance . . . in violation of RCW 69.50.401."); *State v. Nonog*, 169 Wn.2d 220, 225-31, 237 P.3d 250 (2010) (concerning whether an information charging domestic violence reporting in violation of RCW 9A.36.150 was defective for failing to specify the exact domestic violence crime committed, and holding that the information reasonably apprised the defendant of his prior crime); *Allen*, 192 Wn.2d at 544 (regarding whether aggravating circumstances under RCW 10.95.020 are "elements" of "aggravated first degree murder for double jeopardy purposes"). Accordingly, this argument fails.

In his second SAG issue, Yasir argues that the trial court abused its discretion by allowing Nahi to provide expert testimony despite being admitted as a lay witness under ER 701. This evidentiary challenge was not preserved at trial and we decline to review it on appeal. ER 103(a)(1); RAP 2.5(a).

In his third SAG issue, Yasir argues that the prosecutor argued outside the scope of facts and evidence during closing argument. He contends the prosecutor reiterated Nahi's expert testimony and promoted a legal conclusive decision.

Yasir points to the following statement made by the prosecutor during closing:

> You heard from Hamid Nahi. He told you the last time he saw Ibtihal, she was terrified. She was terrified of Yasir. And he said things that she was doing, the rumors that were spreading about her drinking, dancing, nightclubs, driving, jobs, Christianity, all of that is a death sentence in Iraq; maybe here, too.

RP (Nov. 17, 2022) at 2189.

Yasir's argument that the prosecutor argued outside the scope of facts and evidence fails. The prosecutor summarized Nahi's testimony. Yasir fails to show what evidence discussed by the prosecutor was not in evidence. We generally consider only issues raised in a SAG that adequately inform us of the nature and occurrence of the alleged errors. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

In his final SAG issue, Yasir contends the jury's tour of Ibtihal's burnt car prejudiced his right to a fair trial. He argues that the jail environment where the car was displayed and the smell of the victim's burned body caused prejudice.

Before trial, the prosecutor moved to allow the jury to view Ibtihal's burned car as demonstrative evidence.[18] Defense counsel objected, arguing that photographs should suffice and expressing concern that showing the car in the Spokane County Jail sally port would unfairly prejudice the jury, as it would reveal that Yasir was housed in the jail. The prosecutor countered that any prejudice would be mitigated because the car would be

[18] Although the prosecutor references filing a motion regarding demonstrative evidence, that motion is not in the record.

brought into the sally port behind the jail, Yasir would appear before the jury without handcuffs and in regular clothing, and the jury would not pass through the jail itself. Defense counsel clarified that his primary concern was the jury being taken into the jail facility. The court ultimately granted the State's motion.

Before the jury viewed the car, the court issued an oral limiting instruction, stating that the location of the viewing had "no bearing on that evidence or anything else" and instructed jurors not to consider the location of the car. Additionally, the jury was prohibited from speaking while viewing the car. The record does not contain images of the sally port where the car was viewed or any record of what happened during the viewing.

Although defense counsel did object to the facility where the car was shown, the record does not contain any images, or videos showing the sally port or its proximity to the jail. Regardless, we presume the jury followed its instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Similarly, although Yasir contends the "stench" of the victim prejudiced the trial, there is no record of what occurred during the viewing of the car, let alone of any smell emanating from the car.

Because we consider only issues that adequately inform us of the nature and occurrence of the alleged errors, we decline review of these issues. *Alvarado*, 164 Wn.2d at 569. To the extent these alleged issues involve facts or evidence not in the record, Yasir may raise them in a personal restraint petition. *Alvarado*, 164 Wn.2d at 569.

CONCLUSION

We reverse and remand with instructions to vacate and dismiss with prejudice Yasir's conviction for felony harassment. We affirm the conviction for second degree felony murder and remand for resentencing on that conviction.

Staab, J.

I CONCUR:

Lawrence-Berrey, C.J.

