Supreme Court No. __
(COA No. 86244-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICARDO MEJIA,

Petitioner.

# PETITION FOR REVIEW

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## A. INTRODUCTION

GR 37 prevents courts from allowing the State to exercise a peremptory strike if an objective observer could view race as a factor in the strike. GR 37 also lists several presumptively invalid reasons for a strike.

In *State v. Bell*,[1] this Court recently reiterated several principles behind GR 37:

- "The rule was designed to be overinclusive in order to be effective[;]"[2]
- The 'could view' standard under GR 37 "is a sensitive standard," so courts "must be especially prudent" in evaluating GR 37 claims;[3] and
- "[A] party's intent when exercising a peremptory challenge is not part of a court's analysis," and instead

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[1] No. 103077-1 (Wash. July 10, 2025).
[2] *Id*. at 13.
[3] *Id*. at 14.

the court "must consider the optics of the challenge from an objective observer's position."[4]

The Court of Appeals' opinion in this case, which the Court issued a few weeks before this Court's opinion in *Bell*, contradicts these rules and principles. The opinion reads the "could view" standard in an underinclusive rather than in an overinclusive manner. The opinion hyper-focuses on the prosecutor's stated intent rather than the optics of the prosecutor's exercise of the peremptory strike. The opinion deemphasizes the words he used to describe the challenged juror, and it undervalued the racially charged motives he assigned for her assurances to be fair and impartial.

This Court should accept review.

## B. IDENTITY OF PETITIONER AND DECISION BELOW

Ricardo Mejia asks this Court to accept review of a Court of Appeals opinion that affirmed his convictions. The Court of

[4] *Id*. at 17.

Appeals issued the opinion on June 23, 2025. Mr. Mejia has attached a copy of the opinion to this petition.

## C. ISSUES PRESENTED FOR REVIEW

1. GR 37 forbids a court from striking a juror if an objective observer could view race as a factor in the strike. Under GR 37, some reasons for a strike are presumptively invalid. Some of these presumptively invalid reasons include having prior contact with law enforcement and having a close relationship with individuals who have been convicted of a crime.

The court allowed the State to exercise a peremptory strike against a Black woman. The State claimed it was exercising the strike because (1) the prosecutor in Mr. Mejia's trial was co-counsel to the prosecutor who formerly prosecuted Juror 51's ex-boyfriend; (2) the State had to force Juror 51 to testify in her ex-boyfriend's trial; and (3) Juror 51, in one instance, gave false testimony during her ex-boyfriend's trial.

Juror 51's questionnaire admitted that she was a witness in a previous trial, but she stated she neither had strong feelings towards law enforcement nor had concerns about her ability to be fair and impartial. During questioning, she shared that she did not recognize the prosecutor at Mr. Mejia's trial, and she assured the court that despite being forced to testify at her ex-boyfriend's trial, she could be fair and impartial. The trial court allowed the strike.

An objective observer could view race as a factor in the strike for several reasons, including (1) the State relied on presumptively invalid reasons for the strike; (2) the State told the court that Juror 51 gave favorable answers only as a ruse to get on the jury and exact revenge on the State for its prior prosecution of the juror's ex-boyfriend; and (3) the State used racially charged language when it asked the court to strike the juror, as he described her as "hostile."

The Court of Appeals' opinion contradicts GR 37 precedent, warranting this Court's review. RAP 13.4(b)(1), (2), (3), (4).

2. A prosecutor commits misconduct when he argues that a person's exercise of his right to remain silent is substantive evidence of the person's guilt. During closing arguments, the prosecutor pointed out that after Mr. Mejia's arrest, he did not inform the police about the theory of defense he advanced at trial.

The Court of Appeals implicitly agreed this was misconduct, but it nevertheless affirmed Mr. Mejia's convictions by employing the wrong standard of review. The opinion's employment of this standard of review contradicts precedent, warranting this Court's review. RAP 13.4(b)(1), (2), (3), (4).

**D. STATEMENT OF THE CASE**

The State charged Ricardo Mejia with several theft offenses after his attempts to help others obtain legal status

were unsuccessful. Op. Br. at 4-12. During his trial, the State exercised a peremptory strike against a Black juror over Mr. Mejia's GR 37 objection. RP 453-56.

Mr. Mejia's theory of defense was that someone at a law firm in Los Angeles tricked him into unwittingly defrauding the victims. RP 1178-1205, 1223. During closing argument, the prosecutor argued, "[a]fter [Mr. Mejia] was arrested, he didn't say anything about being duped. At no point has he ever claimed that he thought he was acting lawfully." RP 1231. The prosecutor went on to argue that after the victims went to the police, "[Mr. Mejia] had the opportunity to make the claims counsel [advanced], [but] he declined to do it." RP 1231-32.

The jury convicted Mr. Mejia, and the Court of Appeals affirmed his convictions. Op. at. 1.

## E. ARGUMENT

### 1. This Court should accept review because the Court of Appeals' opinion undermines GR 37's robust protections and is contrary to precedent.

Both the federal constitution and the Washington constitution secure a person's right to a fair and impartial jury. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Tesfasilasye*, 200 Wn.2d 345, 356, 518 P.3d 193 (2022). Relatedly, both the federal and the state constitution forbid the State from striking a juror because of her race. U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22; *Batson v. Kentucky*, 476 U.S. 79, 85-87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Saintcalle*, 178 Wn.2d 34, 43, 309 P.3d 326 (2013), *overruled on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

"Parties may use peremptory challenges to strike a limited number of otherwise qualified jurors from the venire without providing a reason." *Tesfasilasye*, 200 Wn.2d at 356. However, a history exists of the State using peremptory strikes

"based largely or entirely on racial stereotypes or generalizations." *Id.* at 356. While the United States Supreme Court sought to curtail race-based strikes with the framework it announced in *Batson*,[5] this Court recognized this framework was inadequate. *Id*.

Accordingly, this Court enacted GR 37 to address *Batson's* shortcomings. *Id*. at 357. Unlike *Batson*, GR 37 does not require the defendant to demonstrate the prosecutor had a discriminatory purpose when he exercised a peremptory strike. Instead, GR 37 requires a court to deny a peremptory strike "if an objective observer **could** view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e) (emphasis added). The use of the term "could" in GR 37 demonstrates our Supreme Court intended courts to forbid peremptory strikes if a mere possibility existed the strike was racially motivated. *State v. Lahman*, 17 Wn. App. 2d 925, 938, 488 P.3d 881 (2021).

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[5] *Batson*, 476 U.S. at 96-99 (discussing framework).

This Court employed the "could" language in GR 37 because such language made it "more likely to prevent peremptory dismissals of jurors based on the unconscious or implicit biases of lawyers." *Tesfasislasye*, 200 Wn.2d at 357.

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

Because some reasons for peremptory challenges "have been associated with improper discrimination in jury selection[,]" GR 37 lists several presumptively invalid reasons for a peremptory challenge. GR 37(h). Some of these reasons include "having prior contact with law enforcement" and "having a close relationship with people who have been [] convicted of a crime." GR 37(h)(i)-(iii).

When a trial court considers a GR 37 challenge, it must consider numerous circumstances. *See* GR 37(g). One of the circumstances GR 37 directs the court to consider is the number

of questions posed to the prospective juror, and whether the party who exercised the peremptory challenge failed to question the juror about his concerns. GR 37 (g).

