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STATE OF WASHINGTON
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Supreme Court No. 99793-4
(COA No. 36530-1-III)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER BAGBY,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

The devaluation and degradation of Black lives is a persistent and systemic injustice of the criminal legal system. Courts must be vigilant in eliminating racial bias. The use of the word “nationality” to distinguish a Black man from other witnesses is unacceptable. Likewise, the reliance on stereotypes to perpetuate the myth that Black men are more likely to commit crimes cannot be tolerated. To correct these errors, Mr. Bagby asks this Court to accept review.

B. IDENTITY OF PETITIONER

Mr. Bagby, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

C. COURT OF APPEALS DECISION

Mr. Bagby seeks review of the Court of Appeals decision dated April 20, 202, attached as an appendix.

D. ISSUE PRESENTED FOR REVIEW

Did the subtle but insidious and improper injection of race and the reliance on racial stereotypes by the prosecutor deprive Mr. Bagby of a fair trial?

E. STATEMENT OF THE CASE

Tyler Bagby is a Black man. From Stockton, California, he moved to Spokane with his mother and siblings to find a better life. 11/26-27 RP 220.¹ After graduating from high school, Mr. Bagby started attending community college at Spokane Falls Community College. *Id.* at 222. He then transferred to Washington State University. *Id.* at 219. At the time of trial, he needed nine credits to graduate with a bachelor's degree in strategic communications. *Id.* at 219.

Mr. Bagby is a large man, at six feet and two hundred pounds. 11/27 RP 263. He enjoys exercising and working out on campus. 11/26-27 RP 223. He worked while in school, with jobs at T-Mobile and a couple of local restaurants. *Id.* at 220.

¹ The date of the proceedings is added to the transcript references because the transcripts are not sequential.

On February 3, 2018, Mr. Bagby drove to Moscow, Idaho, to pick up Kailah Crisostomo so they could hang out, whom he was dating. 11/26-27 RP at 228. The two went to a concert. *Id.* at 229. After the show, Ms. Crisostomo and Mr. Bagby went back to Mr. Bagby's apartment, where they met up with several other people, including Shyla Roberson and Solomon Cooper. 11/26-27 RP 230, 283. After drinking some alcohol, the group left Mr. Bagby's apartment for a nearby fraternity house party. *Id.*

Everyone admitted to drinking at the house party. Mr. Bagby estimated he had between four to six shots. 11/26-27 RP 230. Once they got to the party, Mr. Bagby and the others continued to drink alcohol. Mr. Bagby thought he had between three to five beers at the party. *Id.* at 239. Ms. Crisostomo had about three to five beers at the party after drinking vodka at Mr. Bagby's house. *Id.* at 239. Another witness thought she had about six beers. *Id.* at 101. Ms. Roberson testified she consumed much less than the other witnesses. *Id.* at 42.

While at the party, the friends separated. 11/26-27 RP 27. At one point, Ms. Crisostomo left for the bathroom, leaving Mr. Bagby behind. *Id.* Mr. Bagby became concerned after she did not return and asked Ms. Roberson to check on her. *Id.* When Ms. Roberson did not come back, Mr. Bagby went to check on them in the co-ed bathroom. *Id.* at 241.

The two women were in a stall, with Ms. Crisostomo crying. 11/26-27 RP 28-9. Mr. Bagby tried talking to Ms. Crisostomo while Ms. Roberson encouraged him to leave. *Id.* at 32, 241. After a while, Austin Davis, who was also in the bathroom, told Mr. Bagby to go. *Id.* at 59.² Mr. Bagby thought Mr. Davis bumped him and felt threatened. *Id.* at 62. He punched Mr. Davis in the face, knocking him out. *Id.* at 62, 265. Mr. Bagby only remembered hitting Mr. Davis once, but other witnesses said he punched him more than once. *Id.* at 246; 81. Around this time, Mr. Cooper came to the bathroom.

² Mr. Davis was also drinking and thought he had consumed about eight to ten beers. 11/26-27 RP 53.

Id. at 116. He picked up Mr. Bagby, carried him out of the bathroom, and escorted him outside. *Id.* at 117.

Once outside the fraternity, Mr. Bagby continued to be concerned about Ms. Crisostomo. He was also angry with Ms. Roberson for not letting him speak with her. 11/26-27 RP 135. He tried to contact Ms. Roberson through social media and then tried calling her. *Id.* He ultimately left her a message where he made threats, expressing his anger. *Id.* at 140. Mr. Bagby stated he had no recollection of making the phone call but believed he did after hearing it. *Id.* at 249.