No. 39421-2-III

FEARING, J. (dissenting) — During trial, the State employed three converging dynamics to bias the jury: ethnicity, religion, and Americanism. I agree with the majority that evidence concerning Iraqi culture and Islam, Yasir Darraji's upbringing in Iraq, Ibtihal Darraji's change in lifestyle, and Ibtihal's conversion to Christianity held relevance to the prosecution. For example, a prosecutor may question a witness about religious belief to establish a possible motive for a crime. *State v. Dhaliwal*, 150 Wn.2d 559, 579-80, 79 P.3d 432 (2003); *State v. Kovalenko*, 30 Wn. App. 2d 729, 748, 546 P.3d 514 (2024). But because of the divisive subject of Islam and stereotypes of Middle Eastern men, the State needed to selectively, thoughtfully, and carefully present its evidence rather than turn the trial into a contest between American culture and Christianity, on the one hand, and Iraqi culture and Islam, on the other hand. The State also should have avoided any patriotic appeals to Islam and Iraqi culture being antagonistic to Americanism.

The State gratuitously painted victim Ibtihal Darraji as Christian and American and defendant Yasir Darraji as Muslim and un-American. The State even went as far as suggesting Ibtihal was a martyr to Christianity. With its testimony and arguments to the jury, the State employed the ancient, but common, practice of portraying the victim as

"us" and the accused as "them" in order to assure a conviction. I would reverse and remand for a new trial because Yasir Darraji did not receive a fair trial.

I list the State's disproportionate references during trial to Americanism, Christianity, and Islam. During its opening statement, the State promoted the United States as a refuge for the world. The State mentioned that Yasir and Ibtihal Darraji fled Iraq because of violence directed at the couple after Yasir worked in security for the United States. The State intoned: "[the Darrajis] . . . came here to seek the American dream." RP at 704. Later comments by the State's attorney, during opening, suggested Yasir interfered in Ibtihal's pursuit of the American dream.

Also, during its opening statement, the State blamed hostility between Yasir and Ibtihal Darraji, accruing after the move to the United States, to Ibtihal's becoming more "Americanized." RP at 705.

> Fights started happening again and rumors were being spread about Ibtihal Darraji that this good life she'd come here to live suddenly wasn't looking right anymore. There were a lot of disputes about how she was becoming more Americanized. She'd spend time with friends and go dancing. She'd go drinking sometimes. These are things that were seen as unacceptable in her culture.

RP at 705. Other than perhaps suggesting spending time with friends, dancing, and drinking alcohol, the State never defined for the jury, during the opening, what it meant by "becoming more Americanized." Nevertheless, one who sat through the trial or reads the transcript recognizes that the State deemed "becoming Americanized," which I refer to as "Americanization," to encompass wearing western clothes, discarding the hijab, and

converting to Christianity. More importantly, the term "Americanized" would lead Spokane jurors to identify with Ibtihal Darraji and distance themselves from Yasir, who wished to preserve his Iraqi culture and Islamic religion despite moving to the United States. Thus, the opening statement began the "us" versus "them" dichotomy that did not end until the jury deliberated.

The State employed the term "Americanized" twice thereafter. The State wished two of its witnesses to echo the State's theme that Ibtihal Darraji had increasingly become Americanized. The witnesses did not cooperate. The State's attorney asked witness Zainab Jameel, a close friend of Ibtihal:

> Q Is it safe to say that she became more Americanized?
> A Not Americanized, but became aware, yeah.

RP at 734.

Later the prosecuting attorney asked Sajida Nelson, also an Iraqi refugee and World Relief worker in Spokane who befriended the Darrajis:

> Q You mentioned she [Ibtihal] kind of had stopped covering her hair and some other things. Was that part of the—the gossip that you were hearing, that she was becoming Americanized?
> A No.

RP at 1147. Despite the two witnesses' negative answers, the jury heard the State repeat its theme of Americanization. As a trial lawyer, I sometimes asked a question to a witness regardless of whether the answer would help or hinder and solely for the purpose of planting a seed in the factfinder's mind.