This Court reviews a court's GR 37 determination de novo. *Bell*, No. 103077-1, slip op. at 3.

Over Mr. Mejia's GR 37 objection, the court allowed the State to strike Juror 51, a Black woman, from the panel. The State's justifications for the strike contravened GR 37 in several ways. First, the State relied on two presumptively invalid reasons for the strike. Second, the State asked the court to rely on these presumptively invalid reasons in order to make unsupported assumptions regarding Juror 51's ability to be fair and impartial. These assumptions relied on the harmful stereotype that Black women exploit the legal system for their personal gain.

Third, the State relied on presumptively invalid reasons to justify its decision to not ask Juror 51 any questions during

group voir dire. And fourth, the State used racially charged language when it described Juror 51's behavior.

Before trial, Juror 51 filled out a juror questionnaire. The questionnaire revealed the following: (1) she was Black; (2) she had testified as a witness at a prior trial; (3) she did not recognize any of the State's witnesses; (4) she did not have strong feelings towards law enforcement; and (5) she had no concerns about her ability to be fair and impartial. PT Ex. 1.

The prosecutor asked the court to excuse Juror 51 from service before the parties even questioned her. RP 113. The prosecutor explained that while Juror 51 did not recognize his name, Juror 51 was a witness in a homicide trial from the previous summer. RP 113. The prosecutor at Mr. Mejia's trial was not the lead prosecutor at the trial where Juror 51 served as a witness. CP 43.

The prosecutor explained Juror 51 did not respond to a subpoena to testify, so "she was arrested on a material witness warrant and spent a night in jail prior to her testimony[.]" RP

113. The prosecutor then claimed that while Juror 51 did not recognize his name, she would recognize him when she saw him, and she "could not give [the State] a fair trial under the circumstances." RP 113. Under this assumption, the State asked the court to excuse Juror 51. RP 113.

The court declined to excuse Juror 51. RP 114. Instead, the court directed the parties to question her. RP 114.

The court pulled Juror 51 aside for individual questioning. RP 244. The prosecutor asked Juror 51 if she testified at a specific homicide trial during the summer; Juror 51 said yes. RP 245. Juror 51 agreed the police arrested her to secure her testimony at the trial. RP 245. She also agreed this was a negative experience. RP 245. However, she did not recognize the prosecutor at Mr. Mejia's trial, and she said she could set aside her experience for this case. RP 245-46. Juror 51 explained she did not think her experience would influence her in any way. RP 246.

Despite these assurances, the prosecutor again asked the court to strike Juror 51 for cause. RP 246. Mr. Mejia objected. RP 246. The court opined that while it understood the State's concerns, it did not "have any indication that [Juror 51's prior arrest] itself [was] enough to warrant a for-cause challenge." RP 246-47. The court invited the prosecutor to build a record to establish bias. RP 247.

Shortly afterward, the prosecutor tried again and made additional arguments. The prosecutor claimed Juror 51 would not be "forthright" with the prosecutor during Mr. Mejia's trial because she was not "forthright" with the prosecutor during the murder trial. RP 262. The prosecutor explained that when Juror 51 was on the witness stand but outside of the jury's presence, she agreed she was one of the speakers in a jail phone call. RP 262. However, in the jury's presence, Juror 51 denied recognizing her voice. RP 262. Accordingly, the State impeached her with the prior statement she made outside the presence of the jury. RP 242.

The court reiterated the State had not presented sufficient facts or testimony that gave rise to a for-cause challenge. RP 264. The court reminded the prosecutor he could develop a for-cause challenge through questioning. RP 265-64.

The prosecutor agreed Juror 51's responses were "perhaps not adequate for a for-cause challenge," but asserted he would not ask Juror 51 any more questions because he did not "believe she [was] going to answer them truthfully." RP 264. The prosecutor explained he assumed that if he questioned Juror 51, it would go "south for [him] just like her trial testimony went south[.]" RP 264. True to his word, the prosecutor did not ask Juror 51 any additional questions during voir dire.

Undeterred, the prosecutor filed a motion the following day asking the court to strike Juror 51 due to implied bias. CP 38. The motion provided further details regarding the homicide trial. For example, the motion noted the person on trial was

Juror 51's ex-boyfriend. CP 39. The State tried Juror 51's boyfriend due to a homicide in early 2017. CP 43.

In an attached declaration, the prosecutor claimed that while on the phone with Juror 51 and the lead prosecutor in May of 2022, Juror 51 used "very hostile language" that showed she did not want to cooperate with the prosecution. *Id.* The declaration did not detail the "very hostile language" Juror 51 allegedly used. *Id*. Then, the prosecutor claimed that during Juror 51's testimony in 2023 for the 2017 murder, she "demonstrated hostility toward the prosecution" because "she could not recall events." CP 38. The prosecutor in Mr. Mejia's case was not the prosecutor who questioned Juror 51 in the murder case. RP 445.

With no evidence, the prosecutor's motion to strike Juror 51 claimed she lied to the court at voir dire in Mr. Mejia's case. CP 39. The prosecutor claimed Juror 51's comments "should be discounted as an attempt to be seated on this jury." CP 39. The prosecutor theorized, "there would be no quicker way for [Juror

51] to get back at the State than to participate as a biased juror in this trial, and thereby undermine this prosecution." CP 41.

Mr. Mejia once again objected to the prosecutor's motion to strike. RP 439. Mr. Mejia argued the prosecutor was essentially arguing that because the prosecutor believed Juror 51 was dishonest during her ex-boyfriend's trial, the court could no longer trust anything she said. RP 440. Under the prosecutor's logic, anyone who was previously convicted of giving a false statement could never serve on a jury. RP 440. Mr. Mejia argued the prosecutor's basis for striking Juror 51 rested on a logical fallacy. RP 440-41.

Mr. Mejia also reminded the court that Juror 51 unequivocally said she could be fair and impartial. RP 441. He also pointed out that the prosecutor strategically chose not to further question Juror 51. RP 442-43.

The court concluded that while there was "an adversarial relationship between the prosecutor's office and this prospective juror," the court did not believe the prosecutor

provided sufficient evidence to warrant a for-cause challenge. RP 446-47.

The prosecutor refused to relent and exercised a peremptory challenge against Juror 51. RP 453. Mr. Mejia raised a GR 37 challenge. RP 453. The prosecutor argued an objective observer could not view race as a factor in the strike because he made "abundantly clear this is a challenge against this specific individual for their adversarial relationship" with the "prosecutor's office[.]" RP 453.

In response, Mr. Mejia again pointed out that the prosecutor asked Juror 51 zero questions after her individual questioning. RP 454. Furthermore, Mr. Mejia argued the prosecutor was relying on an invalid basis for the strike, as GR 37 lists having prior contact with law enforcement as a presumptively invalid basis for a strike. RP 454. In essence, the prosecutor wanted to strike Juror 51 because she had one unpleasant and forced interaction with the criminal legal system. RP 454-55.

The court granted the peremptory strike. The court concluded an objective observer could not view race as a factor in the strike because this was a "unique circumstance" where the prosecutor had to get an arrest warrant in order to get Juror 51 to testify and Juror 51 provided "conflicting testimony" at her ex-boyfriend's murder trial. RP 455.

