81216-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

Other Cases

Washington Constitution

United States Constitution

Washington Statutes

Other Statutes

Rules

Other Authorities

A. INTRODUCTION

"[A] representative jury is critical to justice."[1] Paul Rivers, a Black man charged with assaulting his white girlfriend, was denied that justice when the court refused to draw his jury from a fair cross section of the community. Instead, the court relied on procedures that regularly produce the underrepresentation of people of color in jury pools. As a result, Mr. Rivers faced a venire with no summoned jurors who appeared to be Black. Juries cannot be representative unless they are drawn from a pool representative of the community. Mr. Rivers' venire was not.

The jury also did not understand that a person must intend to obstruct someone's airflow to convict that person of assault by suffocation and sent a note seeking clarification. The court refused Mr. Rivers' proposed responses and did not answer the jury's question. Instead, it told the jury to re-read the instructions already provided, even though those instructions prompted the jury's question. The court's failure to answer the question and to make the law manifestly apparent permitted the jury to convict Mr. Rivers without finding the State proved the necessary intent.

These and other evidentiary errors require reversal of Mr. Rivers' convictions and remand for a new trial. Finally, recent retroactive amendments to the sentencing laws entitle Mr. Rivers to resentencing.

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[1] Wash. State Supreme Ct. Minority & Just. Comm'n, *Annual Report 2017-2018* 10.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth and Fourteenth Amendments and article I, sections 21 and 22, the trial court erred in denying Mr. Rivers' motion to draw the jury pool from a fair cross section of the community.

2. The court improperly refused to answer the jury's question about the intent necessary to commit the charged assault, contrary to its duty to explain the law to the jury in a manifestly clear manner.

3. The court erroneously admitted opinion testimony from a nurse about the critical relationship between strangulation and memory loss, despite her lack of expertise, which undermined the fairness of the trial.

4. Engrossed Senate Bill 5164 entitles Mr. Rivers to resentencing because the court counted his 1987 and 1994 convictions for second degree robbery as most serious offenses.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Sixth Amendment guarantees the accused the right to trial by an impartial jury drawn from a fair cross section of the community. An accused person establishes a prima facie violation of this right by showing a distinctive group from the community is not fairly and reasonably represented in the venire in relation to the community representation and the underrepresentation is due to systematic exclusion. Did the court erroneously deny Mr. Rivers his right to an impartial jury drawn from a

fair cross section of the community where he presented evidence of a comparative disparity of Black potential jurors and identified practices that create and exacerbate this underrepresentation in jury pools?

2. The right to a trial by jury under article I, sections 21 and 22 provides protections greater than the Sixth Amendment, and Washington has been particularly concerned about the underrepresentation of people of color in jury pools. Mr. Rivers demonstrated a consistent underrepresentation of Black jurors in both the King County jury pool and the Seattle jury assignment area and demonstrated his jury pool contained no jurors who appeared to be Black. Where Mr. Rivers established an underrepresentation of a distinctive group in the county's jury pools, is he entitled to relief under the Washington Constitution?

3. The Due Process Clause requires the State to prove every element of an offense beyond a reasonable doubt. Second degree assault by suffocation requires proof the person acted "with the intent to obstruct the person's ability to breathe," and the "to convict" instruction must include intentional assault as an element. Despite this requirement, when the jury asked the court whether a person is guilty if they acted "without the intent of obstructing airflow," the court refused to give Mr. Rivers' proposed answer and instead told the jury to refer to the instructions. Did the court's refusal to answer the jury's question constitute a failure of the

court's duty to make the relevant law manifestly apparent to the jury and deny Mr. Rivers his due process right to a fair trial?

4. A court may allow a witness to testify as an expert only where the witness is properly qualified based on her knowledge, skill, experience, training, or education and where this specialized knowledge will help the jury understand the evidence. Mr. Rivers objected to the forensic nurse's testimony about the alleged relationship between trauma and memory loss because this subject was beyond her expertise and she had no training, experience, or specialized knowledge. Did the court err in overruling Mr. Rivers' objection and admitting the "expert" testimony?

