No. 104573-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARTIN STANLEY,

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR REVIEW

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A. INTRODUCTION

The State seeks review of an unpublished opinion applying GR 37 after the trial court clearly erred by applying an incorrect standard. The State primarily complains about the Court of Appeals' recitation of the facts, which is clearly not a basis for review. To the extent it addresses any legal issues, it applies the wrong standard.

The Court of Appeals applied the right standard, evaluated the totality of the circumstances, and correctly concluded an objective observer could view race or ethnicity as a factor in the exercise of the peremptory challenge. Since this case involved a straightforward application of GR 37, there is no basis for review.

Put differently, the petition meets none of the criteria set out in RAP 13.4(b), it merely quibbles with

the details, which is not a basis for review. The State's displeasure with the Court of Appeals' rendition of facts is not a reason for review. There is no conflict, no constitutional issue, and no matter of substantial public interest.

This Court should hold the State to the same standard other litigants are required to meet. Because the petition meets none of the criteria of RAP 13.4(b), this Court should deny review.

B. ISSUE

Should this Court deny review because the Court of Appeals applied settled GR 37 precedent to the facts and issued a well-reasoned unpublished opinion holding that an objective observer *could* view race as a factor in the prosecutor's use of the peremptory to exclude Juror 29?

C. STATEMENT OF THE CASE

In Martin Stanley's jury trial, the State exercised a peremptory strike against Juror 29, a Puerto Rican woman. Defense counsel objected under GR 37, arguing an objective observer could view race as a factor in the strike. See RP 340. The trial court overruled the objection, concluding the peremptory was not based on race because the prosecutor asked the juror questions and had "given a reason" for the strike. *Slip*. Op. 1, 10.

In an unpublished opinion the Court of Appeals recognized that the trial court applied the wrong standard and reversed and held that an "objective observer could view race as a factor" after reviewing the totality of circumstances. Slip. Op. 1, 11-13. The Court of Appeals reasoned although the State claimed its characterization of juror 29's comments was reasonable given the limited time for voir dire, Juror

29 never stated that she was raised by her grandparents or that she was prohibited from going places or doing things. Slip. Op. at 5. Nor did juror 29 say, as the prosecutor claimed, that she "never did anything wrong." *Id*. at 11; RP 329. In fact, juror 29 offered a specific example of misconduct: she was disciplined for smoking as a teenager. Slip. Op. 12; RP 249-50. She missed curfew, just like Juror 36's kids missed curfew, but the State struck Juror 29 and not Juror 36. Moreover, as in *State v. Lahman*, 17 Wn. App. 2d 925, 929, 931, 936, 488 P.3d 881 (2021), the prosecutor never asked juror 29 about her life experiences—either as a minor or an adult—rendering the claim that she lacked such experiences unsupported by the record. GR 37(g)(i). Slip. Op. 11-12.

Additionally, the Court of Appeals concluded that several seated jurors failed to indicate any notable life experiences. Slip. Op. 12. The prosecutor asked multiple jurors—including juror 29—about their ability to assess credibility and their experience with underage drinking. *Id*. Although juror 29 denied any experience with underage drinking, her responses mirrored those of other jurors. *Id*. Four of those five jurors indicated that they did not have issues with their children drinking as teenagers. *Id*. Juror 3 described her children as "pretty easy" and free of drinking issues, though she admitted to drinking as a teenager *Id*. Juror 13 said her children did not have drinking issues as teenagers but drove recklessly on motorcycles. Juror 36 raised three children and described their teenage years as a "roller coaster," citing missed curfews and traffic tickets—but no

underage drinking. *Id*. Finally, the Court of Appeals noted that a justification based on lack of "life experience" is vague and akin to the presumptively invalid reasons listed in GR 37, and is therefore subject to heightened scrutiny. Slip. Op. 13. *Bell* notes that such justifications "are similar to the presumptively invalid reasons listed in the rule." *Id.*

The State filed a petition for review, asking this Court to reverse the Court of Appeals, arguing that the strike was race-neutral and the Court of Appeals misapplied GR 37. It insists Court of Appeals misunderstood the facts and that "[t]he circumstances *would* give an objective observer reason to believe that race was *not* a factor in the challenge." Pet. For Review at 20, 27-28 (emphasis added).

