NO. 86040-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN MARTINEZ-LOYOLA,

Appellant.

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

The Honorable Elizabeth Yost Neidzwski, Judge

REPLY BRIEF OF APPELLANT

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STATUTES, RULES, AND OTHER AUTHORITIES

A. ISSUES IN REPLY

1. The trial court violated Mr. Martinez-Loyola's state and federal constitutional rights to present a defense and confront adverse witnesses.

2. The prosecutor committed misconduct when he elicited improper opinion testimony from the State's expert.

3. The trial court committed evidentiary error when it excluded, as "hearsay," evidence that Mr. Martinez-Loyola encouraged Elizabeth to take LN for a physical examination.

4. Defense counsel provided ineffective assistance because he repeatedly failed to undertake critical objections or impeachment.

5. The trial court violated fundamental due process protections when it denied Mr. Martinez-Loyola's motion for relief from judgment based on racial or ethnic bias.

6. Cumulative error deprived Mr. Martinez-Loyola of a fair trial.

B. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED MR. MARTINEZ-LOYOLA'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND CONFRONT ADVERSE WITNESSES

In his opening brief, Mr. Martinez-Loyola argued that the fact-finding process would have been *enhanced*, not prejudiced, by limited cross-examination regarding Esmeralda's childhood abuse. BOA at 91-92.

In its response brief, the State contends Mr. Martinez-Loyola sought to publicly "dredge[] up . . . intimate details of [Esmeralda's] sexual history," so as to confuse the jury and advance the "damaging myth" that survivors of abuse are "especially dishonest or delusional." BOR at 33 & n.4, 38. The State also contends any evidentiary or constitutional error was harmless because the defense was permitted to elicit testimony that Esmeralda did not like Mr. Martinez-Loyola. BOR at 40-41.

The State is wrong.

The minimal bias evidence that Mr. Martinez-Loyola was permitted to elicit was sanitized beyond all use to the defense. Indeed, this evidence was at best neutral in its effect, and at worst harmful to the defense, suggesting that Esmeralda had some legitimate reason to think Mr. Martinez-Loyola posed a threat to LN.

By depriving the jury of context for LN's allegation, the trial court committed highly prejudicial evidentiary and constitutional error.

a. The trial court abused its discretion under the evidence rules when it excluded cross-examination on Esmeralda's history of abuse.

The State contends the trial court correctly excluded evidence of Esmeralda's abuse, under the Evidence Rules, as irrelevant. BOR at 31. It argues that Mr. Martinez-Loyola sought to advance the antiquated and illogical "myth" that victims of sexual abuse cannot be trusted. BOR at 33 & n.4. The State is wrong.

Mr. Martinez-Loyola sought to elicit the facts that (1) Esmeralda was abused by her mother's partner when she was about LN's age, (2) this experience predisposed Esmeralda to believe Mr. Martinez-Loyola would abuse LN, (3) Esmeralda blamed her mother for failing to protect her daughters, and (4) Esmeralda reacted to LN's allegations by telling her mother that if she ever got back together with Mr. Martinez-Loyola, Esmeralda would take LN away from her. BOA at 46, 85 (citing RP 122-23, 126-27, 647-50; Ex. 13 at 30, 33).

Each of these facts bolsters the defense theory: that Esmeralda primed LN to believe Mr. Martinez-Loyola would abuse her, and that she minimized or denied this priming on the witness stand. BOA at 91-92. The defense theory is logical and specific to the facts revealed by the defense investigation. In no way does it depend on a myth that sexual abuse survivors are delusional liars.[1]

[1] The State's citations to State v. Martinez, 196 Wn.2d 605, 476 P.3d 189 (2020), are not well taken. In Martinez, both the

Nor, contrary to the State's response brief, did Mr. Martinez-Loyola ever suggest that LN was deliberately fabricating her allegations. Contra BOR at 35. The evidence indicates LN sincerely believed that Mr. Martinez-Loyola turned "bad" when he went to the hospital for his gall bladder surgery, and that this led him to touch her a few months later. See BOA at 21-24, 28. The question was what led to this sincere belief.