The State asked witness Zainab Jameel other questions to demonstrate that Ibtihal Darraji sought to become Americanized:

> Q When Ibtihal and Yasir were still married, did Ibtihal cover her hair?
> A Yes.
> Q When Ibtihal and Yasir were still married, did she smoke?
> A No.
> Q When Ibtihal and Yasir were married, did she drink?
> A No.
> Q When Ibtihal and Yasir were married, did she go out to nightclubs?
> A No.
>
> Q After the divorce, how did Ibtihal start dressing?
> A It changed.
> Q How did it change?
> A It changed, like, from one to one hundred.
> Q Did she cover her hair?
> A No.
> Q What types of things would you do socially with Ibtihal after she was divorced?
> A At home and we sit together.
> Q Did you ever go to nightclubs together?
> A I cannot answer this question.
> Q And why can't you answer that question?
> A I can't.
> Q Okay.
> Do you know if Ibtihal went to any bars after she was divorced?
> A Yes.
> Q And did she drink after she was divorced?
> A Yes.
> Q Do you know if she ever smoked after she was divorced?
> A Yes.

RP at 733-34.

The jury heard evidence that Ibtihal Darraji and her friend Galbahar Suwaed assaulted Saad al Karawi at a WinCo Foods store in early January 2020. Karawi had spread rumors about Ibtihal. Through questioning of Zainab Jameel, the State separated

Iraqi and American culture, which intentionally or unintentionally showed Ibtihal as becoming more American.

> Q Is that—in Iraq, as a culture, would that be a bad thing for a man to allow a woman to beat him up?
> A We're not in Iraq. We're in America.
> Q But if it was in Iraq, would that be something that would be something a man would have a problem with, have—
> A It depends on the personality of the woman.

RP at 779.

The State asked Sajida Nelson similar questions about Ibtihal Darraji's striking of Saad al Karawi:

> Q Were you aware that Ms. Darraji had hit him [Saad] because of the rumor mill? Were you aware of that?
> A That's what he said.
> Q Did she ever talk to you about that?
> A No. We never had the chance to talk about it.
> Q Okay.
> In the Iraqi culture, is a woman hitting a man dishonoring that man?
> A Yes, but it depends what is happening in the same circumstances, too.
> Q Okay.
> So that would be considered a dishonorable thing in some situations?
> A Correct.
> Q In Iraq, that would be a—an issue, would it not?
> A Yes.
> Q A big issue?
> A Correct.

RP at 1169.

In blending Americanism and ethnicity with religion, the State repeatedly asked witnesses about Ibtihal Darraji becoming a Christian. The State asked Zainab Jameel, Ibtihal's close friend:

Q Ms. Jameel, did you go to church when you were in Spokane?

A Yes.
Q . . . What religion was the church that you went to?
A The Christian religion.

Q How often did you go?
A Sometimes every Sunday, sometimes every week.
Q Did Ibtihal go to church with you?
A Yes.
Q And did she bring her children?
A Yes.

Q Was Yasir Darraji aware that Ibtihal was taking his children to church?
A Yes.
Q And how do you know that?
A She told me; Ibtihal.

RP at 731-32.

The State called Lee Brown, director of the Union Gospel Mission's thrift store enterprise, to testify. Brown interviewed Ibtihal for a job at the mission's Spokane Valley store. Brown knew the time at which Ibtihal left work on January 30, 2020, the day of her killing. But the State questioned the witness beyond this scope when inserting the subject of Christianity. Brown averred:

Q What was the interview like? What's the process look like, from your standpoint?
A The process looks like, you know, we come in and we let them know—we ask them what they know about Union Gospel Mission. One of the things we really focus on, we ask them do they know it's ministry and we all are believers of Christ. And we ask them how to—how does Christ-what important place does Christ play in their lives. So because, again, you're going to be in a Christian environment. We pray together. We pray for customers. And we have daily meetings where we talk about business numbers, and we also will have prayer and things like

that. So it's very important that you cover those things in the interview so they know what they're stepping into.
Q And when you interviewed Ms. Darraji, was she comfortable with that concept of participating in?
A To my knowledge, yes. Uh-huh.

RP at 805-06.

Evidence of Ibtihal Darraji's employment at Union Gospel Mission bore little, if any, relevance to the prosecution other than to emphasize Ibtihal Darraji's devotion to Christianity. The State presented no evidence that Yasir Darraji knew the requirements to work at the Union Gospel Mission or the practices of the mission, let alone that Ibtihal worked at the mission. Thus, the evidence could not be relevant to any motive to strangle Ibtihal or ignite a pyre.