D. ARGUMENT

The Court should deny the State's petition for review because it primarily complains about the Court of Appeals' recitation of the facts. The Court of Appeals correctly characterized the record and correctly applied the rule to the facts of the case. The prosecutor's quibbling about the details is simply defensiveness; it is not a basis for review.

Moreover, the unremarkable petition severally applies the wrong legal standard: severally discusses whether an objective observer "would" view race as a factor. Pet. For Review at 20, 27. Other times it muddles the "would" with the "could" standards. *Id*. at 27-28. As an example, the petition argues: "[t]he circumstances would give an objective observer reason to believe that race was not a factor in the challenge." Pet. For Review at 20, 27-28. This standard flips the rule on its head.

More importantly, the petition offers no principled reasoning why the Court should change the current workable GR 37 standard.

To be clear, the question is whether, under the totality of circumstances, an objective observer could view race as a factor in the challenge. The Court of Appeals correctly concluded the answer was "yes" after performing a straightforward GR 37 analysis and correctly concluded an objective observer could view race as a factor in the prosecutor's strike of Juror 29. There is no basis for review.

This case involved a straightforward application of GR 37, and there is no basis for review.

a. This Court should deny review because the petition meets none of the criteria of RAP 13.4(b).

i. This case presents no conflict, constitutional issue, or question of substantial public interest meriting review under RAP 13.4(b).

RAP 13.4(b) limits the cases appropriate for this Court's review. The rule provides:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

The State's petition meets none of these criteria. The case does not meet either of the first two criteria because there is no conflict. Far from disagreeing with prior cases, the Court of Appeals applied this Court's cases and its own cases and straightforwardly concluded an objective observer could view race as a factor in the strike of Juror 29.

Nor does subsection (3) apply. There is no constitutional issue; instead, the prosecution merely bemoans the Court's ruling under GR 37.

Finally, there is no issue of substantial public interest warranting review under subsection (4). The Court of Appeals simply applied existing law to the facts. The opinion is not published, not binding, and

not of interest to anyone other than the litigants in this case.

ii. The Court of Appeals properly applied settled law to the facts.

This Court is not an error-correction court, and in any event, the Court of Appeals properly applied GR 37 to the facts of this case. There is no conflict, no constitutional question, and no issue of substantial public interest. This Court should deny review. RAP 13.4(b).

The State primarily complains about the Court of Appeals' recitation of the facts, and this is not a basis for review. To the extent the State addresses the legal issues, it applies and seems to advocate for the wrong standard. Pet. For Review at 20, 27-28. There is no basis for review. RAP 13.4(b).

b. The petition tries to trivialize the prosecutor's misrepresentation of Juror 29's statements but only highlights the correctness of the Court of Appeals GR 37 analysis.

The petition argues that, contrary to the Court of Appeals' findings, the prosecutor's summary of Juror 29's background was either accurate or an objective observer would not view race as a factor in the prosecutor's off-the-cuff misrepresentations of Juror 29's responses. Pet. For Review at 27. The State asks this Court to look past how it mischaracterized Juror 29's answers regarding youthful misbehavior, Pet. for Review at 26-27, and insists the misrepresentation "alone" is insufficient to sustain a GR 37 objection. *Id.* at 22-23. But the State misunderstands GR 37 in a multitude of ways.

The State claims it sought to exclude "jurors without experience with youthful misbehavior." Pet. for

Review at 10-11. But as the Court of Appeals recognized, Juror 29 had experience with "youthful misbehavior." When the prosecutor asked Juror 29 whether she ever got in trouble, she said "oh yes." RP 249-50. She explained she got in trouble for smoking and got in trouble for coming home late. *Id*. Thus, if the prosecutor wanted jurors who engaged in youthful misbehavior, it would not have struck Juror 29.