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majority and dissenting opinions lamented the popular misconception that delayed reporting is less credible than an immediate "hue and cry." Id. at 610-13 (majority opinion), 616-17 (Gordon McCloud, J., dissenting). The majority held that the "fact of the complaint doctrine," a judicially created hearsay exception unique to sex offense prosecutions, remains a valid means of counteracting popular myths about delayed disclosure. Id. at 613-14. The dissent disagreed, opining that it would not "retain one . . . myth" (that victims of sexual assault always timely report the offense) "to combat another" (that rape victims cannot be trusted and therefore need special evidence rules to corroborate their claims). Id. (Gordon McCloud, dissenting) at 616-17.

Mr. Martinez-Loyola's appeal does not involve the "fact of complaint doctrine," nor does it advance the theory that sexual assault victims tend to fabricate allegations. His appeal argues that the trial court erroneously excluded very, very specific evidence of bias provided by the State's own witness.

To answer that question, the jury needed to hear all the relevant evidence. This included the highly relevant evidence that Esmeralda had primed LN to believe that Mr. Martinez-Loyola would abuse her, particularly if they shared a bed, and that Esmeralda was reluctant to admit to this priming because she wanted Mr. Martinez-Loyola to go away.

This evidence was relevant not because it cast aspersions on all victims of sexual violence—that is something Mr. Martinez-Loyola has never sought to do—but because it explained how a loving and conscientious older sister could have created the conditions for a false accusation. This evidence was far more probative than vague and *disputed* testimony that Elizabeth believed Esmeralda had told LN, "be careful, men are bad." See RP 695-700, 721.[2]

[2] As Mr. Martinez-Loyola explained in his opening brief, both Esmeralda and LN denied the "men are bad" conversation. RP 533-34, 721. LN testified that Esmeralda had told her to sleep with Esmeralda, when Mr. Martinez-Loyola was sick, and that Esmeralda "was super nervous because she thinks something will happen." RP 533-34.

Mr. Martinez-Loyola has never advanced the myth that sexual abuse victims are inherently dishonest. The State's contrary argument is a red herring designed to obscure the incredibly prejudicial effects of the trial court's error.[3]

b. By excluding cross-examination on Esmeralda's history of abuse, the trial court violated Mr. Martinez-Loyola's constitutional right to present a defense.

In its constitutional analysis, the State contends the trial court properly excluded evidence of the prior abuse, "even if the inquiry had some minimal relevance." BOR at 37. It argues the evidence would have "confused" the jury, and that the State had an overriding interest in protecting Esmeralda's privacy. BOR at 37-40.

[3] In support of its evidentiary argument, the State cites only one case addressing the relevance of a witness's prior sexual abuse: State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). BOR at 34. The State also relied on this case in the trial court, and Mr. Martinez-Loyola addressed it at length in his opening brief. BOA at 87-89.

Contrary to the State's argument, there is nothing confusing about the defense theory Mr. Martinez-Loyola sought to present. The jury should have heard that Esmeralda mistrusted men—particularly the men chosen by her mother—because of her childhood experience. This would have provided the jury with the proper context in which to evaluate circumstantial evidence that Esmeralda primed LN to anticipate an act of molestation.

Instead, the jury heard that Esmeralda mistrusted Mr. Martinez-Loyola for some unspecified reason. The jury was indeed confused and misled, but it was by the exclusion of the evidence in question here. The introduction of that evidence would have been clarifying, not confusing. See BOA at 90-91.

The State's other argument—that survivors of sexual violence should never have to testify about it—is overstated and misplaced here.

The State contends that, "if Mr. Martinez-Loyola's argument carried the day," victims of sexual violence will cease coming forward to report abuse, knowing that they will be

subjected to "humiliating interrogations" on the witness stand. BOR at 38-39. In support of this argument, the State relies solely on State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Morley, 46 Wn. App. 156, 730 P.2d 687 (1986). BOR at 39. Neither case condones what the trial court did at Mr. Martinez-Loyola's trial.

The codefendants in Hudlow, 99 Wn.2d at 3-5, faced trial for allegedly raping two victims at knifepoint. The defense theory was consent. Id. To prove the victims consented, the Hudlow defendants sought to introduce testimony, from a man who claimed to have had consensual sex with the victims in the past, to the effect that the victims were so promiscuous that he and his roommates referred to them as "'loose'" and "'the whores.'" Id. at 5.