The court also acknowledged that while a person's prior contact with law enforcement officers is a presumptively invalid reason for a strike, it did not see "[GR 37] as applying where you have an individual that had [a] personal interaction with the prosecutor litigating the case here." RP 456. The court acknowledged that while GR 37 provides that a presumptively invalid reason for a strike is a person's personal relationship with someone with a conviction, the strike was "because of [Juror 51's] personal interaction with [the] prosecutor." RP 458.

Upon hearing the court's ruling, Mr. Mejia pointed out the prosecutor concocted this "relationship" with Juror 51, as she said she had no idea who he was. RP 458-59. In the same

vein, the prosecutor merely relied on assumptions in order to justify the strike. RP 458-59. The court acknowledged these arguments but allowed the strike. RP 459-60.

The court's ruling contravened GR 37 for several material reasons. First, the prosecutor relied on presumptively invalid reasons for the strike. GR 37 lists having prior contact with law enforcement and having a close relationship with people convicted of a crime as presumptively invalid bases for a peremptory strike. GR 37 (h)(i), (iii). But here, the prosecutor claimed that because (a) the State had to jail Juror 51 to get her to cooperate in the prosecution of her ex-boyfriend; and (b) the State had to impeach her with a prior inconsistent statement at her ex-boyfriend's trial, she could not be fair to the State.

The Court of Appeals found that the prosecutor's stated reasons did not "implicate GR 37(h)(i) and (ii)" because they were based on his personal interaction with Juror 51. Op. at 10-11. This is plainly wrong. Nowhere in GR 37 does it state that an exception to GR 37's presumptively invalid reasons exists

where the prosecutor has had a personal interaction with a juror. The Court of Appeals' opinion reads language into the rule that simply does not exist.

Furthermore, the Court of Appeals' opinion over-relies on the prosecutor's stated intent when exercising the strike and his express reason for declining to question Juror 51 any further. Op. at 10, 13. However, the prosecutor's actual intent in "exercising a peremptory challenge is not part of a court's analysis. This is because the court must consider the optics of the challenge from an objective observer's position." *Bell*, No. 103077-1, slip op. at 16-17. The same is true of a prosecutor's decision to not further question a juror—the court must focus on the optics of this decision rather than the prosecutor's stated reason for not questioning the question. The Court of Appeals' opinion critically ignores the optics of the prosecutor's behavior and words.

An objective observer could also view race as a factor in the strike because Juror 51 assured the court that despite being

jailed and forced to testify at her ex-boyfriend's trial, she could follow the court's instructions and be fair and impartial. The trial court found these assurances credible, as the court did not allow the prosecutor to exercise a for-cause challenge against Juror 51.

The Court of Appeals concluded this was irrelevant and "conflate[d] for-cause and peremptory challenges." Op. at 11. This Court's caselaw belies this conclusion. In *State v. Tesfasilasye*, this Court noted that an objective observer could view race as a factor in the strike of a juror of color because "the record show[ed] that [the juror] repeatedly indicated she could be fair and impartial." 200 Wn.2d at 359. This Court contrasted this with other juror's answers, which demonstrated that many of the jurors were actually equivocal about their ability to be fair and impartial. *Id.* at 360. The fact that these jurors were not struck fortified this Court's conclusion that an objective observer could view race as a factor in the strike.

An objective observer could also view race as a factor in the strike because the prosecutor asked the court to make several baseless, racially charged assumptions about Juror 51: (1) she was a perpetual liar who could never be trusted; and (2) she was purposefully trying to get on the jury in order to exact revenge on the prosecutor and sabotage the State. This invoked a harmful stereotype about Black women. A longstanding racist stereotype exists that Black women are "untrustworthy," "deceptive," and game the legal system in order to extract some sort of personal benefit. *Henderson v. Thompson*, 200 Wn.2d 417, 437, 518 P.3d 1011 (2022).

To this argument, the Court of Appeals seemingly concluded the prosecutor's prior interaction with Juror 51 supported his belief that Juror 51 lied about her ability to be fair and impartial. Op. at 15-16. This conclusion was patently wrong. Outside the context of the State forcing her to testify at her ex-boyfriend's trial, nothing in the record suggests Juror 51 was inherently untrustworthy and deceptive. Certainly, nothing

in the record supports the conclusion that Juror 51 specifically plotted to get on the jury in order to exact her revenge on the State.

This unsupported assumption—which rested on a known racist stereotype about Black women —could certainly lead an objective observer to conclude race was a factor in the strike. The Court of Appeals was wrong to conclude otherwise.

Relatedly, the prosecutor's claim that during a phone call with Juror 51, she used "very hostile language" could also lead an objective observer to view race as a factor in the strike. The declaration does not describe the allegedly "very hostile language" Juror 51 uttered to the prosecutor. The declaration also notes Juror 51 demonstrated "hostility" and "extreme hostility" to the State. CP 38-39.

The term "hostile" is a synonym of the term "combative." *Combative*, Merriam-Webster Thesaurus.[6] This

[6] https://www.merriam-webster.com/thesaurus/combative (last visited Aug. 20, 2024)

Court has recognized that describing a Black woman as hostile—or, in other words, combative— "evokes the harmful stereotype of an 'angry Black woman.'" *Henderson*, 200 Wn.2d at 436. Describing a Black woman as hostile "is concerning and harmful," as society "has stereotyped Black women as 'violent, hostile, and aggressive.'" *State v. Hawkins*, 200 Wn.2d 477, 500 n.17, 519 P.3d 182 (2022) (quoting J. Celeste Walley Jean, *Debunking the Myth of the 'Angry Black Woman:' An Exploration of Anger in Young African American Women*, 3 Black Women, Gender, & Fams. 68 (2009)).

The Court of Appeals concluded this language could not lead an objective observer to view race as a factor in the strike because the prosecutor's "word choice was consistent with established legal terminology and supported by specific facts[.]" Op. at 15-16. Several problems exist with this conclusion.

First, just because a phrase is a legal term of art does not mean the use of the phrase cannot cause an objective observer

to view race as a factor in a strike. Legal terms of art can be offensive and serve as dog-whistles to refer to a person's race. For example, the term "illegal alien" is a legal term of art, but it has fallen out in many circles in recent years because it dehumanizes people who are undocumented. *See* Ben Fox, *US under Biden will no longer call migrants "illegal aliens,"* AP (Apr. 19, 2021);[7] *see also* Jonathan Kwan, *Words Matter: Illegal Immigrant, Undocumented Immigrant, or Unauthorized Immigrant?*, Santa Clara University (Feb. 11, 2021).[8] And this Court and our legislature have recognized that legal terms of art can be offensive. *See Pitzer v. Union Bank of California*, 141 Wn.2d 539, 9 P.3d 805 (2000) (recognizing that the term "illegitimate children" is a legal term of art that is offensive);

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[7] https://apnews.com/article/donald-trump-coronavirus-pandemic-immigration-7c8c0bad5dedb750c2aa7c1e9d8aa3cb.

[8] https://www.scu.edu/ethics/focus-areas/more-focus-areas/immigration-ethics/immigration-ethics-resources/immigration-ethics-blog/words-matter-illegal-immigrant-undocumented-immigrant-or-unauthorized-immigrant/.