Despite its lack of relevance, the State called Lorie Skillman, immediately after Lee Brown's testimony, to over-embroider its Christianity pattern. Skillman served as the assistant manager of the Union Gospel Mission's Spokane Valley store, and she supervised Ibtihal Darraji. The State questioned Skillman:

Q Did you also start morning with a team meeting?
A Actually, no. We had team meetings, though, and they were always around noon.
Q Oh. Excuse me.
Tell me a little bit about that team meeting.
A We had what we called a huddle, and it was usually a daily devotional that we would read, and then we would discuss it. We would pray over it, and then we would talk about the day and how things were going, how the store was doing. And it was a good time to be able to communicate with the employees if there was anything that needed to be said. Yeah.
Q Okay.

Tell me a little bit about the devotion. Where did that devotion come from?
A We--there are books that are put out and published that are yearly devotionals, and there's one each day. So we would pick one, a book, and then we'd read that for the year.
Q So is that, like, a page a day or—
A Yes.
Q Are you reading--a page a day. Okay.
And is there Bible scriptures that are involved in that?
A Yes.
Q Okay.
And you said you would pray over it. What do you mean by that?
A Well, whatever the message was for the day, we would pray about that. We would take anything that anybody else had, we would ask if they had any sort of prayer requests, and we would go ahead and put those in our prayer. And we would discuss the message and just thank God for it.
Q It sounds like the Christian faith was a fairly big part of UGM's Thrift Store, kind of employment, is that--
A Correct.
Q Does that sound right?
A Uh-huh.
Q When you did those daily huddles, who was present for those?
A All the employees that were not in the check stand actually checking out people. So all the people in the front and all the people that were [doing] the processing in the back.
Q When you were working at the Valley thrift store, did you work with somebody named Ibtihal Darraji?
A I did.

RP at 814-15.

The State asked Lorie Skillman to describe the non-Muslim dress adorned by Ibtihal Darraji.

Q How did she dress for work?
A How did she dress?
Q Uh-huh.

A Usually jeans, a shirt, sweatshirt because it got cold back there because we didn't have really any--too much heat in that. Shoes. Gloves if we needed them.
Q Sure.
There's a picture on the screen here. It's State's Exhibit 103. Do you recognize that?
A Yes.
Q And is that the thrift store on Sprague?
A Yes.
Q And is that Ibtihal there in the photo?
A Yes.
Q And you see–can you describe her clothing for us in that photo?
A It's really hard for me to see it from here, but it looks like she has her jeans.

RP at 817. Although Skillman encountered difficulty identifying objects in the photo, I doubt a juror would encounter more difficulty in discerning the jeans than Skillman.

Later, again through Lauri Skillman, the State again repeated the theme of Ibtihal Darraji's abandonment of Iraqi dress and practicing Christianity.

Q You mentioned the kind of daily team huddle?
A Uh-huh.
Q Did Ibtihal participate in that?
A Yes.
Q And did she come daily to that devotional?
A Yes.
Q Did she participate in prayer requests?
A Yes.
Q Were you aware of Ibtihal's religion?
A She was Christian.
Q Did you ever see her wear a hijab or cover her hair?
A No. But she'd show me a picture of herself, and she had--I know that she had worn one.

RP 818-19.

The State questioned Hamid Nahi, another man who left Iraq because he formerly worked for the United States military, about Ibtihal's change in dress and conversion to Christianity. Nahi befriended Yasir and Ibtihal Darraji when they arrived in Spokane.

Q So when you saw her that day, how did she physically look? Did she look healthy to you?
A She did.
Q Okay.
Was her hair covered at that time?
A No.
Q Do you remember when you first met her if she used to cover her hair?
A She did, yes, sir.
Q Okay.
Did she tell you about any rumors she was concerned about that day?
A Yes.
Q What specific rumors was she worried about?
A So when I asked her about her life, she says she's really concerned this time, and she told me that there is a rumors been throwing about her converted to Christianity. Another rumor is that she's basically smoking meth, going dancing in the nightclubs, drinking alcohol, and but--dating, all of that stuff.
Q Okay.
And did she tell you where she heard these rumors about herself?
A She says--she stated that Yasir was telling him and other group of his friends were saying those rumors against her.
Q Okay.
So in Iraq would rumors like this be a big deal about Christianity, drug usage, dancing, things like that?
A Yes, sir. It will be--basically will be a death penalty. In Iraq, that—it's a law. Law goes on females only, and basically you--you can murder your wife, your daughter, whoever, if they went and dated somebody or if they had alcohol or something. They call it wash of shame, and it--you can-- you don't even go to jail for it. You probably will go for like maybe one or six months if you did it in public.
Q And was she worried about these rumors going back to Iraq specifically?
A Correct. Yes, sir.