Ms. Roberson and Ms. Crisostomo went to Ms. Roberson's apartment. Once there, Ms. Crisostomo passed out on the couch. 11/26-27 RP 141. Shortly afterward, Mr. Bagby arrived. *Id.* Ms. Roberson alleged he kicked the door in, although the jury would ultimately find him not guilty of this charge. *Id.* at 144. Once inside, Mr. Bagby tried to talk with Ms. Crisostomo, who left the living room to sleep in the bedroom. *Id.* The police arrived shortly afterward. *Id.*

The government charged Mr. Bagby with residential burglary, assault in the fourth degree, malicious mischief, and harassment. CP 11-13.

Other than Mr. Cooper, Mr. Bagby was the only Black person at his trial, other than one of the witnesses. 11/16-26 RP 97. The entire jury pool, the judge, the lawyers, and all the remaining witnesses were white. *Id.*

Despite Mr. Bagby's identification not being at issue, the government asked most witnesses to describe Mr. Bagby by his "nationality" or race. Three times, the prosecutor asked the witnesses to comment on Mr. Bagby's "nationality." 11/26-27 RP 79, 80, 94. The prosecution often asked witnesses to differentiate Mr. Bagby from the other witnesses in his trial, based on his race. *See* 11/26-27 RP 33; 71; 72; 80; 80-81; 81; 86; 88; 95; 96; 97; 180.

Mr. Bagby testified to his intoxication. He admitted he had only vague memories of what happened that night. He had no memory of talking to Mr. Davis. 11/26-27 RP 242. He did not remember leaving the troubling message for Ms.

Roberson. *Id.* at 249. He could not say much about what he did inside Mr. Roberson's apartment, other than that he did not kick in the door. *Id.* at 254. He told the jury he would not have committed any of the acts had he been sober. *Id.* at 250.

At the start of his cross-examination of Mr. Bagby, the prosecutor asked him whether he loved his dog. 11/16-27 RP 261-62. When Mr. Bagby said that he did, the prosecutor responded with the statement, "Unfortunately, some people [don't]; but I'm glad to hear you're not one of them." *Id.*

The jury found Mr. Bagby not guilty of malicious mischief but guilty of residential burglary, assault in the fourth degree, and harassment 11/26-27 RP 362.

Describing the misconduct raised in Mr. Bagby's appeal as implicit bias, the Court found no error. App. 1, 7. The Court determined that the prosecution did not appeal to racial bias, although it did misuse the term "nationality." App. 10. The Court also found the exchange with Mr. Bagby "awkward" and an attempt to build rapport with Mr. Bagby. *Id.* The Court found that the government's description of Mr.

Bagby as someone who does not hurt dogs to be an attempt to compliment him. *Id.* The Court found the misuse of the term nationality or the questions about Mr. Bagby's dog not to be attempts to play into racial stereotyping or misconduct. *Id.*

F. ARGUMENT

This Court should review whether the prosecutor's improper insertion of race into Mr. Bagby's trial requires reversal.

While Mr. Bagby never denied he was the person who the government alleged committed the charged acts, the government continuously inserted race into his trial to prove his identity. Using the term "nationality" to distinguish Mr. Bagby from the other witnesses, the government subtly employed bias at Mr. Bagby's trial. The prosecutor compounded this improper use of race by relying on stereotypes to enforce the myth that Black men are dangerous. These errors deprived Mr. Bagby of his right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22.

Because this misconduct deprived Mr. Bagby of a fair trial, this Court should accept review. Further, the decision of

the Court of Appeals is in conflict with decisions of this Court, involves a significant question of constitutional law, and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

a. Racial bias in the criminal legal system devalues and degrades Black lives.

“The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.” *State v. Towessnute*, ___ Wn.2d ___, ___ P.3d ___ (S.Ct. No. 13083-3, Apr. 26, 2021) (quoting Letter from the Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (June 4, 2020)). “As judges, we must recognize the role we have played in devaluing black lives.” *Garfield Cty. Transp. Auth. v. State*, 196 Wn.2d 378, 390, n.1, 473 P.3d 1205 (2020) (quoting Letter from the Wash. State Supreme Court to the Members of the Judiciary and the Legal Cmty. (June 4, 2020)).