Michael LeCompte, *Bill for removal of 'master' and 'servant' from employment terms working its way through WA state house*, NBC (Jan. 25, 2023)[9] (describing bill that eliminates the legal terms of art "master" and "servant" from certain statutes because they are offensive).

Furthermore, the Court of Appeals appeared to have overlooked the fact that the prosecutor's declaration claimed Juror 51 used "very hostile language," but the declaration fails to document what Juror 51 actually said. Accordingly, the record fails to show whether Juror 51's interaction with the prosecutor was truly "hostile." And even if it was "hostile," this Court has already stated prosecutors should neutrally describe a person's behavior instead of simply characterizing it as "hostile." *Hawking*, 200 Wn.2d at 500 n.17.

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[9] https://www.nbcrightnow.com/news/bill-for-removal-of-master-and-servant-from-employment-terms-working-its-way-through-wa/article_0e7cb55c-9cfa-11ed-9bce-1b34a5933f8e.html.

The Court of Appeals also relied on *State v. Orozco*, which concluded that "a prosecutor's adversarial relationship with a prospective juror in a previous criminal proceeding is a 'race-neutral justification' supporting a peremptory challenge." Op. at 15, citing 19 Wn. App. 2d 367, 376, 496 P.3d 1215 (2021). However, *Orozco* does not advance the Court of Appeals' reasoning. In *Orozco*, the prosecutor struck a Black juror because (a) the prosecutor previously prosecuted her for minor crimes; and (b) "her name [] appeared in a number of police reports as associating with people that [he] believe[d] [were] engaged in criminal activity. 19 Wn. App. 2d 367, 376, 496 P.3d 1215 (2021). While Division Three believed "personally prosecuting a prospective juror for minor crimes [was] a race-neutral justification," the prosecutor nevertheless violated GR 37. *Id.* This was because the prosecutor combined this justification "with a presumptively invalid one." *Id.*

Here, like in *Orozco*, the prosecutor did not exercise a peremptory strike against Juror 51 only because of his prior

interaction with Juror 51. The prosecutor also exercised a peremptory strike against Juror 51 because he believed she was only providing favorable answers in "an effort to be seated on [the] jury" and "get back at the State" for prosecuting her ex-boyfriend. CP 39, 41. That was improper. *Henderson*, 200 Wn.2d at 437. Thus, even assuming that the prosecutor's prior interaction with Juror 51 was a permissible basis to strike Juror 51, the prosecutor coupled a valid reason with an invalid reason. That requires reversal.

In sum, the Court of Appeals' opinion hyper-focuses on the prosecutor's stated intent rather than the optics of the prosecutor's exercise of the peremptory strike. The court overlooked the words he used to describe Juror 51, and it discounted the racially-charged motives he offered to explain away her assurance to the court that she would be fair and impartial.

This Court should accept review.

**2. This Court should accept review because the Court of Appeals continues to apply an inconsistent standard of review when evaluating prosecutorial misconduct claims that directly assail a person's exercise of his constitutional rights.**

The Sixth and the Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington Constitution secure a defendant's right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecutor's misconduct may deprive a defendant of this right. *Glasmann*, 175 Wn.2d at 703.

As a representative of the people, a prosecutor owes a duty to the accused. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). He must ensure that he secures a verdict without undermining the accused's constitutional rights. *See id.* Consequently, a prosecutor commits misconduct when he argues to the jury that it may infer the defendant is guilty because he exercised his right to remain silent. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). This is because the

accused has the right to remain silent and to "decline to assist the State in the preparation of its criminal case [against him.]" U.S. Const. V; Const. art. I, § 9; *Easter*, 130 Wn.2d at 243. The prosecutor therefore violates a person's right to a fair trial when he "comment[s] upon or otherwise exploit[s] a defendant's exercise of his right to remain silent." *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).

A defendant may raise an argument that the prosecutor improperly commented on the defendant's right to remain silent for the first time on appeal. *State v. Gregory*, 158 Wn.2d 759, 837, 147 P.3d 1201 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018); *Romero*, 113 Wn. App. at 786; *see also State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006); RAP 2.5(a)(3).

During Mr. Mejia's closing argument, he pointed out that the evidence strongly suggested that someone at the Los Angeles law firm scammed the couples. RP 1179-80. The centerpiece of Mr. Mejia's argument was that the evidence

suggested someone at the law firm swindled Mr. Mejia into unknowingly participating in the scam. RP 1178-1205, 1223.

In his rebuttal, the prosecutor pushed back against this argument. The prosecutor pointed out that Mr. Mejia's theory was that the law office bamboozled him, but "[a]fter [Mr. Mejia] was arrested, he didn't say anything about being duped. At no point has he ever claimed that he thought he was acting lawfully." RP 1231. The prosecutor then remarked that when the victims went to the police, "[Mr. Mejia] had the opportunity to make the claims that counsel [advanced], [but] he declined to do it." RP 1231-32.

The Court of Appeals concluded that even if these arguments were improper, the proper standard of review was the "flagrant and ill-intentioned standard," which requires the defendant to show that (a) no curative instructive would have mitigated the prejudicial effect of the comment; and (b) the misconduct had a substantial likelihood of affecting the verdict.

Op. at 21. This is incorrect. As cited above, the defendant need only comply with RAP 2.5(a)(3).

The Court of Appeals' misapplication of the law warrants this Court's review.

## F. CONCLUSION

For the reasons stated in this petition, Mr. Mejia respectfully requests that this Court accept review.

This petition uses Times New Roman Font, contains 4,972 words, and complies with RAP 18.17.

DATED this 23rd day of July, 2025.

Respectfully submitted,

/s Sara S. Taboada
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FILED
6/23/2025
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>RICARDO MEJIA,<br>Appellant. | No. 86244-8-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

FELDMAN, J. — Ricardo Mejia appeals his convictions following a jury trial for three counts of theft in the first degree. On appeal, Mejia argues the trial court erroneously allowed the State to exercise a peremptory challenge contrary to GR 37 and excluded testimony in violation of his constitutional right to present a defense. He also claims the prosecutor committed reversible misconduct. We affirm.

I

Mejia's convictions arise out of an elaborate scheme to defraud six people by charging them tens of thousands of dollars for legal services that were never provided. According to Mejia, these legal services were to be provided by a California attorney, Eric Price, whose law firm employed his niece. But as Price would later testify, his firm never employed a relative of Mejia or performed any

work for the victims of his fraudulent scheme. Eventually, Mejia's conduct was reported to the police. Following an investigation, the State charged Mejia with three counts of theft in the first degree with a "major economic offense" aggravator.

The case proceeded to a jury trial. Prior to voir dire, the lead prosecutor, Christopher A. Fyall, informed the court that he and his co-counsel, Salvador Segura-Sanchez, recognized juror 51 from a recent trial. Fyall recalled juror 51 "was a witness" in that trial, "did not respond to her subpoena," "was arrested on a material witness warrant," "spent a night in jail prior to her testimony," and then testified while Fyall and Segura-Sanchez were in the courtroom. Fyall asked the court to excuse juror 51 for cause because, "I believe there's every reason to believe that she would recognize us when she sees us, and that she could not give us a fair trial under the circumstances." The trial court denied Fyall's request, stating, "I'm not going to just excuse at this point. . . . We'll do individualized questioning with [juror] 51."