RP at 1535-36. The State may have thought what occurs in Iraq relevant because, if some men in Iraq kill an apostate female, Yasir Darraji likely killed Ibtihal Darraji. The State may have wished to harness the law of averages. The State could have asked Hamid Nahi whether Ibtihal feared that Yasir would kill her without invoking the phenomenon of shame killing in Iraq.

The State wanted the jury to repeatedly hear about Ibtihal Darraji's devotion to Christianity. Despite the hearsay nature of the testimony, the State recalled investigating officer, Detective Corey Turman, to the stand and asked:

> Q And then do you recall when she started work at UGM?
> And if you want to follow along in the PowerPoint.
> A Oh.
> Q It's also there.
> A Thank you.
> Q It's a lot to remember.
> A Yes. October 31st, 2019.
> Q So October 31st of 2019, Ibtihal started working for a Christian organization?
> A Yes.
> Q Okay.
> And we heard about kind of daily devotions and prayer time at that organization?
> A Yes.

RP at 1949.

The State gratuitously introduced as an exhibit a photograph of the couple's daughter. Ex. P-84 at 24.

The daughter chose to live with her father, not her mother, during approximately the last six months of Ibtihal's life because Ibtihal recurrently insulted Yasir. The State asked Detective Turman to identify the photograph.

> Q So you mentioned that they had this fight [fight between Ibtihal Darraji and Saad al Kawari at Winco] on 1/9. Did you observe anything else on the iCloud account that was unusual from--from Yasir's phone on that same day?
> A Yes. I assume we're talking about the next slide.

Q Yes, we are.
A So this is in the middle of the fight.
Q Okay.
A Allegedly when Ibtihal is doing something shameful, and he took a picture, which I believe it is in [the daughter's] room. And it is--appears to be a female, from her build, and she is dressed in a black robe, head scarf. There appears to be a prayer rug, and she is on her knees in what appears to be prayer.
Q Why did you think that was significant?
A Well, I'd be offering an opinion and speculating.
MR. COSSEY [defense counsel]: And I would be objecting.
Q (By MS. STEARNS) [deputy prosecuting attorney] Why did you document--
THE COURT: I'll sustain the objection as to an opinion.
Q (By MS. STEARNS) Why did you document that photograph?
A Well, it appeared out of ordinary from all the photos that I had seen prior that were saved of [the daughter]. [The daughter] was--what she wore in court yesterday was very consistent with her dress and style on social media. There was one time in one interview, I believe the very first interview, she was wearing--had her head covered. But those are all the only two times in all of her pictures that--and I--I thought it was unusual.
Q So you documented this because it stood out to you and its abnormality, I suppose?
A Yes.

RP at 1953-54.

In addition to me, the investigating detective struggled to understand the relevance to the prosecution of the daughter wearing the headdress. But according to the State, the daughter of a Muslim man, which daughter occasionally wears a hajib, is an "abnormality." RP at 1954. Even if a Muslim daughter inconsistently wearing a hijab constitutes an abnormality, the State still has not explained its relevance. The jury was left to reflect that Yasir Darraji demanded that his daughter wear the hijab and would grow angry with her if she did not because of his clinging to Islam. The jury could

juxtapose the daughter, who retained some of the Iraqi culture, from the mother, Ibtihal Darraji, who wanted to be American.

At the conclusion of trial and during its closing argument, the State returned to its theme that Ibtihal was a Christian, not a Muslim. The State went further and told the jury that Christian daily devotions and prayer time began "the end." RP at 2174. The State's attorney remarked:

> Later, she started a job October 31st of 2019 for the Union Gospel Mission, another religious organization, an organization that required their employees to have daily devotionals, daily prayer time, that Ibtihal involved herself in, that Ibtihal participated in, that Ibtihal attended. That was the beginning of the end.