5. To sentence a person as a persistent offender, the State must prove a person has been previously convicted of three most serious offenses. Effective July 25, 2021, current or past second degree robbery convictions are no longer most serious offenses, and a court must hold a resentencing hearing where it relied on any such convictions to sentence someone as a persistent offender. Where the court found Mr. Rivers was a persistent offender and imposed a sentence of life without the possibility of parole based on Mr. Rivers' 1987 and 1994 convictions for second degree robbery, is Mr. Rivers entitled to resentencing?

D. STATEMENT OF THE CASE

Paul Rivers and Summer Power had a sporadic relationship marred by drinking. RP 899, 903, 933-34, 944-45. The two dated for about six months before Mr. Rivers' arrest. RP 899. Prior to the incident, the manager of the group home where Mr. Rivers lived banned Ms. Power from the home for violating the rule prohibiting alcohol in the house. RP 942, 997-98.

On February 11, 2018, around 2 a.m., a concerned citizen called 911 to report "a female assaulting a male" on the street after he saw Ms. Power striking Mr. Rivers. RP 679, 684, 702, 993. When police responded, Ms. Power denied physically assaulting Mr. Rivers. RP 681. Mr. Rivers told police the two had an argument but would not admit Ms. Power hit him. RP 692, 696-97. Two different officers observed injuries on Mr. Rivers, but Ms. Power was uninjured. RP 680, 685, 698-99. When police asked Mr. Rivers about the numerous visible injuries on his face, he first claimed he was injured at work and then said the injuries were from sports. RP 692, 694, 697. The officer told Mr. Rivers he did not believe his claims about how he was injured, but police did not arrest Ms. Power. RP 697, 700. Instead, one officer drove Mr. Rivers home while another brought Ms. Power to the precinct so she could call for a ride to her home. RP 683, 700.

Ms. Power said she did not remember the 2 a.m. incident in which she was described as assaulting Mr. Rivers, nor did she remember the police responding. RP 901-04. She did not remember police bringing her to the precinct or how she left. RP 932-36. Although Ms. Power did not remember doing so, after leaving the precinct, she returned to Mr. Rivers' house. RP 936. Ms. Power claimed the first thing she remembered about the entire night was arguing with Mr. Rivers in his room. RP 903, 907-08. She did not remember what they were arguing about but believed she woke up shortly before the argument began. RP 903-04, 908.

When she tried to leave, Ms. Power said Mr. Rivers bit her, choked her, and covered her nose and mouth with his hand. RP 908-18. Although she did not have difficulty breathing when he choked her, she did when he covered her mouth. RP 915, 918. After that, Ms. Power ran out of the room and left the house. RP 918-19. She ran across the street and thinks she called the police but could not remember the conversation. RP 919-20. Mr. Rivers followed her and grabbed the phone. RP 920. When Ms. Power rang the doorbell of a neighboring house, someone inside called 911. RP 921, 968-69.

Ms. Power told the responding police she and Mr. Rivers had been drinking. RP 596, 714, 903. Although she remembered they were drinking, she did not know how much she had to drink or what she drank.

RP 903, 937. The responding officer described Ms. Power as "quite intoxicated" and "too hammered to drive." RP 716-17.

Ms. Power refused to get medical treatment that night. RP 573, 923. She visited the hospital three days later. RP 603. The treating staff did not observe any injuries to her neck, and Ms. Power did not report any injuries to her neck. RP 606-07, 612, 753, 757. The State charged Mr. Rivers with second degree assault and interfering with domestic violence reporting. CP 1-2.