During Fyall's individualized questioning of juror 51, the following exchange occurred:

> Q: Juror 51, . . . I recognized your name. I want to ask, . . . did you testify in the [previous defendant's][1] homicide trial this summer?
>
> A: Yes.
>
> Q: Okay. Thank you. And you were brought to court by sheriffs who arrested you at your home, correct?
>
> A: Yes.

[1] We omit the name of the defendant in the previous trial to protect juror 51's privacy, and we omit the names of the victims of Mejia's theft for the same reason.

Q: Okay. . . . [Y]ou may or may not recognize my face, but I recognized your name. I was one of the prosecutors on that case. And I – I don't know. Do you recognize my face?

A: No.

Q: Okay. Do you think that that was a negative experience for you?

A: Say that again.

Q: Was that a negative experience for you, being arrested and brought to court?

A: Yes.

Q: Do you think that that's something that you could set aside while being a juror in this case?

A: Yes.

Q: Do you think – you don't think that it would influence you in any way?

A: No.

After this exchange, Fyall moved again to strike juror 51 for cause.

In response to Fyall's motion, defense counsel asked juror 51, "understanding that it may have been a bad experience for you, are you able just to put that aside if the judge tells you to be fair and impartial to this case?" Juror 51 replied, "Yes," and defense counsel then objected to the State's for-cause challenge. The court returned juror 51 to the jury pool and then denied the State's for-cause challenge, reasoning that "while I understand the State's concerns, I don't think we have enough testimony to establish a for-cause [challenge]" because juror 51 "said that she can put it aside." The court told Fyall he was "free to look into it further." Fyall then asked whether additional questioning of juror 51

would be outside the presence of the other jurors, to which the court replied, "[T]his is your opportunity to . . . . inquire individually. And so I will leave that to you."

Later that day, Fyall further "advised [the court] of [his] personal knowledge of [juror 51]." He recounted that his "relationship with [juror 51] was rather fraught" because "[s]he was a hostile witness in our [previous] trial" and was impeached by the prosecution for giving conflicting testimony. Fyall then asserted that "as a prosecutor with potentially having [juror 51] be someone whom I am trying to commit to a story in front of the entire jury, I don't think that's possible" because "I don't think there's any objective person who understands [juror 51] the way I do who thinks she can be a fair juror on a case that I have." The trial court told Fyall it "underst[ood] being in your shoes the concerns that you likely have," and it noted, "You may be able to develop a for-cause through the course of this questioning," but it concluded it, "With what was presented to me, it just wasn't enough based on what this Court was able to view."

Fyall then stated that, based on juror 51's unwillingness to be "forthright" with the prosecution in the previous trial, he would not question her further because he believed she would not answer his questions "truthfully." Fyall explained that further questioning would "go south for me just like her trial testimony went south" and "taint this entire pool in a way that I'm not going to be able to unring that bell." Fyall also stated if juror 51 was not removed for cause, he "absolutely will be moving to pre-empt [juror 51] based on . . . her conduct and what just happened to her four months ago" in the previous trial. The trial court responded, "Should you exercise your peremptory [challenge], the Court is aware of what you have

represented here. And I'm sure we will take that – we may take that into whatever consideration we need to give it when we get to that analysis."

The next morning, Fyall filed a written "Motion to Strike Juror 51 for Implied Bias" and submitted a declaration recounting additional facts from the previous trial. According to Fyall's declaration, the defendant in that trial was charged with felony murder and unlawful possession of a firearm, juror 51 was the defendant's current girlfriend or ex-girlfriend, and Fyall was co-counsel for the prosecution. Fyall also stated the prosecution in the previous trial sought to introduce a recording of a phone call between juror 51 and a jail inmate made shortly after the victim's death in which juror 51 purportedly "indicated that [the defendant] told her that he shot somebody downtown." According to Fyall, during a phone call between juror 51, Fyall, and the lead prosecutor before trial, juror 51 "[u]sing very hostile language . . . made clear to me and [the lead prosecutor] that she did not want to participate in the prosecution . . . and that she would not cooperate with her subpoena."

Fyall then stated that juror 51 was arrested on a material witness warrant, booked into jail, and compelled to testify. Fyall recounted that juror 51 "demonstrated hostility toward the prosecution" during her testimony "by repeatedly answering that she could not recall events." Fyall also averred that juror 51 gave conflicting testimony because she initially "denied remembering the existence of any jail phone call" in front of the jury, then "acknowledged that she recognized her voice on the recording" after it was played for her outside the presence of the jury, but after the jury was called back in "denied recognizing her

own voice" and "further denied testifying minutes earlier that she *did* recognize her own voice." Fyall asserted that based on her inconsistent testimony, the judge in the previous trial permitted the State to impeach juror 51. The defendant was ultimately convicted and sentenced to 37 years in prison.

Based on these "extraordinary circumstances," Fyall argued the trial court should strike juror 51 for cause due to implied bias. Given his role in compelling juror 51's testimony and convicting her ex-boyfriend[2] in the previous trial, Fyall posited, "There would be no quicker way for [juror 51] to get back at the State than to participate as a biased juror in this trial, and thereby undermine this prosecution." Fyall continued, "While [juror 51] disclaimed any such inclination, this Court should evaluate that claim skeptically" due to her previous "willingness to ignore the obligation to speak truthfully while under oath." At oral argument on the State's motion, Mejia did not dispute Fyall's recitation of the facts regarding juror 51's conduct in the previous trial but nonetheless opposed the motion because juror 51 said she is "not going to hold it against [Fyall]" and "can be fair and impartial." The trial court denied the State's motion, reasoning that although "there is an adversarial relationship between the prosecutor's office and this prospective juror. . . . I have not seen from the testimonies in this case . . . that that will carry over to bias against Mr. Mejia and will unfairly inject that bias into this process."

Later that day, the State exercised a peremptory challenge to juror 51. The trial court then noted that juror 51 is a "person of color," at which point Mejia raised

[2] Both parties refer to the defendant in the previous trial as juror 51's "ex-boyfriend."

a GR 37 objection. In response, Fyall provided the following reasons for the challenge:

> I have filed a motion to strike Juror 51 for implied bias. It makes abundantly clear this is a challenge against this specific individual for their adversarial relationship the Court had found and the prior ruling that the Court – or that the witness had an adversarial relationship in that case with the prosecutor's office and perhaps with me. Not seen as applied to this case specifically, but given that relationship, given the concerns I have made abundantly clear throughout the procedure, I don't believe any objective observer would believe it's anything other than the reasons I have given, which are manifold, and not racial discrimination.

Fyall later clarified he was not seeking to strike juror 51 because "she has a close relationship . . . with someone who has a criminal conviction," but rather because "that individual [referring to the person with a criminal conviction] is someone I have prosecuted and sent to prison." The court overruled Mejia's GR 37 objection and granted the State's peremptory challenge.

At trial, Mejia attempted to elicit testimony from Price regarding whether a crime of dishonesty, such as theft, would constitute a "crime[] involving moral turpitude" that would subject Mejia to deportation if he were convicted. The trial court sustained the State's relevance objection to this line of questioning. During closing argument, Mejia argued that "it was someone from Eric Price's law firm who put together this elaborate scheme" and was "scamming these people along with Mr. Mejia," who "thought he was actually helping these people." In rebuttal, the prosecution stated that "[a]fter [Mejia] was arrested, he didn't say anything about being duped" and "declined" to "make the claims" asserted by defense counsel in his closing argument. The jury convicted Mejia as charged, and he now appeals.