RP at 2174. "The end" presumably was the death of Ibtihal. Thus, the State fashioned Ibtihal as a martyr to her faith. The State presented no evidence, however, that Yasir Darraji knew of Ibtihal engaging in Christian devotions and prayer at work, let alone that such knowledge contributed to Yasir's motivation to kill Ibtihal.

Later in its closing argument, the State again emphasized: "Ibtihal was Christian." RP at 2195. Then, without evidence, the prosecution suggested that a Muslim woman in America who converts to Christianity receives a death sentence.

> You heard from Hamid Nahi. He told you the last time he saw Ibtihal, she was terrified. She was terrified of Yasir. And he said things that she was doing, the rumors that were spreading about her drinking, dancing, nightclubs, driving, jobs, Christianity, all of that is a death sentence in Iraq; maybe here, too.

RP 2189. Hamid Nahi did not testify that a conversion to Christianity, for a Muslim female residing in the United States, constituted a death penalty.

During the trial, Arabic interpreters assisted Yasir Darraji, who spoke rudimentary English. The use of interpreters, despite its inevitability, separated Darraji from the jury and bolstered Darraji's status as a "them." The underlying principle of a jury trial is to be judged by one's peers. Defendants who do not share the same cultural and linguistic background as the jurors can hardly be considered peers. Hale, S., Martschuk, N., Goodman-Delahunty, J., & Lim, J. (2024), Juror perceptions in bilingual interpreted trials, *Perspectives*, 1–24. https://doi.org/10.1080/0907676X.2024.2343772.

Recent Washington Supreme Court decisions have focused on racism in the criminal justice system. Yasir Darraji's appeal combines religion with race. Race and religion engage in an intimate interplay during an era of emergent white populism and religious intolerance. Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 Iowa L. Rev. 1475, 1475 (2020). In addition to emphasizing religion, the State also promoted Americanism often a codeword for racism. The State claimed Ibtihal Darraji became "Americanized." Americanized, as demonstrated by this court proceeding, means whitenessized and Christianized.

In a Michigan decision, the appeals court paralleled religion with race, nationality, and ethnicity as a subject that risks arousing prejudice during a trial. *George v. Travelers Indemnity Co.*, 81 Mich. App. 106, 265 N.W.2d 59, 63 (1978). Just as important, the court observed that even when race, ethnicity, nationality or religion holds relevance to the suit, the law demands restraint in the use of evidence. The court wrote:

> Even in the occasional case where racial, ethnic, or religious matters are relevant to the issues, there is always the risk of incidentally arousing prejudice and this Court abhors injecting the poison of prejudice into any legal proceeding. The law is blind to differences in race, religion, and nationality.

George v. Travelers Indemnity Co., 265 N.W.2d 59, 63 (1978).

One commentator has observed that Islam over time and through its social and legal resignification has become, in North America and Europe, a race called "Muslim." Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1, 3 (2022). Islamophobia has become a distinct form of racism. Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1, 3 (2022). Individuals immigrating from northern Africa and the Middle East have shed Islam and converted to Christianity in order to gain full assimilation and acceptance in the United States and to expedite American citizenship. Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1, 21 (2022). Hijabs and beards serve as a marker of stubborn clinging to foreign-ness and a rejection of American ideals and values. Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1, 48 (2022). When a man from an immigrant community murders his wife, government leaders attribute the crime to culture, but when a White American commits the same crime, the same leaders label the act as one of individual deviancy. Leti Volpp, *Protecting the Nation from "Honor Killings": the Construction of a Problem*, 34 Const. Comment 133, 135-36 (2019).

Being identified as a Muslim does not bode well for an accused. Despite the legend under the Statue of Liberty, the United States of America does not welcome all tired and poor huddled masses to our nation. Instead, the leader of our nation tells Muslims born in this country to return to "where they came from." "*Send Her Back!": President Trump Slams Rep. Ilhan Omar at Rally* - CBS Minnesota, July 17, 2019. Many Americans adjudge Islam as foreign to America and American history. Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475, 1518 (2020).