Washington’s legal system is not immune from these biases. *State v. Walker*, 182 Wn.2d 463, 491, n.4, 341 P.3d

976, 991 (2015) (Gordon McCloud, J. concurring) (citing *State v. Saintcalle*, 178 Wn.2d 34, nn. 3-6, 309 P.3d 326 (2013)).

This court recognizes that “bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly.” *Id.*, at 488 (quoting Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System* at 6 (2011) (alteration in original)³ (quoting Wash. St. Minority & Justice Comm’n, 1990 *Final Report* at xxi (1990)).⁴

Subtle or implicit bias can be even more dangerous than explicit racism. “Implicit racial bias can affect the fairness of a trial as much as, if not more than, ‘blatant’ racial bias.” *State v. Berhe*, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019) (citing *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)); GR 37; *State v. Jefferson*, 192 Wn.2d 225, 240, 429 P.3d 467 (2018) (plurality opinion); *Saintcalle*, 178 Wn.2d

³http://www.law.washington.edu/About/RaceTaskPorce/preliminary_report_race_criminal_justice_030111.pdf.

⁴<http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>

at 49. “Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial.” *Monday*, 171 Wn.2d at 678. (citing *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)).

Despite these holdings, the Court of Appeals held there was no misconduct in Mr. Bagby’s case. App. 1. This Court should accept review of the erroneous conclusion to affirm that it will not tolerate racial bias in Washington’s courts. Misconduct occurred when the prosecutor made improper references to race, first using the word “nationality” to describe Mr. Bagby and then using racial stereotypes to reinforce the impression that Mr. Bagby was a dangerous Black man. *See* 11/26-27 RP 79, 80, 94; 11/27 RP 262.

b. The government relied on racial stereotypes and bias to secure Mr. Bagby’s conviction.

Empirical evidence shows the prevalence of negative attitudes towards Black people and the stereotype that they are violent and criminal. Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, et al.,

Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1128 (2012); see also Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 Personality & Soc. Psychol. Bull. 1139 (1995).

Because these attitudes about Black men are implicit, they function automatically, including in ways a person would not endorse as appropriate if they were consciously aware of the bias. Kang, at 1129. Bias towards persons of color is responsible for mass incarceration movements, such as the need to imprison the “new breed” of juvenile “super predators” and the war on drugs to prevent the horrors of “crack babies.” Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. Davis L. Rev. 839, 843 (2019).

These biases are present in the criminal legal system. Bias influences verdicts and sentencing. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 Law & Hum. Behav. 621, 627-28 (2005). Bias impacts the way police

interact with Black people. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 976-77 (2002) . It influences the charging and plea bargaining decisions of prosecutors. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 Law & Soc’y Rev. 587, 615-19 (1985). Defense attorneys interact with their clients of color differently than their white clients. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1545-55 (2004). Jurors tend to show bias against defendants of another race. Kang at 1143. Even judges trained to compartmentalize information and transcend their own biases are not immune. Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1051 (2019).

1) Improper use of the word “nationality” to distinguish Mr. Bagby from other witnesses.

With three witnesses, the prosecutor asked them to describe Mr. Bagby by his “nationality.” 11/26-27 RP 79, 80, 94. Despite there being no contest about identity, the

prosecutor asked every witness to distinguish Mr. Bagby based on his race. *Id.* at 33, 80. Unlike Mr. Bagby, the prosecutor never described the white witnesses by nationality, instead using the word “white” or “ethnicity” to identify them. *Id.* at 33, 95, 180.

This Court should not assume that these intentional word choices were in error but rather that they were a subtle attempt to distinguish Mr. Bagby based on his race. *Monday*, 171 Wn.2d at 678. Instead, this Court should see these questions for what they are: improperly highlighting Mr. Bagby’s race and ensuring his race played a predominant role in the jurors’ consideration of the case against Mr. Bagby.

The questions about Mr. Bagby’s race were not necessary. Almost every witness knew Mr. Bagby. 11/16-27 RP 116. Mr. Bagby did not contest his identity, agreeing in his testimony that he was present in both the fraternity and his friend’s home. He asserted self-defense for the acts at the fraternity and that he did not commit a crime at his friend’s house. Identity was not an issue.

Nonetheless, the government continuously differentiated Mr. Bagby from the other witnesses based on his race. See 11/26-27 RP 33; 71; 72; 80; 80-81; 81; 86; 88; 95; 96; 97; 180. While the Court of Appeals acknowledges the prosecutor misused the term “nationality” when differentiating Mr. Bagby from other witnesses, it found no inference of racial bias from this misuse. App. 10.