Indeed, the State kept Juror 36, a white juror who talked about her kids missing curfew. RP 252. But it struck Juror 29, a juror of color who missed curfew. An objective observer could view race as a factor leading to the State's disparate treatment of those jurors—even more so now that the State insists that Juror 36's "curfew violations are more serious than those described by juror 29" because "she talked about her daughter staying at a social event instead of

coming home, not merely being a few minutes late, like juror 29." Pet. for Review at 14, 17.

The State also admits it did not strike Juror 6, a juror who "did not mention underage drinking or other serious misbehavior by herself or her children." Pet. for Review at 12.

Tellingly, the State insists it can distinguish these jurors based on minor factual differences (e.g., "serious curfew violations" vs. minor curfew violations) that does not affect their ability to assess credibility and their experience with underage drinking.

But *Bell* cautions that such comparisons are not dispositive. The issue is not whether reasons proffered for the strike were reasonable or whether other jurors were similarly situated—it is whether race could have played a role in the strike. This is why, of course, the State's insistence that the standard allows a strike if

an objective observer could "not" view race as a factor gets it backwards: so long as an objective observer could determine race played a role, the strike is prohibited, regardless of the circumstances.

An objective observer could view race as a factor in the use of the strike to exclude Juror 29, a Puerto Rican, while allowing other jurors to serve though they were similarly situated. In sum, the prosecutor's claim that he struck Juror 29 because of a lack of youthful misbehavior fails the objective observer test.

The State suggests the Court of Appeals relied on the prosecutor's innocent, off-the-cuff, mischaracterization alone to conclude a reasonable observer could view race as a factor in the decision to strike Juror 29. Pet. For Review 6, 22-23. That supposition is belied by the part of the opinion comparing the prosecutor's justification for striking

Juror 29 to the presumptively invalid reasons under GR 37: "Finally, we note that a justification based on lack of 'life experience' is vague and similar to the presumptively invalid reasons listed in the rule is subject to scrutiny under GR 37." Slip. Op at 13. And the opinion relied on the failure to strike similarly situated jurors as well.

Moreover, *Bell* emphasizes that a prosecutor's mischaracterizations—especially those tied to stereotypes—support a GR 37 violation. The prosecutor's claim that Juror 29 "never did anything wrong" and had "no life experiences" was contrary to the record and steeped in racialized assumptions. *State v. Bell*,___Wn.3d___, 571 P.3d 272 , 279 (2025) GR 37 is designed to prevent precisely this kind of vague, stereotype-laden justification from influencing jury selection.

An objective observer could well view race as a factor if a prosecutor mischaracterizes a juror's statements in justifying a strike. But regardless, here, the State mischaracterized the juror's answers, failed to strike similarly situated jurors, and offered vague justifications of the type historically used to discriminate in jury selection. The Court of Appeals correctly concluded that under the totality of circumstances an objective observer could view race as a factor. There is no basis for review. RAP 13.4(b).

c. At the core of this petition is a fundamental misunderstanding and discomfort with the implications of GR 37's legal standard.

The trial court did not apply the correct GR 37 legal framework. The petition fails to grapple with that legal error, reargues the facts, and downplays the significance of the prosecutor's mischaracterizations of

Juror 29's statements and insists the strike was not motivated by racial bias or racial stereotypes.

Specifically, the petition repeatedly argues that the peremptory strike of Juror 29 was not "based on race." But GR 37 does not require a finding of purposeful discrimination. As this Court's most recent opinion on the issue, *Bell,* explains, the relevant question is whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." *Bell*, 571 P.3d at 276 (citing GR 37(e)). The rule explicitly rejected the *Batson* framework and adopted a broader, structural approach to implicit bias. *Id*. *Bell* teaches that because the stakes are high, and it can be extremely difficult to determine when a justification is influenced by racial bias, trial courts must be especially prudent in denying peremptory challenges in light of GR 37 objections to

fulfill the rule's purpose and avoid reversal on appeal. 571 P.3d at 278.