Even in the early 1980s, the trial court rejected this evidence as more prejudicial than probative. Id. at 5-6. The Supreme Court

agreed,[4] deeming the "loose whore" defense theory antiquated, misogynist, illogical, and therefore legitimately prohibited under the rape shield statute. Id. at 6-19.

In Morely, 46 Wn. App. at 157, the defendant was accused of raping the victim after giving her a ride. He argued she had consented to sex for money. Id. The trial court admitted testimony by a man who claimed he had recently given the victim a ride and that she had offered him sex in exchange for money. Id. at 157, 159-60. But it excluded hearsay testimony, by the defendant's fiancée, to the effect that the victim had told her she had been following her boyfriend around the country and would sometimes resort to prostitution to fund her travel. Id. at 159.

The Court of Appeals affirmed the trial court's exercise of discretion, observing that it left the defendant "ample opportunity to present his theory." Id. at 159-60.

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[4] The Court of Appeals did not agree; it had reversed the convictions. State v. Hudlow, 30 Wn. App. 503, 507, 635 P.2d 1096 (1981).

Mr. Martinez-Loyola has no quarrel with the holdings in Hudlow or Morley. They are entirely irrelevant to his constitutional claim.

Mr. Martinez-Loyola never sought to punish a victim for reporting her assault; he did not argue that any witness was promiscuous, and he did not seek to inflame the jury with salacious sexual detail. He sought only to provide the jury with context for a terrible misunderstanding. The analogy to Hudlow and Morley is inappropriate, to say the least.

The State offers no meaningful response to Mr. Martinez-Loyola's constitutional claim.

c. The erroneous exclusion of the abuse evidence was not harmless.

The State contends any error was harmless because the defense elicited testimony that Esmeralda did not like Mr. Martinez-Loyola, and because it "impeached" her testimony that she never told LN, "be careful, men are bad." BOR at 40-41 &

n.6. Mr. Martinez-Loyola strongly disagrees with the State's characterization of the record.

Contrary to the State's harmless error argument, Mr. Martinez-Loyola was *not* permitted to "impeach" Esmeralda's testimony that she never told LN, "be careful, men are bad." Contra BOR at 40-41, n.6 (citing RP 697, 698, 721). The trial court's erroneous ruling prevented precisely this impeachment.

Elizabeth testified that Esmeralda had admitted telling LN, "be careful, men are bad." RP 695-700. But when Esmeralda took the stand, she denied both the admission and the conversation with LN. RP 721. The jury had no particular reason to believe Elizabeth over Esmeralda—only Esmeralda had firsthand knowledge of the conversation with LN.

Also contrary to the State's harmless error argument, the jury heard minimal testimony about Esmeralda's bias against Mr. Martinez-Loyola, and this testimony was not particularly helpful to the defense. Contra BOR at 40-41 & n.6.

LN testified that Esmeralda did not like Mr. Martinez-Loyola, and that Esmeralda told LN not to sleep with him after he had his gall bladder surgery. RP 533-34; see BOA at 40-41. Elizabeth testified that Esmeralda disapproved of her relationship with Mr. Martinez-Loyola, but that Esmeralda had nevertheless "start[ed] to warm up to him" towards the end. RP 658-59. And Elizabeth testified that Esmeralda might "[s]ometimes" have appeared jealous that LN was so close to Mr. Martinez-Loyola. RP 689.

This vague testimony, about a teenager's feelings, comes nowhere close to explaining why Esmeralda would prime LN to sincerely but falsely accuse Mr. Martinez-Loyola.

Indeed, it is entirely possible that the jury inferred that Esmeralda had some *legitimate* reason to believe Mr. Martinez-Loyola posed a threat to LN—that is, a reason having to do with Mr. Martinez-Loyola himself. Without context for this belief, all the sanitized "bias" testimony was a wash, at best.

2. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE ELICITED IMPROPER OPINION TESTIMONY FROM THE STATE'S EXPERT WITNESS

Mr. Martinez-Loyola moved in limine to prevent the State's expert witness, Courtney Long, from testifying that she uses special techniques to elicit accurate and reliable statements from a child during a forensic interview. RP 137-41. The trial court granted the defense motion. RP 141, 671-73.