The Court of Appeals’ opinion on whether this misuse was a mistake is misplaced. App. 10. “Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.” *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir.1979). Mr. Bagby’s nationality was not a valid identifying characteristic. Had Mr. Bagby been white, it is unlikely the prosecutor would have asked about his race at all, focusing instead of distinguishing features like his size. Focusing on nationality operated to differentiate Mr. Bagby from all of the other witnesses at his trial. It was improper under any circumstances.

“Like wolves in sheep’s clothing, a careful word here and there can trigger racial bias.” *Monday*, 171 Wn.2d at 678. Using the term “nationality” separated Mr. Bagby from almost every other person in the courtroom, including the judge and jury. This subtle but insidious word choice played on the natural biases of the jury, which was likely to show bias against Mr. Bagby because of his race. *See Kang*, at 1143.

2) Reliance on stereotype to reinforce the myth that Black men are dangerous.

In addition, the government relied on racial stereotypes to argue Mr. Bagby was dangerous. First, the prosecutor asked one of his witnesses in the bathroom stall why she was scared of Mr. Bagby. 11/26-27 RP 33. She replied, “Well he’s way bigger than me, and he goes to the gym and works out, like, if he -- I’ve known before that he has, like a temper and a rage, and he’s started to shake it, and I started getting scared like what if he gets in.” *Id.*

At no time was there a suggestion Mr. Bagby tried to break into the stall. On the contrary, evidence suggested he did not do anything other than push on the door, even when

one of the women opened the door to look out. 11/16-27 RP 59.

This reference to Mr. Bagby's dangerousness reinforced the stereotype he was more dangerous than those around him.

The prosecutor built on the stereotypes associated with Black men when cross-examining Mr. Bagby. In some of his first questions to Mr. Bagby, rather than focus on the facts of the case, the prosecutor asked Mr. Bagby about his dog. The prosecutor asked Mr. Bagby:

[Prosecutor:] Still have your dog?

MR. BAGBY: Yes, I do.

Prosecutor]: Love him?

A: Of course.

Q: Care about him deeply?

A: Who has a dog for over a year and don't care about him? Yes, I do.

Q: Unfortunately, some people; but I'm glad to hear you're not one of them, so okay.

11/27 RP 262.

While the Court of Appeals found that these questions were an "awkward" attempt to build rapport with Mr. Bagby, this Court should be more critical. App. 10. The suggestion that Black men mistreat dogs is a frequent myth that

perpetuates the stereotype that Black men are dangerous. Kevin Blackistone, *Black Men and Dogs: Don't Believe Vick*, National Public Radio (2007);⁵ Ann Linder, *The Black Man's Dog: The Social Context of Breed Specific Legislation*, 25 *Animal L.* 51, 57 (2018).⁶ This subtle suggestion played on bias and was improper. It was not an attempt to build rapport.

Questions designed to inject race as an issue before the jury pose a serious threat to a fair trial. *Miller v. State of N.C.*, 583 F.2d 701, 706 (4th Cir. 1978). They violate the “fundamental fairness which is essential to the very concept of justice.” *Weddington v. State*, 545 A.2d 607, 613 (Del. 1988) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974); *Lisenba v. California*, 314 U. S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166 (1941)).

The prosecutor did not need to build rapport with Mr. Bagby. The government was not trying to make friends with

⁵<https://www.npr.org/templates/story/story.php?storyId=14698643>

⁶<https://web.archive.org/web/20071211120818/http://www.cnn.com/2007/US/law/12/10/vick.sentenced/index.html>

him. It had charged him with serious crimes and was seeking convictions for them. This justification for the government's "awkward" questions ignores the history of using race for improper purposes in Washington's courts. *Garfield*, 196 Wn.2d at 390, n.1. The questions should not be excused.

c. The government's use of race to secure its conviction unfairly prejudiced Mr. Bagby.

The government owed a duty to Mr. Bagby to see that his right to a constitutionally fair trial was not violated. *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). The government violated this duty when it appealed to racial stereotypes or racial bias to achieve a conviction. *Monday*, 171 Wn.2d at 676; U.S. Const. amend. XIV; Const. art. I, § 22.