The petition asks this Court to reverse because the county prosecutor had no racist intent: "There is no indication that race might have been a factor in the challenge." Pet. for Review at 35.

The petition boils down to a naked insistence that the prosecutor's strike of juror 29 was not based on purposeful discrimination. Under GR 37, intent is no longer part of the equation, so we no longer look to determine whether the prosecuting attorney in fact intended to exclude Juror 29 because was a person of color. Instead, after a GR 37 objection, the trial court must determine, looking at all the circumstances, whether an objective observer could conclude that race or ethnicity was a factor in the use of the peremptory challenge. GR 37(d), (g); *Bell*, 571 P.3d at 295–96.

The petition's insistence on race-neutral intent is doctrinally incompatible with GR 37 and *Bell*. The Court of Appeals correctly applied GR 37 consistent with *Bell*'s framework and reversed the conviction. Review should be denied.

The State rejects well-settled GR 37 precedent by arguing neither attorney could tell based on appearance whether Juror 29 belonged to a cognizable racial or ethnic group, therefore an objective observer would have been "uncertain" and "unlikely" to conclude that racial stereotypes could have been a factor in the strike. Petition at 29-30. It thus claims an objective observer could not view race as a factor because the prosecutor was not "sure" that the juror was a person of color, and knew only that her last name was Sanchez. Pet. for Review at 28-29.

It should go without saying that people make assumptions based on surnames. Indeed, in *Lahman*, the Court of Appeals was willing to assume the juror at issue was Asian based on the juror's last name, even though the record did not otherwise reveal his race. *State v. Lahman*, 17 Wn. App. 2d 925, 929, 935, 488 P.3d 881 (2021). An objective observer could view race or ethnicity as a factor in the State's peremptory of challenge of Juror 29, where her last name was Sanchez, the prosecutor mischaracterized her answers, and the State failed to strike similarly situated white jurors.

The State's argument hinges on the idea that Juror 29 was uniquely inexperienced. But the appellate court found that other jurors gave comparable answers and were not struck—undermining the State's claim of race-neutrality. Slip. Op. at 5-6.

The State seems to reduce to a lament that GR 37's standard, when properly applied, prevents trial attorneys from using their "instincts about which jurors will be best for their case." Pet. for Review at 10 (*quoting Lahman*, 17 Wn. App. 2d at 932). This Court enacted an objective GR37 standard precisely because "the use of instincts to render judgment about other people's thought processes and beliefs has historically opened the door to implicit and explicit bias." *Lahman*, 17 Wn. App. 2d at 932. The State's reliance on "instincts" only reinforces the conclusion that an objective observer could view race as a factor.

Here, like *Lahman* warned, the prosecutor used his instincts to render judgment about a Puerto Rican woman's naivety and lack of worldly experiences. The State appears to believe the current GR 37 framework should be clarified to qualify that a prosecutor can

never be motivated by implicit and explicit bias when they use their "instincts" to exclude a Juror of color.

In sum, the Court of Appeals' decision applied the correct GR 37 standard to the facts of this case and reversed Mr. Stanley's conviction. Slip. Op at 5.

The Court of Appeals's rationale was in line with *Bell*, 571 P.3d at 295–96; *Lahman*, 17 Wn. App. 2d at 935; *State v. Tesfasilasye*, 200 Wn.2d 345, 355, 518 P.3d 193 (2022), and *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018). The State's conclusory assertion that this decision conflicts with other case is not borne out by any facts or analysis.

GR 37 analysis is purely objective and de novo. *Lahman*, 17 Wn. App. 2d at 935. These cases support the Court of Appeals' approach: they emphasize the importance of context, the danger of vague justifications, and the need to scrutinize strikes that

disproportionately affect Jurors of color. The Court of Appeals correctly determined that an objective observer could view race as a factor in the peremptory strike of Juror 29.

d. This is not a question of substantial public interest.

As already explained above, the Court of Appeals properly performed a straightforward GR 37 analysis in this case. There is no basis for review. RAP 13.4(b).