In *State v. Farokhrany*, 259 Or. App. 132, 312 P.3d 584 (2013), our southern neighbor's court noted the interrelationship between race and religion. The Oregon court reversed Shahin Farokhrany's convictions for controlled substances crimes and sexual abuse crimes because of the insertion of religion and race into the case. "During *voir dire*, the [State] engaged potential jurors in a discussion about their views regarding the prosecution calling only one witness to prove a fact." *Id.* at 134. "The prosecutor contrasted for the potential jurors a scenario that he asserted '[came from] either Iran or Saudi Arabia,'" a nation "where an alleged rape victim was required to produce five male witnesses to prove the rape." *Id.* "One juror . . . correct[ed] the prosecutor, stating that the prosecutor was describing Sharia law, a religious law, not the legal system of a country." *Id*. The State used a preemptory challenge to remove the potential juror. Outside of the jury's presence, defense counsel requested a curative instruction regarding the prosecutor's comments on Sharia law. Defense counsel worried that the

prosecution's comments could bias the jury against Farokhrany because he is Iranian and Muslim. *Id.* The prosecutor responded that he always posited this hypothetical during the many sex abuse cases he tried. The trial court refused to give the proposed instruction, commenting that such an instruction was unnecessary as the jury did not know defendant's ethnicity or religion. According to the trial court, as far as the jury was concerned, defendant could be an American, and a Christian, not a Muslim.

When reversing the verdict, the Oregon appeals court, in *State v. Farokhrany*, concluded that the State "invited the jurors to identify [Shahin Farokhrany] with one of the countries mentioned . . . and with the dominant religion of those countries." *Id.* at 136. "Moreover, the example of Sharia law used by the prosecutor may have suggested to the potential jurors that men from countries that follow Sharia law feel free to commit sexual offenses, as long as the requisite number of witnesses are not present." *Id.* The reviewing court recognized that the prosecutor did not intend to appeal to prejudice, but the court could not gauge in the effect on the jury of the prosecutor's remarks. The comments enticed the jury to consider irrelevant factors when reaching a verdict. Americans view an Iranian background and Muslim negatively. Thus, the State denied Fahroarky an impartial jury demanded by the federal constitution and the Oregon constitution. The court wrote:

> In the end, regardless of the prosecutor's motivation in making such comments, this court simply cannot tolerate conduct, blatant or subtle, that even borders on an attempt to introduce, at any stage of a trial, issues of racial, ethnic or religious bias.

Id. at 137. The State, in Yasir Darraji's prosecution not only attempted to introduce excessive evidence that invoked racial, ethnic and religious bias, but its attempt succeeded.

In *State v. Kovalenko*, 30 Wn. App. 2d 729 (2024), this court declined to reverse a conviction based on the assertion of religion during trial. Nevertheless, the court ruled that the prosecution improperly attributed Sergey Kovalenko's religion to a strict and isolating family lifestyle that explained why his daughters did not earlier report sexual abuse. The State could have provided evidence of a sequestered family life without mentioning religion.

The State could have avoided its persistent discussion of Iraqi culture and Islam during Yasir Darraji's trial and still convinced the jury of guilt by tailored evidence and argument. The State could have presented evidence of Ibtihal Darraji's conversion to Christianity without extrapolating on and duplicating evidence of the devotional exercises at the Union Gospel Mission. The State could have introduced testimony of Yasir's aversion to the conversion without portraying Ibtihal as a Christian martyr or asserting that employment with the Union Gospel Mission acted as the beginning of her end.

The State also harnessed Americanization in addition to religion against Yasir Darraji. In *Varughese v. State*, 892 S.W.2d 186 (Tex. App. 1994), a jury convicted East Indian Matthew Varughese of murdering his wife. The wife died, in her bed, from burning and smoke inhalation. Varughese claimed she committed suicide. The reviewing court ruled that the prosecution committed misconduct when referring to

Varughese's race and nationality during jury argument. The prosecutor commented that "Varughese and his wife were born in India." *Id.* at 193. The State's attorney added that husbands often engaged in wife-burning in order to dispose of an unwanted spouse in India. The prosecutor expressly labeled the wife as "Americanized," but Varughese clung to his birth country's culture and traditions. 892 S.W.2d at 194. The appeals court, despite the misconduct, refused to reverse the conviction because Varughese's failure to object to the argument waived any error. The Washington Supreme Court demands reversal regardless of the extent of prejudice.