When the government relied on racial bias to ensure its conviction, it fatally undermined Mr. Bagby's right to a fair trial. *Monday*, 171 Wn.2d at 681. "Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir.1979). This Court should not

excuse the government insertion of racial bias as a mistake, poor word choice, or as “awkward.” Instead, the use of the word “nationality” and intentional stereotyping was an unacceptable appeal to the jury’s bias. To restore Mr. Bagby’s right to a fair trial, this Court should grant review.

G. CONCLUSION

“If justice is not equal for all, it is not justice.” *Monday*, 171 Wn.2d at 680. The prosecutor’s misconduct deprived Mr. Bagby of his right to fair trial. For all of the reasons detailed in this petition, Mr. Bagby asks this Court to grant review. RAP 13.4 (b).

DATED this 20th day of May 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Washington Appellate Project (91052)
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APPENDIX

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Court of Appeals Opinion APP 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 36530-1-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
TYLER TERELL BAGBY,)	
)	
Appellant.)	

LAWRENCE-BERREY, J. — Tyler Bagby appeals his convictions for residential burglary, harassment, and fourth degree assault. We reject his arguments of prosecutorial misconduct (implicit racial bias) and instructional error and affirm.

FACTS

Tyler Bagby, a Black American student at Washington State University, went to a fraternity party with three friends, Solomon Cooper, Shyla Roberson, and Kailah Crisostomo. Ms. Crisostomo had been dating Mr. Bagby for a couple of weeks and attended nearby University of Idaho. The group had shots of vodka before the party and they continued to drink at the fraternity.

At one point, Ms. Crisostomo separated from Mr. Bagby and went into the fraternity’s coed bathroom. When Ms. Crisostomo did not return, Mr. Bagby asked Ms.

Roberson to see if his girlfriend was alright. Ms. Roberson found Ms. Crisostomo in the bathroom crying, saying she did not want to go home with Mr. Bagby.

At some point, Mr. Bagby entered the bathroom and asked what was going on. Ms. Roberson told him that she could take Ms. Crisostomo home. Mr. Bagby argued with her and insisted that he take Ms. Crisostomo home. He began hitting the stall door and continued to demand that Ms. Crisostomo come with him.

Three other people at the fraternity party watched this unfold—Austin Davis, Sabrina Manzo, and Leann Griffith. None of those three people knew Mr. Bagby or either of the two women.

Mr. Davis, a white man, attempted to intervene and get Mr. Bagby to leave the bathroom. Mr. Bagby responded by punching Mr. Davis, causing him to lose consciousness and fall to the ground. Mr. Bagby continued punching Mr. Davis. Mr. Bagby was restrained and removed from the fraternity by his friend, Mr. Cooper. Ms. Roberson was able to leave the party with Ms. Crisostomo and the two went to Ms. Roberson's apartment.

Over the next 40 minutes, Mr. Bagby repeatedly called and texted Ms. Roberson, sending her insulting and threatening messages. Approximately 10 minutes later, Mr. Bagby arrived at Ms. Roberson's apartment and began loudly banging on her door. He

forced the door open and made his way into the apartment where he began yelling at Ms. Crisostomo. Ms. Roberson called 911 and Ms. Crisostomo locked herself in a bedroom.

Daniel Robinett and Elizabeth Nelson heard the yelling and tried to assist the two women. Mr. Robinett and Ms. Nelson did not know each other nor did they know Mr. Bagby or the two women. Mr. Robinett and Ms. Nelson intervened and tried to get Mr. Bagby to leave. About this time, officers from the Pullman Police Department arrived and escorted Mr. Bagby away.

The State charged Mr. Bagby with one count of residential burglary, one count of third degree malicious mischief, one count of harassment, and one count of fourth degree assault.

Prior to trial, both parties submitted their proposed jury instructions. The instructions proposed by Mr. Bagby included the standard voluntary intoxication instruction. The State's proposed instructions did not include a voluntary intoxication instruction.

At trial, the State called multiple witnesses. Many did not know Mr. Bagby or Mr. Davis. The prosecutor and defense counsel often asked these witnesses questions about what they saw and at times referred to either the nationality, race, or ethnicity of the person they were describing:

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[STATE]: . . . And the gentleman talking to the women in the stall trying to get his girlfriend out, what was his nationality?

[WITNESS]: He was African American.

Report of Proceedings (RP) at 79.

[STATE]: . . . Now the record reflects she identified the defendant, and then the gentleman that came up to talk to him, what was his nationality?