II

Mejia first argues the trial court erred by allowing the State to exercise a peremptory challenge contrary to GR 37. We disagree.

A

The purpose of GR 37 is to "eliminate the unfair exclusion of potential jurors based on race or ethnicity" through the use of peremptory challenges. GR 37(a). Under GR 37(c), "[a] party may object to the use of a peremptory challenge to raise the issue of improper bias." Upon such an objection, "the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised." GR 37(d). The court "shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances." GR 37(e). The court "shall" deny the challenge if it determines "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." *Id.* "[A]n objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors." GR 37(f).

GR 37(g) provides a non-exhaustive list of "circumstances the court should consider" in ruling on a GR 37 objection, and GR 37(h) sets forth seven reasons for a peremptory challenge that are "presumptively invalid." Because the GR 37(h) reasons are potentially dispositive, we discuss those reasons first in section II.B below. We then turn to the GR 37(g) circumstances in section II.C below. We review the trial court's GR 37 rulings de novo because we "'stand[] in the same position as does the trial court' in determining whether an objective observer could

conclude that race was a factor in the peremptory strike." *State v. Tesfasilasye*, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022) (quoting *State v. Jefferson*, 192 Wn.2d 225, 250, 429 P.3d 467 (2018)).[3]

B

Mejia argues we must reverse his convictions because the State exercised a peremptory challenge against juror 51 for two reasons that are presumptively invalid under GR 37(h): (1) "having prior contact with law enforcement officers" and (2) "having a close relationship with people who have been stopped, arrested, or convicted of a crime." *See* GR 37(h)(i), (iii). Mejia asserts the State improperly struck juror 51 for the first reason because it relied on her "one unpleasant and forced interaction with the criminal legal system." And Mejia asserts the State improperly struck juror 51 for the second reason because it relied on her "reluctance in helping the State convict [her] loved one[]," referring to her ex-boyfriend convicted in the previous trial.[4]

These arguments are unconvincing. GR 37 was enacted to combat the historical use of peremptory challenges "based largely on racial stereotypes or generalizations." *Tesfasilasye*, 200 Wn.2d at 356. In drafting GR 37, the Supreme Court included these "presumptively invalid" reasons for striking jurors because

[3] Our Supreme Court has noted "further refinement" of this standard of review may be appropriate in cases involving "actual findings of fact" or a "trial court's determinations . . . [that] depended on an assessment of credibility." *Tesfasilasye*, 200 Wn.2d at 356. We decline to apply a deferential standard of review in this case because both parties agree we should review the trial court's GR 37 ruling de novo and neither party has identified any finding that could be entitled to deference.

[4] The five other presumptively invalid reasons are "(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; . . . (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker." GR 37(h). Mejia does not argue that the State's reasons for striking juror 51 resemble any of these presumptively invalid reasons.

they "have been associated with improper discrimination in jury selection." GR 37(h). The court has observed that the GR 37(h) reasons "are not accurate indicators of a person's fitness to serve as a juror" because "[o]ur Black, Indigenous, and other People of Color communities are arrested, searched, and charged at significantly higher rates than White communities, and therefore are more likely to know someone who has a close relationship with someone who has had contact with the criminal legal system." *Tesfasilasye*, 200 Wn.2d at 358.

Here, Fyall's reasons for striking juror 51 are not based on racial stereotypes or generalizations. Instead, Fyall's reasons relate to a specific experience in a criminal proceeding involving himself, juror 51, and her ex-boyfriend. Fyall had personally interacted with juror 51 in his capacity as a prosecutor in the previous trial, observed her conduct in that trial (including failing to comply with a subpoena and providing conflicting testimony), and successfully prosecuted her ex-boyfriend. Fyall specified that his reason for striking juror 51 "isn't that she has a close relationship, as contemplated by the rule [GR 37(h)(iii)], with someone who has a criminal conviction. Instead it's about the fact that that individual is someone I have prosecuted and sent to prison." These reasons for striking juror 51—relating to her specific conduct and interactions with Fyall in the previous trial—do not implicate GR 37(h)(i) and (iii).

Mejia's contrary arguments misapply GR 37(h). Mejia argues GR 37(h)(iii) "presumptively prohibits" challenging "any person convicted of a 'crime of dishonesty' or any person who recants at trial" based on the "assumption that if a person is dishonest once, she is perpetually dishonest." The text of GR 37(h)(iii)—

which refers to a juror's "relationship with people who have been stopped, arrested, or convicted of a crime"—contains no such prohibition on striking a juror due to their prior dishonesty, and Mejia provides no authority suggesting that striking jurors for previously providing conflicting testimony has "been associated with improper discrimination in jury selection." *See* GR 37(h). Mejia also argues the State's reasons for striking juror 51 are presumptively invalid because "[j]uror 51 assured the court that despite being jailed and forced to testify at her ex-boyfriend's trial, she could follow the court's instructions and be fair and impartial." This argument erroneously conflates for-cause and peremptory challenges. *See State v. Hale*, 28 Wn. App. 2d 619, 636-37, 537 P.3d 707 (2023) ("whether a juror would be subject to a for cause challenge . . . cannot be the test" for whether a peremptory challenge violates GR 37). Contrary to Mejia's argument, juror 51's statement that she could remain fair and impartial did not preclude the State from exercising a peremptory challenge against her.

In sum, we conclude the State's reasons for striking juror 51 were not presumptively invalid under GR 37(h).

C

Turning to GR 37(g), this rule provides a non-exhaustive list of five "circumstances the court should consider" in determining whether an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge. Our Supreme Court has stressed that GR 37(g) "is not a checklist for trial courts to cross off but, instead, factors to be considered in making a determination." *Tesfasilasye*, 200 Wn.2d at 358. Because GR 37(e) requires

courts to evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances, "we give equal weight to all of the evidence when determining whether race 'could' have been a factor." *State v. Booth*, 22 Wn. App. 2d 565, 573, 510 P.3d 1025 (2022).

> Three of the GR 37(g) circumstances are relevant here:
>
> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> . . .
>
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
>
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

GR 37(h). We analyze these circumstances below to determine whether, in light of the totality of circumstances, an objective observer could view race or ethnicity as a factor in the State's use of a peremptory challenge against juror 51.[5]

1

Regarding GR 37(g)(i)—which generally concerns the number and types of questions posed to the prospective juror—after Fyall recognized juror 51's name, he questioned her outside the presence of the other venire members. During this questioning, Fyall posed seven questions to juror 51, including whether she

[5] The two other GR 37(g) circumstances are "(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors" and "(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party." The parties do not ask us to analyze either of these circumstances. Moreover, the record does not implicate circumstances (ii) or (iii) because no other jurors were uniquely situated like juror 51 and, thus, were not questioned as she was.

testified in the previous trial, whether she was arrested and brought to court, whether she recognized Fyall, whether being arrested and brought to court was a "negative experience," whether she "could set [that negative experience] aside while being a juror in this case," and whether that negative experience "would influence [her] in any way." Because Fyall asked juror 51 numerous questions that directly related to his stated concerns—whether juror 51 was the recalcitrant witness in the previous trial and whether that experience would influence her service as a juror in Mejia's case—this circumstance weighs against concluding race could have been a factor in the use of the peremptory challenge.