Ms. Long provided this testimony, anyway, and the prosecutor repeatedly emphasized it in closing argument. See BOA at 51-53, 60 (citing RP 861, 870, 874), 98-99; BOR at 45 (acknowledging that Ms. Long called LN's forensic interview "accurate" or "reliable" seven times during her testimony).

On appeal, Mr. Martinez-Loyola argued the prosecutor committed misconduct, by eliciting testimony the trial court had specifically prohibited. BOA at 96-108.

In its response, the State seeks to minimize the prejudicial effect of this testimony, arguing that Ms. Long neutralized it by

testifying that it was "'not [her] . . . job to . . . check the veracity of a [child's] statement.'" BOR at 49-50 (quoting RP 755). The State also contends that any claim of error is unpreserved by a proper contemporaneous objection. BOR at 53-58.

Mr. Martinez-Loyola anticipated the State's arguments in his opening brief. BOA at 104-07. He will rely on that briefing, with one additional observation:

The State should never attempt to mislead a jury with vague rhetoric. The prosecutor has a duty to ensure that the defendant receives a fair trial. If this means the prosecutor must counsel his expert witness, so be it.

3. THE TRIAL COURT COMMITTED EVIDENTIARY ERROR WHEN IT EXCLUDED, AS "HEARSAY," EVIDENCE THAT MR. MARTINEZ-LOYOLA ENCOURAGED ELIZABETH TO TAKE LN FOR A PHYSICAL EXAMINATION

In his opening brief, Mr. Martinez-Loyola argued the trial court erred by excluding, as hearsay, Elizabeth's testimony that he urged her to take LN for a physical examination. BOA at 109-11. Mr. Martinez-Loyola correctly pointed out that "'questions,

requests, and statements of advice'" are not hearsay, because they are not assertions of fact. BOA at 109-10 (citing numerous cases).

In its seven-page response to this claim, the State cites only a single case in which a trial court was deemed to have properly excluded a "request" as hearsay. BOR at 60-67. This case is State v. Carte, 27 Wn. App. 2d 861, 877-78, 534 P.3d 378 (2023), and it is readily distinguishable.

In Carte, 27 Wn. App. 2d at 866-69, the defendant was charged with felony harassment and several counts of assault, all arising from incidents of domestic violence against his girlfriend. During one incident, the victim gave her phone to her son and instructed him to hide and call for help. Id. at 869. The son called 911 and told the dispatcher, "'my mom's boyfriend is hitting my mom.'" Id.

At his trial, the defendant testified that the victim told her son: "'call the police and tell them [the defendant] is hitting me.'" Id. at 878. The trial court sustained the prosecutor's hearsay objection. Id. The Court of Appeals affirmed, reasoning that the

victim's alleged statement was relevant only if offered for "the truth or falsity of its content."

The problem with the State's analogy to Carte is readily apparent: the "request" at issue in Carte was a request that the listener *assert something*—specifically, that the victim's son assert that the defendant was hitting his mother. Id. at 878. The request was offered to prove the falsity of this assertion. Id.

By contrast, Mr. Martinez-Loyola requested that Elizabeth *do something*—specifically, that she take LN for an examination. BOA at 110-11. As Mr. Martinez-Loyola explained in his opening brief, this request contained no factual assertion at all, so it could not have been offered for its truth. BOA at 110-11.

Indeed, the State appears to recognize this. Nowhere in its response does it identify the "assertion" that Mr. Martinez-Loyola offered for its truth. Instead, the State contends that Mr. Martinez-Loyola's request was hearsay *because it would have been helpful to the defense*. BOR at 66-67 ("he plainly wanted the jury to infer

from the purported request that no innocent man would have made such a request").

The State is wrong. An out-of-court statement is hearsay only "when offered to prove the truth *of the matter asserted*." State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (emphasis added). Whether a statement meets the definition of hearsay does not depend on which party it helps, and the trial court should never exclude evidence as hearsay on that basis. See State v. Pavlik, 165 Wn. App. 645, 650, 268 P.3d 986 (2011) ("there is no 'self-serving hearsay' rule that bars admission of statements that would otherwise satisfy a hearsay rule exception").

Finally, with respect to this evidentiary issue, the State's harmless error "analysis" is misleading.