[WITNESS]: He looked white.

RP at 80.

[STATE]: . . . Did you ever pay attention to his nationality or anything else?

[WITNESS]: No.

[STATE]: Ethnicity, sorry.

[WITNESS]: He was black, I think.

RP at 94.

[STATE]: Okay. White, black, Latino?

[WITNESS]: White.

RP at 34.

[DEFENSE COUNSEL]: . . . Were they African American, or were they white?

[WITNESS]: I believe they were African American.

RP at 71.

[DEFENSE COUNSEL]: Were there any other black people in the bathroom?

[WITNESS]: I do not know that.

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RP at 73.

[STATE]: . . . All right, so, then you see these, then did you see the white guy talk with the black—with the defendant here?

[WITNESS]: Hmm hmmm. [Indicating yes.]

RP at 80.

[STATE]: . . . What was the demeanor like of the white guy at this time?

[WITNESS]: He was pretty calm, very casual, was kind of like hey bro, like you just need to leave. . . .

RP at 80-81.

[STATE]: . . . And the defendant punched the white guy that was talking to him?

[WITNESS]: Yes.

RP at 81.

[DEFENSE COUNSEL]: . . . Do you recall, you said you indicated that Mr. Bagby was there, okay, do you recall any other black guys in the bathroom at that time?

[WITNESS]: At the time, no.

RP at 86.

[DEFENSE COUNSEL]: . . . He was the only black guy in the bathroom?

[WITNESS]: That I remember, yeah.

RP at 88.

[STATE]: Did you recognize the ethnicity of that guy?

[WITNESS]: He was white.

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RP at 95.

[STATE]: Is that the person that was talking to the African American man?

[WITNESS]: Yes.

RP at 96.

[STATE]: And again, we're talking, the white guy did not push touch [or] hit the black guy he was talking to?

[WITNESS]: Yes.

RP at 97.

[STATE]: . . . What ethnicity was he?

[WITNESS]: White.

RP at 180.

Neither party objected to the other referring to nationality, race or ethnicity when asking questions.

The State began its cross-examination of Mr. Bagby by focusing on his friendship with Ms. Roberson. Mr. Bagby admitted that he and Ms. Roberson had been to each other's apartments. This led to a few questions about Mr. Bagby's dog:

[THE STATE]: She'd watch your dog for you while you went to the store?

[MR. BAGBY]: Yes.

[THE STATE]: How long have you had that dog?

[MR. BAGBY]: I got my dog in August of 2017, so that makes him about a year and a half now, his birthday is June 11th.

[THE STATE]: So, he would have been a puppy when she knew him?
[Mr. BAGBY]: Yes.
[THE STATE]: For six months?
[MR. BAGBY]: That's [why] she watched him.
[THE STATE]: Okay. All right. Still have your dog?
MR. BAGBY: Yes, I do.
[THE STATE]: Love him?
[MR. BAGBY]: Of course.
[THE STATE]: Care about him deeply?
[MR. BAGBY]: Who has a dog for over a year and don't care about him? Yes, I do.
[THE STATE]: Unfortunately, some people [don't]; but I'm glad to hear you're not one of them, so okay. . . .

RP at 261-62. Defense counsel did not object to these questions.

After both sides presented their cases, the trial court instructed the jury on the law. The instructions included the standard voluntary intoxication instruction submitted earlier by defense counsel.

The jury found Mr. Bagby guilty of all charges except malicious mischief. The trial court imposed a standard range sentence. Mr. Bagby timely appealed.

ANALYSIS

PROSECUTORIAL MISCONDUCT

Mr. Bagby contends the prosecutor committed misconduct by use of racial descriptions and stereotypes in his questioning. We disagree.

“Prosecutorial misconduct is grounds for reversal if ‘the prosecuting attorney’s conduct was both improper and prejudicial.’” *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)).

Generally, where a prosecutor’s conduct is unobjected to, a defendant waives the right to argue prosecutorial misconduct unless the conduct was so flagrant and ill intentioned that a curative instruction would not have alleviated the prejudice. *Fisher*, 165 Wn.2d at 747. Here, Mr. Bagby did not object to the prosecutor’s questions that repeatedly referred to his and Mr. Davis’s national origin, race, and ethnicity nor did Mr. Bagby object to the prosecutor’s questions about his dog.