Mejia counters that this circumstance weighs in favor of concluding race could have been a factor because, "[a]fter trying and failing" to "buil[d] a record that was sufficient to establish a for-cause challenge or [overcome] a GR 37 challenge," Fyall "made the deliberate choice not to further question Juror 51." This argument is unpersuasive because Fyall provided legitimate reasons for not asking additional questions of juror 51. After the trial court denied Fyall's initial for-cause challenge, it did not allow him to conduct further individualized questioning of juror 51 and, instead, indicated that any such questioning would need to occur in front of the other venire members. Fyall declined to engage in such questioning because he believed juror 51 would not "be forthright with me" and any additional questioning would "go south for me just like her trial testimony [in the previous trial] went south" and "taint this entire pool in a way that I'm not going to be able to unring that bell." The trial court recognized the validity of Fyall's reasoning, stating: "There was a strategic choice by the prosecutor to limit the questions that he did

at that particular time. I understand reasons why that might be. And I understand reasons why it might not be brought further up in the group setting." On this record, circumstance GR 37(g)(i) weighs against concluding race could have been a factor in the use of the peremptory challenge.

2

Regarding GR 37(g)(iv)—whether a reason might be disproportionately associated with a race or ethnicity—courts are skeptical of "nebulous," "vague," and "unsubstantiated" reasons for challenging a juror because they "might mask conscious or unconscious bias." *State v. Omar*, 12 Wn. App. 2d 747, 754, 460 P.3d 225 (2020) (citing *Jefferson* 192 Wn.2d at 251). Conversely, courts are less likely to find a GR 37 violation where the proffered reasons for challenging a juror are "legitimate" and not based on "race or racial stereotypes." *Hale*, 28 Wn. App. 2d at 638-39. Here, in exercising the peremptory challenge against juror 51, Fyall referred to his previously filed "motion to strike Juror 51 for implied bias" and stated that it "makes abundantly clear this is a challenge against this specific individual for their adversarial relationship . . . in that [previous] case with the prosecutor's office and perhaps with me." Fyall also referred to the "concerns I have made abundantly clear throughout the procedure."

Fyall's reasons for seeking to strike juror 51 are based on specific facts as opposed to racial stereotypes. Fyall noted that juror 51 had "recently lied under oath" and "fail[ed] to comply with a lawful subpoena" in the previous trial. Additionally, Fyall was a prosecutor in the previous trial and, as a result, personally spoke with juror 51 and witnessed her conduct during that trial. Division III of our

court recently observed that a prosecutor's adversarial relationship with a prospective juror in a previous criminal proceeding is a "race-neutral justification" supporting a peremptory challenge. *See State v. Orozco*, 19 Wn. App. 2d 367, 376, 496 P.3d 1215 (2021). Based on his interactions with juror 51 in that previous trial, Fyall explained he was concerned that juror 51, despite her assertions otherwise, still harbored animosity toward him and could not set those feelings aside during Mejia's trial. These reasons weigh against concluding race could have been a factor in the use of the peremptory challenge.

Notwithstanding the above analysis, Mejia argues "the prosecutor's claim that Juror 51 lied in order to get on the jury and sabotage the State invoked a harmful stereotype about Black women" being "'untrustworthy' and 'deceptive'" and that by using the term "hostile" to describe juror 51's conduct in the previous trial, Fyall evoked "the harmful stereotype of an 'angry Black woman.'" Neither argument is persuasive here. The phrase "hostile witness" is routinely used in legal proceedings to refer to "[a] witness who is biased against the examining party, is unwilling to testify, or is identified with an adverse party." BLACK'S LAW DICTIONARY 1926 (12th ed. 2024); *see also* ER 611(c) (allowing a party to ask leading questions of "a hostile witness"). While we recognize there are circumstances where words like "hostile," "combative," and "confrontational" can be used to project a racial stereotype,[6] Fyall's word choice here was consistent

[6] *See State v. Hawkins*, 200 Wn.2d 477, 500 n.17, 519 P.3d 182 (2022) (recognizing that describing Black women as "hostile," instead of "neutrally recounting the facts" of the prior conduct, is "concerning and harmful" because it perpetuates the stereotype that Black women are "violent, hostile, and aggressive") (internal quotation marks omitted); *Henderson v. Thompson*, 200 Wn.2d 417, 436, 518 P.3d 1011 (2022) (observing that the terms "combative" and "confrontational" "evoke the harmful stereotype of an angry BLACK woman") (internal quotation marks omitted).

with established legal terminology and supported by *specific* facts, including juror 51's conduct in the previous trial and her interactions with Fyall and his co-counsel. Thus, Mejia has not persuaded us that circumstance GR 37(g)(iv) weighs in favor of concluding race could have been a factor in the use of the peremptory challenge.

3

Lastly, as to GR 37(h)(v)—whether the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case or in past cases—nothing in the record suggests Fyall used peremptory challenges disproportionately against a given race or ethnicity in Mejia's trial or has done so in past cases. To the contrary, Fyall made no attempt to strike any other venire members who identified as Black or African American. Fyall completed jury selection without using all of his peremptory strikes, and seven members of the petit jury that heard Mejia's case identified as members of racial or ethnic minority groups, including two who identified as Black or African American. Therefore, circumstance GR 37(g)(v) weighs against concluding race could have been a factor in the use of the peremptory challenge.

D

Based on the totality of the circumstances, an objective observer could not view race or ethnicity as a factor in the use of the State's peremptory challenge against juror 51. The GR 37(g) circumstances weigh against concluding race could have been a factor. Additionally, the record does not support Mejia's argument that the State's reasons for striking juror 51 are presumptively invalid under GR 37(h). On balance, the record shows the State challenged juror 51 due

to Fyall's personal knowledge of her specific conduct in the previous trial and relationship with her stemming from their involvement in that trial, as opposed to racial stereotypes or generalizations. Thus, the trial court did not err in granting the State's peremptory challenge against juror 51 over Mejia's GR 37 objection.

III

Mejia next argues the trial court erroneously excluded testimony in violation of his constitutional right to present a defense. We disagree.

"'A criminal defendant's right to present a defense is guaranteed by both the federal and state constitutions.'" *State v. Butler*, 200 Wn.2d 695, 713, 521 P.3d 931 (2022) (quoting *State v. Jennings*, 199 Wn.2d 53, 63, 502 P.3d 1255 (2022)). We apply a two-step analysis to determine whether the exclusion of evidence violates that right. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). In step one, we review the evidentiary ruling for abuse of discretion. *Id*. at 797. "'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.'" *Id.* at 799 (quoting *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)). In step two, we consider de novo whether the ruling deprived the defendant of their constitutional right to present a defense. *Id*. at 797-98.

Here, Mejia attempted to elicit testimony from Price regarding whether the crimes for which he was charged are "crimes of moral turpitude" that would subject him to deportation if he were convicted. Mejia's justification for asking this question was to "show that there was a disincentive for him to do something like this." The prosecutor objected on relevance grounds, claiming "the defense is attempting to

backdoor into the jury's mind the consequences of the penalty that might be at issue in this case." The trial court sustained the State's objection due to the "potential prejudice that might come from this particular line of questioning and confusion it might cause the jury."