The State nevertheless argues review is appropriate because GR 37 is still relatively new and its application is therefore a matter of substantial public interest. Pet. for Review at 36-37. But since GR 37 was adopted in April 2018, there have been numerous published cases correctly interpreting and applying GR 37, which gave the Court of Appeals the framework necessary to correctly determine an objective observer could view race as a factor in the

prosecutor's strike of Juror 29. *See Jefferson*, 192 Wn.2d at 232-33; *Tesfasilasye*, 200 Wn.2d at 347; *Bell*, 571 P.3d at 295–96; *Lahman*, 17 Wn. App. 2d at 933; *State v. Listoe*, 15 Wn. App. 2d 308, 324, 475 P.3d 534 (2020); *State v. Orozco*, 19 Wn. App. 2d 367, 377, 496 P.3d 1215, 1221 (2021). There is nothing to clarify, and nothing to address. This Court should deny review.

E. CONCLUSION

The petition meets none of the criteria under RAP 13.4(b). This Court should deny review.

This brief complies with RAP 18.17 and contains 3,612 words.

DATED this 2nd day of October 2025.

Respectfully submitted,

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Appendix

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MARTIN THOMAS STANLEY, Appellant.	))))))))))	No. 39509-0-III UNPUBLISHED OPINION

STAAB, J. — During voir dire, the State exercised a peremptory challenge on a potential juror who identified as Puerto Rican. Following defense counsel's GR 37 objection, the State explained that the potential juror was raised by strict grandparents and lacked "life experiences." The trial court concluded that the peremptory challenge was not based on race and overruled the GR 37 objection, excusing the juror.

On de novo review, we reverse. We conclude that an objective observer could view the juror's race or ethnicity as a factor in the use of the peremptory challenge.

BACKGROUND

In February 2021, Martin Stanley spent a day drinking and driving around in his new truck with his friend Michael Timentwa. Both Stanley and Timentwa were under 21 years old. When they ran out of beer, they convinced a friend to buy more. Later that

day, Stanley and Timentwa picked up Isabel Englert, who was 15 years old. Early the next morning, Stanley swerved and lost control of the truck, causing a roll-over accident that resulted in Englert's death and Timentwa's injury.

The State charged Stanley with vehicular homicide and vehicular assault. The case proceeded to a jury trial.

During voir dire, the prosecutor transitioned from general questions to more specific questions about underage drinking and determining truthfulness, asking the potential jurors whether they had children who argued, got into trouble, and whether they had to act as "the investigator, prosecutor and judge all at the same time." Rep. of Proc. (RP) at 234. Several jurors talked about experiences with their children. A few indicated that their children were relatively well-behaved. The prosecutor then turned to juror 3, who explained that she did not have to deal with her children drinking, but acknowledged that as a teenager she had gone to parties where drinking was involved.

The prosecutor next turned to juror 29 and the following exchange took place:

> [THE PROSECUTOR]: 29. Okay. [juror 29], are you nervous?
> PROSPECTIVE JUROR: No.
> [THE PROSECUTOR]: Okay. Good. I am. I don't know about you.
> . . .
> [THE PROSECUTOR]: How many kids do you have . . .?
> PROSPECTIVE JUROR: None.
> [THE PROSECUTOR]: None?
> PROSPECTIVE JUROR: (Shakes head.)

[THE PROSECUTOR]: Okay. But you were a teenager once before like Number 3, right?

PROSPECTIVE JUROR: Yes.

[THE PROSECUTOR]: Did you ever have fun like Number 3?

PROSPECTIVE JUROR: Nope.

[THE PROSECUTOR]: No?

PROSPECTIVE JUROR: I had very strict grandparents.

[THE PROSECUTOR]: Oh, okay.

PROSPECTIVE JUROR: You had to be home, and if you were not home you were in trouble—

[THE PROSECUTOR]: Well, let's talk—

PROSPECTIVE JUROR: —because you needed to be home.

[THE PROSECUTOR]: Let's talk a little bit about that, what that was like. Did you ever get in trouble?

PROSPECTIVE JUROR: Oh, yes.

[THE PROSECUTOR]: What for?