The State contends it ultimately acquiesced at trial, anyway, allowing Mr. Martinez-Loyola to testify that "he 'told' L.N.'s mother to take the child to the hospital." BOR at 68 (citing RP 815). The State says it then helped Mr. Martinez-Loyola even more, by cross-examining him on this "out-of-court utterance,"

allowing him to get it before the jury not once, but twice. BOR at 69 (citing RP 823-24). Finally, the State accuses Mr. Martinez-Loyola of misrepresenting the record on appeal by referring to the prosecutor's cross-examination as argumentative. BOR at 69 (citing BOA at 111).

Contrary to the State's reimagination of the record, the prosecution did not help Mr. Martinez-Loyola get his theory before the jury. Instead, it capitalized on the trial court's erroneous "hearsay" ruling to paint Mr. Martinez-Loyola as a liar.

In her defense interview, Elizabeth said that Mr. Martinez-Loyola had reacted to the allegations by denying them and immediately urging her to take LN for an examination. Ex. 13 at 28. At trial, defense counsel tried to elicit Elizabeth's testimony to this effect. RP 706. But the prosecutor prevented this with his hearsay objection. RP 706.

Later, the prosecutor refrained from objecting when Mr. Martinez-Loyola testified that he urged Elizabeth to take LN to the hospital. RP 815. But on cross-examination, the prosecutor

blatantly implied that the suggestion was a hollow ruse, since Mr. Martinez-Loyola knew an examination was forthcoming, anyway:

> Q. Then you testified that you told Elizabeth she should take [LN] to the hospital, right?
>
> A. Yes.
>
> Q. So you encouraged her to take [LN] to the hospital, but wasn't the conversation about taking her to the hospital already happening? Wasn't that something that was already being discussed?
>
> A. I told her to take [LN] to the hospital because she was not believing my version of the facts, and she was continuing to believe that I had done something to her daughter.
>
> Q. Aren't you aware that there was a conversation already going on between Esmeralda and Elizabeth about going to the hospital; were you aware of that?
>
> A. No, at no time did she tell me that.

RP 823-24.

The implication of this cross-examination is clear. The State's entire theory of the case was that Mr. Martinez-Loyola was

a liar, who molested LN and then tried to cover his tracks by lying to Elizabeth. See RP 871-74.

This kind of gamesmanship has no place in a criminal trial. The trial court's hearsay ruling was prejudicial error.

4. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BECAUSE HE REPEATEDLY FAILED TO UNDERTAKE CRITICAL OBJECTIONS OR IMPEACHMENT

Mr. Martinez-Loyola will rely on his opening brief for his ineffective assistance claims. BOA at 112-17.

5. THE TRIAL COURT VIOLATED FUNDAMENTAL DUE PROCESS PROTECTIONS WHEN IT DENIED MR. MARTINEZ-LOYOLA'S MOTION FOR RELIEF FROM JUDGMENT BASED ON RACIAL OR ETHNIC BIAS

Immediately after the jury convicted Mr. Martinez-Loyola, Juror 6 began asking about his citizenship. See BOA at 64-65 (citing RP 918-19, 924; CP 48-49, 57-58); CP 145. She asked the trial judge, and then the attorneys, whether Mr. Martinez-Loyola was United States citizen. Id.

These repeated inquiries raised concerns for the court and the defense, regarding the possible influence of racial or ethnic bias on the verdict. See BOA at 67 (citing CP 48, 53). The defense moved for an evidentiary hearing, under State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019), and Henderson v. Thompson, 200 Wn.2d 417, 518 P.3d 1011 (2022), to address these concerns. See BOA at 67-68 (citing CP 51-52; RP 924-25).

The trial court granted the motion, concluding that:

> An objective observer[,] . . . aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State[,] could view race as a factor in the verdict in this case.

CP 58; see BOA at 68-70 (citing CP 57-58; RP 930-40, 945-46).

At the subsequent evidentiary hearing, Juror 6 testified that she asked about Mr. Martinez-Loyola's citizenship because she was aware that "we are spending so much money" to address an immigration crisis, and she wondered whether this case was connected to "the border situation." RP 978-81; see BOA at 73-76. She also insisted that her curiosity had arisen only immediately

after the verdict, not during deliberations, and that Mr. Martinez-Loyola "seemed like . . . a very nice man," despite apparently contributing to the border crisis. RP 978-79; see BOA at 74-75, 130.