Regarding step one, the trial court did not abuse its discretion in excluding the above evidence on relevance grounds. Evidence is admissible only if it is relevant, meaning it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401, 402. Because the jury's "sole function is to decide the defendant's guilt or innocence," it "should 'reach its verdict without regard to what sentence might be imposed.'" *State v. Rafay*, 168 Wn. App. 734, 776, 285 P.3d 83 (2012). Moreover, even if relevant, the trial court may exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. "[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Shannon, v. U.S.*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994).

In light of the legal authority discussed above, evidence relating to Mejia's risk of deportation was not relevant in his trial because it related to a punishment he could receive following a conviction rather than whether he committed the crimes for which he was charged. The trial court correctly concluded that inviting jurors to consider the potential immigration consequences Mejia could face if

convicted would confuse the jurors by distracting them from their factfinding role. Accordingly, the trial court did not abuse its discretion in sustaining the State's relevance objection to Price's testimony that Mejia could be subject to deportation if he were convicted.

Mejia argues a different rule should apply based on *State v. Bedada*, 13 Wn. App. 2d 185, 463 P.3d 125 (2020). Contrary to Mejia's argument, *Bedada* did not abrogate the general rule that jurors may not consider evidence of potential consequences that stem from a defendant's convictions. Instead, *Bedada* acknowledged a narrow exception where the defendant seeks to introduce the topic of "a witness's subjective belief that a defendant might face a specific consequence if the witness complains to the police or testifies at trial." *Id.* at 203. Unlike in *Bedada*, where the defendant attempted to use evidence of his at-risk immigration status to demonstrate bias or prejudice of a *witness*, Mejia sought to argue that his at-risk immigration status deterred *himself* from acting unlawfully. *Bedada* does not sanction this use of evidence regarding immigration status. Nor does Mejia argue Price's testimony was admissible under ER 413,[7] which was central to the *Bedada* court's analysis. 13 Wn. App. 2d at 194. *Bedada* is inapposite here.

Turning to the second step of the right to present a defense analysis, Mejia fails to show the trial court's evidentiary ruling violated his constitutional right to present a defense. The second step is not "merely a repetition of the analysis

[7] ER 413 states in relevant part that "evidence of a party's . . . immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607." ER 413(a).

undertaken at step one." *State v. Ritchie*, 24 Wn. App. 2d 618, 629, 520 P.3d 1105 (2022). Instead, the "right to present a defense" is concerned with "whether there is a unique or aberrant rule that results in the defendant having a lesser Sixth Amendment right than that possessed by citizens in other jurisdictions or persons charged with a different crime in the same jurisdiction." *Id.* Also, "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Mejia fails to squarely address this constitutional analysis and instead argues the evidence at issue was relevant, which, as discussed above, it was not. Mejia's constitutional argument thus fails.

IV

Lastly, Mejia argues the prosecutor committed reversible misconduct. We disagree.

A

In closing argument, Mejia's attorney argued "it was someone from Eric Price's law firm who put together this elaborate scheme" and was "scamming these people along with Mr. Mejia," who "thought he was actually helping these people." In rebuttal, the prosecutor argued "Mejia never once claimed that he was duped," "After he was arrested, he didn't say anything about being duped," and "At no point, has he ever claimed that he thought he was acting lawfully." Mejia did not object below to the prosecutor's statements. He now argues for the first time on appeal that the above statements improperly commented on his constitutional right to

remain silent because the prosecutor "argue[d] that Mr. Mejia did not tell the police the law firm scammed him."

To prevail on his prosecutorial misconduct claim, Mejia must show the prosecutor's statements were "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Zwald*, 32 Wn. App. 2d 62, 74, 555 P.3d 467 (2024). Where, as here, the defendant did not object at trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). "In evaluating whether the defendant has overcome waiver in cases where an objection was not lodged, we will 'focus less on whether the prosecutor's conduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" *State v. Gouley*, 19 Wn. App. 2d 185, 201, 494 P.3d 458 (2021) (quoting *Emery*, 174 Wn.2d at 762).

Mejia's prosecutorial misconduct claims fails because even if he could show the prosecutor's statements improperly commented on his right to remain silent, he has not shown the statements were so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. Had Mejia objected, the trial court could have sustained the objection, directed the prosecutor to avoid any

further statements that could potentially comment on Mejia's right to remain silent, and instructed the jury that it must not use Mejia's silence as evidence of substantive guilt or to prejudice him in any way. We presume the jury would have followed such an instruction. *See id*. at 203-04. Because Mejia fails to show any resulting prejudice could not have been cured, his prosecutorial misconduct argument "'necessarily fails, and our analysis need go no further.'" *Id.* at 201 (quoting *Emery*, 174 Wn.2d at 764).

Mejia contends Washington cases "have held that a defendant can raise an unpreserved argument regarding a prosecutor's improper comment on the right to remain silent under RAP 2.5(a)(3) without having to discuss the flagrant and ill-intentioned standard." In one such case cited by Mejia, the Supreme Court noted that for the defendant to argue on appeal for the first time that a detective's testimony during trial and prosecutor's reference to that testimony in closing argument improperly commented on his right to remain silent, he "must establish that the alleged constitutional error was manifest" under RAP 2.5(a)(3). *State v. Gregory*, 158 Wn.2d 759, 837, 147 P.3d 1201 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). And in another case, the defendant argued the State improperly commented on his silence by eliciting testimony about his silence from a detective and then urged the jury in closing argument to use this testimony to link the defendant's silence with guilt. *State v. Chuprinov*, 32 Wn. App. 2d 508, 516-17, 556 P.3d 1127 (2024). We held the defendant could raise this argument for the first time on appeal under RAP 2.5(a)(3). *Id.* at 515.

*Gregory* and *Chuprinov* are distinguishable because they addressed situations in which the prosecutor *both* improperly elicited evidence at trial regarding the defendant's silence *and* used that evidence in closing argument as substantive evidence of guilt. In contrast, Mejia's prosecutorial misconduct claim solely concerns the prosecutor's statements during closing argument. As our Supreme Court has emphasized, "[o]ur standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument" because "[o]bjections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." *Emery*, 174 Wn.2d at 761-62. Therefore, we apply the heightened standard of review to Mejia's prosecutorial misconduct claim and conclude the challenged statements, even if improper, were not so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.

B

Mejia also asserts two claims of prosecutorial misconduct in his statement of additional grounds. First, he states, "The Court should reverse Mr. Mejia's convictions because the prosecutor engaged in misconduct by engaging in retaliatory prosecution by seeking a higher sentence because Mr. Mejia exercised his right to a fair trial." Second, he states, "The court should reverse Mr. Mejia's convictions because the prosecutor engaged in misconduct by failing to disclose evidence that could exonerate the defendant." We reject both arguments pursuant to RAP 10.10(c), which provides that "the appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the

court of the nature and occurrence of alleged errors." Neither of Mejia's arguments, quoted in full above, sufficiently inform us of the nature and occurrence of the alleged errors. In any event, we have carefully reviewed the record and it does not support either argument.

Affirmed.

Feldman, J.

WE CONCUR:

Cox, J.

, ACJ

**WASHINGTON APPELLATE PROJECT**

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