Mr. Rivers, who is Black, moved for the court to draw the jury from a fair cross section of the community. CP 66-161; RP 171-76. Mr. Rivers presented evidence that Black potential jurors are a distinctive group in the community who are underrepresented in the King County jury venire in general and the Seattle jury pool in particular due to systematic exclusion. CP 66-191. In support of his motion, Mr. Rivers presented evidence that although 5.6 percent of the King County adult population is Black, not a single juror who appeared to be Black was part of Mr. Rivers' jury venire.[2] CP 74; RP 275-76. The court denied the

[2] King County's population of Black residents has continued to increase since the data collected in the 2015 study on which Mr. Rivers relied. CP 74; https://www.census.gov/quickfacts/fact/table/kingcountywashington; https://datausa.io/profile/geo/king-county-wa#demographics.

motion and selected Mr. Rivers' jurors from a venire without any Black potential jurors. RP 176-78, 275-76.

The State alleged Mr. Rivers assaulted Ms. Power by strangulation or suffocation. CP 1, 46. Both sides presented expert witnesses. Dr. Carl Wigren, a forensic pathologist, opined the lack of certain symptoms indicated Ms. Power had not been strangled or suffocated. RP 829-31. Conversely, Terri Stewart, a nurse, testified the photographs of Ms. Power taken after the incident and her statements in medical records and to the police were consistent with strangulation. RP 781.

The jury sent two notes asking for help understanding what strangulation and suffocation required the State to prove. CP 62-65. The court declined to answer the jury's questions both times and instead referred the jury to the court's original instructions. CP 63, 65. After twice seeking clarification and receiving none, the jury asked no more questions. Instead, it returned a verdict of guilty on both counts. CP 30, 32.

At sentencing, the court found Mr. Rivers was convicted of three prior offenses that constitute most serious offenses, two of which were second degree robbery convictions. CP 194, 200; RP 1191. The court found Mr. Rivers was a persistent offender and imposed a sentence of life without the possibility of parole on count one, concurrent with a sentence

of 364 days' confinement and 36 months' community custody on count two. CP 197; RP 1191.

E. ARGUMENT

1. The court violated Mr. Rivers' right to a jury drawn from a fair cross section of the community.

With the enactment of GR 37, Washington leads the nation in establishing rules that strive to eradicate bias in the jury selection process. But such efforts address bias in the selection process only for those potential jurors who are summoned to jury duty. GR 37 and other efforts to protect the rights of potential jurors to serve, the rights of the accused to a fair jury, and the right of the public to have confidence in the process cannot address the problem of the exclusion or disproportionate underrepresentation of potential jurors of color in the jury pool itself.

Article I, sections 21 and 22 afford greater protection of the right to a jury trial than the Sixth Amendment. This Court should hold that, under Washington's Constitution, an accused person establishes a prima facie claim of a fair cross section violation when he or she demonstrates the jury pool reflects a disproportionate underrepresentation of a distinctive group. Alternatively, Mr. Rivers also established a prima facie case under the Sixth Amendment. Because Mr. Rivers established his jury was not drawn from a fair cross section of the community, this Court should reverse his convictions and remand for a new trial.

a. People accused of crimes are constitutionally entitled to a jury drawn from a fair cross section of the community.

Article I, section 22 guarantees the right to trial "by an impartial jury of the county in which the offense is charged to have been committed." Const. art. I, § 22. Article I, section 21 dictates this right "shall remain inviolate." Const. art. I, § 21. The Sixth Amendment guarantees people accused of crimes the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amends. VI, XIV. These constitutional provisions create the right to an impartial jury with jurors drawn from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 19, 296 P.3d 872 (2013); *City of Bothell v. Barnhart*, 172 Wn.2d 223, 228, 233, 257 P.3d 648 (2011).

In addition, the legislature declared, "It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity . . . to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose." RCW 2.36.080(1).