The trial court concluded that this testimony dispelled any lingering doubts about bias affecting the verdict. CP 170.

Mr. Martinez-Loyola challenged this conclusion on appeal, arguing the trial court erred at the second step of the two-part Berhe inquiry. BOA at 122-25. Specifically, Mr. Martinez-Loyola argued that Juror 6's testimony exacerbated, rather than dispelled, concerns that she viewed him as part of an immigration crisis our country cannot afford. BOA at 129-30. Mr. Martinez-Loyola contends the trial court failed in its duty to properly scrutinize apparent implicit bias.

a. The parties agree on the first step of the Berhe inquiry: the trial court properly determined that an objective observer could view Juror 6's citizenship questions as evidence that racial or ethnic bias tainted the verdict

The State concedes that the trial court's initial determination, whether "an objective observer . . . could view race as a factor in the verdict," is reviewed de novo. BOR at 87-88 (internal quotations and alterations omitted). And the State agrees that the trial court made the right determination in this case: Mr. Martinez-Loyola made a prima facie showing that racial bias tainted the verdict, because an objective observer *could* view Juror 6's questions as evidence that ethnic bias tainted the verdict. BOR at 88-90.

b. The parties agree that the State bore the burden at the second step of the Berhe inquiry, but the State erroneously contends that the "objective observer" standard ceases to apply at this stage, and that this Court must therefore defer to all the trial court's purported "credibility" determinations

The State also agrees that, once a party makes the prima facie showing, the trial court must hold a hearing at which it

presumes that bias tainted the verdict. BOR at 89-90. And the State agrees that, at the hearing, the non-moving party must *disprove* this presumption beyond a reasonable doubt. BOR at 90.

The State agrees that the GR 37 "objective observer" standard remains relevant, at the evidentiary hearing, in that the trial court must act as an "objective observer," aware that "'implicit, institutional, and unconscious' racial biases . . . have plagued our justice system." BOR at 95 (quoting Berhe, 193 Wn.2d at 665.

But the State contends the question at the evidentiary hearing is no longer whether an objective observer *could* conclude that bias tainted the verdict, but rather whether bias *did*, in fact, taint the verdict. BOR at 98-99. And the State apparently believes this distinction renders all the trial court's conclusions inherently factual and essentially unreviewable. BOA at 99-100.

Mr. Martinez-Loyola disagrees with the State's argument, for two reasons.

First, the State's purported distinction does not withstand scrutiny. There is no practical difference between (1) the "objective observer" standard and (2) disproof beyond a reasonable doubt. If, after the evidentiary hearing, an objective observer *could* still conclude that racial or ethnic bias tainted the verdict, then the non-moving party has not met its burden of disproof.

Presumably, this is why our Supreme Court has twice explained that, in ruling on a motion for a new trial, "'the ultimate question for the court is whether an objective observer . . . could view race as a factor in the verdict.'" Henderson, 200 Wn.2d at 422 (quoting Berhe, 193 Wn.2d at 665).[5]

Second, as Mr. Martinez-Loyola noted in his opening brief, appellate courts review de novo the trial court's application of GR 37. BOA at 121 (citing State v. Tesfasilasye, 200 Wn.2d 345, 355-

[5] Mr. Martinez-Loyola disagrees with the State's assertion, at footnote 16 of the response brief, that he has misrepresented the Supreme Court's holdings on this question. See BOR at 96-97 n.16.

56, 518 P.3d 193 (2022); Lantz v. State, 28 Wn. App. 2d 308, 329, 353 P.3d 501 (2023) (citing State v. Jefferson, 192 Wn.2d 225, 249-50, 429 P.3d 467 (2019))). In the peremptory challenge context, the de novo standard is justified because, "the appellate court 'stands in the same position as does the trial court' in determining whether an objective observer could conclude that race of a factor." Tesfasilasye, 200 Wn.2d at 355-56 (quoting Jefferson, 192 Wn.2d at 250) (alteration omitted).