The State could have presented evidence of Ibtihal's change in dress, alteration in lifestyle, and transition to the prevailing religion in the United States without labeling Ibtihal as becoming "Americanized." Muslim American women who wear a hijab and adhere to a strict lifestyle code are as much American as an American Christian woman who wears Western dress. America values liberty. Women may choose what to wear. Some Muslim women, regardless of nationality or country of residence, find a headdress and shapeless clothing liberating because men do not ogle them. The State did not need to influence the jury with the photograph of the daughter, contrary to her mother, following Iraqi custom and Islam.

Washington State abhors ethnic bias, particularly bias inserted by the State in a criminal prosecution. The Washington Supreme Court desires a prophylactic rule when confronting ethnic bias in the court because "'past efforts to address prosecutorial misconduct [had] proved insufficient to deter such conduct.'" *State v. Zamora*, 199

Wn.2d 698, 722, 512 P.3d 512 (2022). The nature of ethnic bias creates an impossibility in determining the extent to which the accused suffers prejudice. *State v. Zamora*, 199 Wn.2d 698, 712 (2022).

When adjudging whether the State wrongly appealed to bias, the Supreme Court considers "the apparent purpose of the statements, whether the comments were based on evidence or reasonable inferences in the record, and the frequency of the remarks." *State v. Zamora*, 199 Wn.2d 698, 718-19 (2022). The Washington Supreme Court does not measure the strength of the State's evidence to convict. The court instead applies "the tested and proven rule of automatic reversal." *State v. Zamora*, 199 Wn.2d 698, 722 (2022) (emphasis added).

The State repeatedly, repeatedly, and repeatedly mentioned Ibtihal Darraji's Christianity and Yasir Darraji's Islamism. The State often and frequently elicited testimony of Ibtihal's change in dress and shedding of the hijab. The incessant reference to Christianity and Americanization served no purpose other than to arouse the jurors. The State told the jury that Ibtihal's devotional exercises at the Union Gospel Mission began her journey to death despite no evidence supporting this assertion. The State falsely told the jury that Hamid Nahi averred that Christianity could be a death sentence to a Muslim female residing in the United States.

Yasir Darraji's trial counsel did not object to most of the testimony cited in this dissent. The Washington Supreme Court instructs, however, that "inaction by defense

counsel [does not] excuse a prosecutor's misconduct." *State v. Zamora*, 199 Wn.2d 698, 717 (2022).

During oral argument, the court asked Yasir Darraji's counsel whether, despite the State's employment of tropes to engender bias, overwhelming evidence supported the conclusion that Darraji murdered his wife. Counsel twice refused to answer the question, a refusal that confirms a belief that the jury based its verdict on robust evidence. This belief raises a quandary. Should a reviewing judge reverse a conviction when overwhelming evidence supports the conviction despite the trial's infection of racial, ethnic, and religious bias?

The Washington Supreme Court answers this question. When reviewing appeals wherein the prosecution engaged in racial pandering, the court asks whether the prosecutor flagrantly or "apparently intentionally appealed to . . . racial bias in a way that undermine[s] [the defendant's credibility or the] presumption of innocence." *State v. Zamora*, 199 Wn.2d 698, 704, 718 (2022). If so, "the defendant need not establish prejudice." *State v. Zamora*, 199 Wn.2d 698, 721 (2022). Instead, the "prejudice is incurable and requires reversal" regardless of the evidence against the defendant. *State v. Zamora*, 199 Wn.2d 698, 721 (2022).

Yasir Darraji's prosecutor intentionally inserted a theme that undermined the credibility of Darraji because he, unlike his wife, refused to be Americanized and held to Islam. The prosecutor portrayed Darraji as the stereotypical Middle Eastern man seeking

revenge against an ex-wife. The State did not need to insert ethnic and religious bias to convict Darraji, but it insisted in doing so.

Although weak, some evidence pointed to Saad al Kawari as the killer. Ibtihal Darraji had struck Kawari weeks earlier. Kawari lived near Darraji. Kawari twice purchased gloves and cleaning solutions at Walmart on the night of January 30, 2000.

Fearing, J.

WASHINGTON APPELLATE PROJECT

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