Mr. Bagby argues that his prosecutorial misconduct claims are not waived because the prosecutor’s repetitive references reflect implicit bias that tainted his trial. We first review the roles of a prosecutor and why convictions tainted by a prosecutor’s racist arguments or stereotypes are so repugnant to our system of justice.

A prosecutor serves two important functions—enforcing the law by prosecuting law breakers and representing the state in the search for justice. *Monday*, 171 Wn.2d at 676.

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Thus, a prosecutor must function within boundaries while zealously seeking justice. A prosecutor gravely

violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions.

Id. (citations omitted).

In *Monday*, the defendant was on trial for murder and assault. *Id.* at 669. At trial, the defense called a number of witnesses, some of whom were Black. *Id.* at 676. During closing, the prosecutor argued: “[T]he only thing that can explain to you the reasons why witness after witness after witness is called to this stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don’t testify against black folk.” *Id.* at 674 (alteration in original). The jury returned guilty verdicts.

On appeal, the State conceded that the prosecutor’s remarks were misconduct but argued the defendant waived his prosecutorial misconduct claim because he failed to object. *Id.* at 677. The Supreme Court disagreed. It determined that the prosecutor’s racist remarks violated the defendant’s constitutional right to an impartial jury and reviewed the defendant’s prosecutorial misconduct claim by applying the constitutional harmless error standard of review. *Id.* at 680. The court held: “[W]hen a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant’s credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury’s

verdict.” *Id.* The court determined that the prosecutor’s misconduct was not harmless beyond a reasonable doubt and reversed the defendant’s convictions. *Id.* at 681.

Applying the rule in *Monday*, we first look to whether the prosecutor appealed to racial bias. Mr. Bagby first claims the prosecutor appealed to racial bias by repeatedly referring to race, ethnicity, skin color, and national origin when asking witnesses questions. Here, both the prosecutor and defense counsel referred to race, ethnicity, and skin color when questioning witnesses. This allowed the witnesses, who did not know Mr. Bagby or Mr. Davis, to distinguish them when testifying.

At various other times, the prosecutor used the term “nationality.” This was a misuse of the term, as both Mr. Bagby and Mr. Davis are American. After reviewing the questions and their context, we find nothing to support an inference of racial bias in the prosecutor’s misuse of the term.

Mr. Bagby also argues that the prosecutor appealed to racial stereotypes that Black men mistreat animals. Arguably, the prosecutor’s questions to Mr. Bagby were an awkward attempt to build rapport at the beginning of a cross-examination. The prosecutor accepted Mr. Bagby’s answer that he loved his dog and complimented him. We disagree with Mr. Bagby’s argument that these questions played into a racial stereotype that Black men mistreat animals.

Here, the prosecutor's questions do not reflect racism or stereotypes nor do they reflect flagrant or ill-intentioned misconduct. Mr. Bagby's prosecutorial misconduct claims were thus waived by counsel's failure to object and we do not review them.

VOLUNTARY INTOXICATION INSTRUCTION

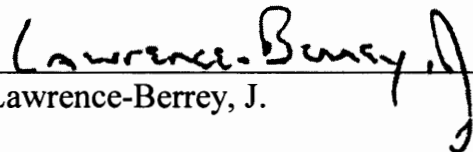
Mr. Bagby contends the trial court erred by giving the jury the standard voluntary intoxication instruction. He complains that the instruction is confusing and misled the jury. We decline to review this claim of error.

The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). This doctrine precludes a party who requested an instruction to later complain of it on appeal. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). Here, Mr. Bagby requested the standard voluntary intoxication instruction and the trial court gave it. He may not complain of it on appeal.

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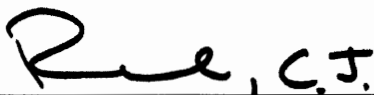
Affirmed.

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.



Lawrence-Berrey, J.

WE CONCUR:



Pennell, C.J.



Staab, J.

IN THE SUPREME COURT OF STATE OF WASHINGTON


STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 36530-1-III
)	
TYLER BAGBY,)	
)	
PETITIONER.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF MAY, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE COURT OF APPEALS – DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] TYLER BAGBY 2424 N. CHERRY STREET SPOKANE VALLEY, WA 99216	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF MAY, 2021.



X _____

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May 20, 2021 - 2:49 PM

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Appellate Court Case Title: State of Washington v. Tyler Terrell Bagby
Superior Court Case Number: 18-1-00027-5

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