Mr. Martinez-Loyola can conceive of no reason that a different rule should apply in the context of a Berhe evidentiary hearing. See Berhe, 193 Wn.2d at 664-65; accord Simbulan v. NW Hosp. & Med. Ctr., __ Wn. App. 2d __, 555 P.3d 455, 461 (2024) ("[b]ecause the determination as to whether a prima facie showing has been made relies on the objective observer standard under GR 37 and incorporates the totality of the circumstances at trial, we review the prima facie showing de novo").

Mr. Martinez-Loyola acknowledges that the trial court made a credibility determination: it believed Juror 6 when she

promised that her concerns about immigration did not influence her deliberations. See BOA at 131-32. But Berhe, 193 Wn.2d at 657, anticipates that "implicit bias . . . can influence our decisions without our awareness." For this reason, the trial court erred by ignoring all the evidence of bias in Juror 6's testimony, in favor of her general assertion that none of it influenced her verdict.

With respect to that evidence of bias, this Court stands in the same position as the trial court: it must evaluate Juror 6's testimony and determine whether it dispelled the objective observer's concerns, beyond a reasonable doubt. Accord Tesfasilasye, 200 Wn.2d at 355-56 (quoting Jefferson, 192 Wn.2d at 250); see Berhe, 193 Wn.2d at 664-65 (incorporating GR 37 objective observer standard). Mr. Martinez-Loyola contends it did not.

Immediately after rendering her verdict, Juror 6 began inquiring whether Mr. Martinez-Loyola had legal citizenship. When asked about these inquiries, Juror 6 said she was curious whether Mr. Martinez-Loyola was supposed to be here—or

whether, despite seeming like a nice man, he was one of the immigrants contributing to a crisis our nation cannot afford.

An objective observer could—indeed, should—view these comments with concern. Juror 6's testimony may not conclusively prove that bias affected her deliberations, but it certainly does not disprove those effects. Her testimony did not dispel the concerns raised by her post-verdict inquiries, and the State therefore did not meet its burden under Berhe.

Finally, Mr. Martinez-Loyola has never argued that trials must be sanitized of all racial or ethnic cues, or that verdicts must be set aside any time a juror mentions race or ethnicity. For this reason, the State's discussion of Simbulan, 555 P.3d 455 (2024),[6]

[6] In Simbulan, 555 P.3d at 456-57, the plaintiffs in a wrongful death action obtained an evidentiary hearing, under Henderson, citing the following indicia of bias: (1) counsel for the respondent mentioned that the plaintiff's first baby had been born in the Philippines; (2) counsel for the respondent elicited testimony that the plaintiffs had lived in separate countries for much of their marriage; (3) the plaintiffs testified through interpreters; and (4) the respondent doctor impliedly represented herself as a "model minority" when she testified that she grew up in India and

and of "faux progressivism" and "white-savior complex," are unresponsive to his claim or the facts of this case. See BOR at 111, 115-18.

6. CUMULATIVE ERROR DEPRIVED MARTINEZ-LOYOLA OF A FAIR TRIAL

The defense investigation yielded substantial evidence that LN was primed to imagine the act of sexual abuse alleged in this case. The jury should have heard that evidence, and it should have heard that Mr. Martinez-Loyola reacted to the allegations by immediately urging Elizabeth to take LN for a physical examination.

Instead, the jury heard only that LN's older sister viewed Mr. Martinez-Loyola with suspicion, and that a trained expert used

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immigrated to the United States to get her medical degree. Simbulan, 555 P.3d at 458, 462-64.

This Court granted interlocutory review and reversed. Id. at 465-67. It reasoned that all the ostensibly inflammatory testimony or procedure had been relevant and necessary, and that it therefore did not give rise to any inference of a tainted verdict. Id.

special techniques to ensure that LN gave accurate and reliable statements in her recorded interview.

Finally, the jury that convicted Mr. Martinez-Loyola included a juror who questioned his right to be in the United States.

This Court should be very concerned that an innocent man was convicted after an unfair trial.

C. CONCLUSION

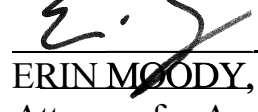
For all the reasons given above and in the opening brief, this Court must reverse Mr. Martinez-Loyola's conviction.

DATED this 2nd day of January, 2025.

I certify this document is 14-point font and contains 4,997 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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