PROSPECTIVE JUROR: If I was like a minute late I got into trouble. I got caught smoking one time as a teenager and got into trouble because my brother told on me.

[THE PROSECUTOR]: Did you ever get in trouble for something you didn't do?

PROSPECTIVE JUROR: No.

[THE PROSECUTOR]: No? Okay. So whenever you got in trouble was it because somebody caught you?

PROSPECTIVE JUROR: Yes.

[THE PROSECUTOR]: Okay. And when you got caught did you just say you did it?

PROSPECTIVE JUROR: Yes, I did.

[THE PROSECUTOR]: Why?

> PROSPECTIVE JUROR: Because my grandpa knew us very well and knew when we were lying and he told me "You need to tell the truth, otherwise you could get into more trouble."
>
> [THE PROSECUTOR]: How can you tell if somebody is telling the truth?
>
> PROSPECTIVE JUROR: Well, for me I try to make eye contact with people, and by the way . . . their eyes will move or body language. That's my personal—that's my experience.
>
> [THE PROSECUTOR]: Because we're human beings, we observe things, right?
>
> PROSPECTIVE JUROR: Yes.

RP at 248-50. The prosecutor then questioned two other jurors who discussed experiences with their own children.

After defense counsel's questioning, the prosecutor resumed, using the remaining time to ask about the jurors' experiences in medicine and law enforcement, and whether they could decide the case based on the evidence presented in the courtroom.

The State used a peremptory strike on Juror 29. Defense counsel objected, citing GR 37. The prosecutor explained the reasons for the challenge: "The reason we struck her was based upon her answers. She was raised by her grandparents. She was not allowed to go anywhere or do anything. She never did anything wrong. She has no life experiences. That was the basis for the challenge." RP at 328-29.

The court then noted its concern with one of Stanley's peremptory challenges, then returned to discussing the State's preemptory strike on Juror 29:

> THE COURT: The court noted that defense struck Juror Number 1, who is of Hispanic ancestry, as well as the court noted it appeared that [juror 29] is also of Hispanic background. The court under Rule—General Rule 37 has to make a determination as to the reasons given to justify the peremptory in terms of the totality of the circumstances.
>
> . . .
>
> Again, the court's observation based on the last name [of juror 29] . . .
>
> I'll overrule the objection in light of the fact that the prosecution asked her questions and they've given a reason, based on her upbringing, background, and basically her I'll call it "worldly experiences" as indicated on the record by her questioning.

RP at 328-30. Defense counsel later added, "I don't—the fact that [juror 29's] not worldly is not a basis for overcoming [GR 37]." RP at 333.

Upon further discussion regarding juror 29's ethnicity, the court asked the entire panel to identify their ethnicity. The inquiry revealed that the panel had three members who identified as Hispanic/Latino, three who identified as Native American, and one who identified as half Philipino and half eastern European. Juror 29 raised her paddle when asked if she identified as Hispanic/Latino and Caucasian/White, and explicitly identified herself as "half American and half Puerto Rican." RP at 338.

The court then reiterated its ruling on the GR 37 objection:

> As to [juror 29], she's Caucasian and Puerto Rican. It does not appear to the court that . . . [the State's] exercise of the peremptory is based on race; that it's based on life experiences and her responses to the questions. I'll overrule the objection based on that.

RP at 340.

The court also addressed Stanley's peremptory strikes of two jurors, one who identified as Hispanic and one who identified as Native American. After some discussion, the court allowed those strikes after defense counsel explained that juror 1 was removed due to his employment with the Department of Licensing—relevant because some of the evidence involved driving records—and juror 49 was struck due to his law enforcement background.

After jurors were excused for cause, 40 jurors remained in the venire. Of those, 7 identified as minorities. Of the 12 jurors sworn in, 2 identified as minorities. The State used 7 peremptories: 6 were white/Caucasian and 1 was the juror who identified as half Puerto Rican at issue (Juror 29). The defense used 5 peremptories: 3 were white/ Caucasian and 2 identified as minorities.

Following trial, the jury found Stanley guilty of both charges. Stanley timely appealed.

ANALYSIS

Stanley argues the trial court violated GR 37 by failing to apply the objective observer standard and permitting the State to strike prospective juror 29, who identified as half Puerto Rican. The State argues that no objective observer could view race or ethnicity as a factor in the striking of juror 29, pointing out that the questions posed to juror 29 were no different than other jurors and the State did not disproportionately use peremptory strikes against a given race or ethnicity.

GR 37 Standards

Both the Washington and federal constitutions protect the right of a criminal defendant to a fair and impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. This right includes the guarantee of a trial free from discrimination, both for the parties and jurors. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). GR 37 was implemented not only to forbid purposeful discrimination in jury selection, but to also address the influence of implicit racial bias in jury selection. *State v. Berhe*, 193 Wn.2d 647, 664, 444 P.3d 1172 (2019).

Under GR 37, a party may object to the use of a peremptory challenge by simply citing the rule. Upon objection, the party exercising the peremptory challenge must articulate the reasons for the challenge. GR 37(d). The court must then evaluate these reasons in light of the totality of the circumstances. GR 37(e). "If the court determines that an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." *Id*. (emphasis added).

An "objective observer" is one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f). In the context of an objective observer, the word "can" has been defined as "'made possible or probable by circumstances.'" *Simbulan v. Nw. Hosp. & Med. Ctr.*, 32 Wn. App. 2d 164, 176, 555

P.3d 455 (2024) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 323 (2002)).

Because the GR 37 analysis is purely objective, we review such a claim de novo. *State v. Lahman*, 17 Wn. App. 2d 925, 935, 488 P.3d 881 (2021).

GR 37(g)[1] lists five nonexclusive circumstances relevant to assessing the nature of a peremptory challenge:

> (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;
>
> (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;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
>
> (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.

[1] The party raising a GR 37 challenge on appeal is responsible for ensuring that the record is sufficient for this court to apply GR 37. This means the record should indicate which jurors were seated on the panel and which jurors were excused on peremptory challenge. Here, following oral argument, Stanley supplemented the record with the jury sheet that contained this information.

The rule also specifies seven presumptively invalid justifications for peremptory challenges.[2] GR 37(h). In addition, if a prosecutor exercising a peremptory strike mischaracterizes the prospective juror's answers it could support an inference of implicit bias. *See State v. Jefferson*, 192 Wn.2d 225, 250-51, 429 P.3d 467 (2018). "[T]he remedy for the erroneous exclusion of a juror from service on the basis of race or ethnicity is reversal and remand." *Lahman*, 17 Wn. App. 2d at 929.

Analysis

In Stanley's case, the first step was met when defense counsel objected to the State's use of a peremptory strike against juror 29 on the basis of GR 37. Juror 29 identified herself as either Hispanic or Caucasian and noted that she was half Puerto Rican. This was "enough to raise the concern that an objective observer could perceive Juror [29] as a racial or ethnic minority." *See Id.* at 935.

Turning to the second step, the party exercising the strike must offer a race-neutral justification. *Id.*; GR 37(d). Here, the prosecutor explained the reason for the

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[2] (i) having prior contact with law enforcement officers;
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
(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.

peremptory: "She was raised by her grandparents. She was not allowed to go anywhere or do anything. She never did anything wrong. She has no life experiences." RP at 329. Given this information, we must determine whether an objective observer "*could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphasis added).

As an initial matter, we note that despite the trial court's cognizance of GR 37's standard, it appears that the court applied the wrong standard. The trial court overruled Stanley's GR 37 objection after concluding that the State's exercise of the peremptory was not based on race. This was error under GR 37(e). "The court need not find purposeful discrimination to deny the peremptory challenge." GR 37(e). The standard is not whether the peremptory challenge was based on race. Rather, the standard is whether an objective observer "*could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphasis added).

On appeal Stanley contends this standard is met. In support of his argument he contends the State mischaracterized juror 29's answers, noting that juror 29 was never asked about her life experiences, did not state that she was raised by her grandparents, did not say that she was not allowed to go anywhere or do anything, and did not claim that she never did anything wrong. He compares his case to *Lahman*.

In *Lahman*, the prosecutor attempted to use a peremptory challenge against a 23-year-old prospective juror with an Asian surname. 17 Wn. App. 2d at 929. The

prosecutor's justification for the strike was that the juror was young and did not have "life experiences." *Id.* at 931. This court held that the trial court erred in overruling the GR 37 objection, reasoning that the juror was not questioned about his life experiences and was not afforded an opportunity to explain himself and the circumstances due to the limited questions he was asked. *Id.* at 936. In addition, we found that the prosecutor's focus on the juror's youth and life experiences played into some improper stereotypes about Asian-Americans. *Id.* at 937-38.

Applying the correct standard to the record before us, we conclude that an objective observer could conclude that juror 29's race or ethnicity was a factor in the State's peremptory. Our conclusion is based on the application of several factors. First, the prosecutor's justifications for the strike mischaracterized juror 29's responses. GR 37(g)(i). Although the State contends that its characterization of juror 29's comments was reasonable given the limited time for voir dire, juror 29 never said that she was raised by her grandparents, nor did she say that she was not allowed to go anywhere or do anything.

Similarly, juror 29 did not state, as the prosecutor put it, that she "never did anything wrong." RP at 329. In fact, juror 29 gave a specific example of getting in trouble and doing something wrong: she got in trouble for smoking as a teenager. Moreover, like the prosecutor in *Lahman*, the prosecutor here never asked juror 29 about

her "life experiences" either as a minor or as an adult, making the justification about juror 29 having "no life experiences" unsupported by the record. GR 37(g)(i).

In addition, we note that several of the seated jurors failed to indicate that they had life experiences. The prosecutor asked a series of questions to several jurors, including juror 29, to determine how the jurors would judge credibility and whether the jurors had experience with underage drinking. While the State asked juror 29 similar questions as other jurors, and juror 29 denied having experience with underage drinking, her answers were not unique.

Similar to juror 29, five of the seated jurors were asked about their experience with underage drinking either with their children or their own experience. Four of those five jurors indicated that they did not have issues with their children drinking as teenagers. Juror 3 said her children were "pretty easy" and did not have issues with drinking, though she admitted that she drank alcohol when she was a teenager. Juror 6 had raised four children and acknowledged inter-family squabbles but said nothing about drinking issues. Juror 13 said her children did not have drinking issues as teenagers but drove recklessly on motorcycles. And juror 36 raised three children and said it was a roller coaster when they were teenagers, with a few missed curfews and traffic tickets, but no experience with underage drinking. Juror 24 was the only juror who confessed that her children struggled as teenagers with drinking and law enforcement contacts.

Finally, we note that a justification based on lack of "life experience" is vague and similar to the presumptively invalid reasons listed in the rule is subject to scrutiny under GR 37.

Considering the totality of the circumstances, we conclude that an objective observer could have viewed juror 29's race or ethnicity as a factor in the prosecutor's use of the peremptory challenge. As we have said before, our determination does not mean that the prosecutor's peremptory challenge was subjectively based on race or ethnicity. *See Lahman*, 17 Wn. App. 2d at 938. "GR 37 was written in terms of possibilities, not actualities . . . peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution." *Id*.

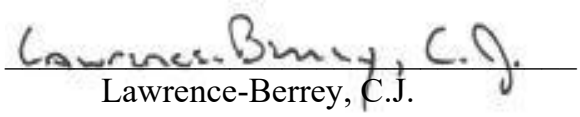
Ultimately, "[b]ecause 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose,' mistakenly allowing a party to dismiss a juror for reasons of race or ethnicity requires reversal and remand for a new trial." *Id*. at 932 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). "This remedy applies regardless of the strength of the prosecutor's case or the hardship to victims or witnesses." *Id.*

Reversed and remanded for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:



Lawrence-Berrey, C.J.

Cooney, J.

WASHINGTON APPELLATE PROJECT

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