Based on these constitutional and statutory provisions, Mr. Rivers moved in limine for "a jury drawn from a jury pool that fairly represents

the population of King County and does not exclude any distinctive group of King County residence." CP 66. He supported his motion with a report analyzing data from surveys answered by summoned jurors. The report and data demonstrate the standard summons practices in King County result in the systematic underrepresentation of Black potential jurors. CP 105-120. The concern over the underrepresentation of summoned Black jurors in the venire is far from academic. Juries with at least one Black person are less likely to convict Black defendants than juries with no Black members. Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. Econ. 1017, 1019-21, 1048-50 (2012).[3]

Although the report concluded, "[B]lack adult citizens residing in King County are under-represented among those appearing in King County courts in response to a jury summons," the court found Mr. Rivers did not establish an unreasonable underrepresentation caused by systematic exclusion. CP 113; RP 176-78. The court denied Mr. Rivers' motion, and the parties selected Mr. Rivers' jury from a venire with no potential jurors who appeared to be Black. RP 176-78, 275-76.

Because Mr. Rivers established a prima facie violation under both the state and federal constitutions, the court erred in denying the motion

[3] https://doi.org/10.1093/qje/qjs014

and forcing Mr. Rivers to proceed to jury selection with a venire not drawn from a fair cross section of King County.

b. Mr. Rivers made a prima facie showing that Black jurors are systematically excluded from King County jury panels.

"[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor*, 419 U.S. at 528. The systematic exclusion of distinctive groups in the community violates this right. *Duren v. Missouri*, 439 U.S. 357, 363-64, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). "[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538.

To prove a violation of this Sixth Amendment right, a person must show (1) a "distinctive" group is excluded from the jury pool; (2) that group's representation is "not fair and reasonable" compared to the community; and (3) "this underrepresentation is due to systematic exclusion . . . in the jury-selection process." *Duren*, 439 U.S. at 364. The court erred in finding Mr. Rivers did not meet the *Duren* test. RP 176-78.

First, Mr. Rivers established Black potential jurors qualify as a distinctive group in the community. *Yates*, 177 Wn.2d at 20; CP 71.

Second, Mr. Rivers offered statistical evidence of "a gross discrepancy" between the percentages of Black potential jurors in jury venires versus the King County community, establishing Black potential jurors were not fairly and reasonably represented in the venire. *Duren*, 439 U.S. at 366; CP 71-76. Mr. Rivers presented evidence that jury venires in Seattle and Kent consistently underrepresent the Black population in King County. CP 74, 105-120. Comparing the survey results in both courthouses to the population of King County, Black jurors are underrepresented by a 35.5 percent comparative disparity. In Seattle, where Mr. Rivers was tried, the venire underrepresents the jury-eligible Black population of King County by a very large comparative disparity of 59.1 percent. CP 74.[4]

Table 3. Absolute and Comparative Disparity between Black Representation in the Jury Pool and the Population

	Black Share of Adult Citizen Population (A)	Black Share of Jury Pool (B)	Absolute Disparity (A-B)	**Comparative Disparity ((A-B)/A)**
Seattle Jury Assignment Area Population/Seattle Survey	4.14%	2.29%	1.85%	**44.7%**
All King County Population/ Seattle Survey	5.60%	2.29%	3.31%	**59.1%**
Kent Jury Assignment Area Population/Kent Survey	8.11%	5.33%	2.79%	**34.4%**
All King County Population/ Kent Survey	5.60%	5.33%	.27%	**4.8%**
All King County Population/All Survey Respondents	5.60%	3.61%	1.98%	**35.5%**

[4] The chart summarizing the disparity between Black representation in the jury pool and the King County population appears in Mr. Rivers' motion at CP 74, in Professor Beckett's report (CP 105-20) at CP 115, and is reproduced below.

Courts have recognized the comparative disparity test is appropriate where the distinctive group is a relatively small percentage of the population. *See, e.g., United States v. Hernandez-Estrada*, 749 F.3d 1154, 1161-65 (9th Cir. 2014); *United States v. Orange*, 447 F.3d 792, 799 (10th Cir. 2006); *Mosley v. Dretke*, 370 F.3d 467, 479 n.5 (5th Cir. 2004); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992); *see also Berghuis v. Smith*, 559 U.S. 314, 329-30, 130 S. Ct. 1382, 176 L. 2d 249 (2010) (finding "no cause to take sides" on appropriate test).

Courts have also found comparative disparities similar to those reflected in King County meet the second prong of the *Duren* analysis. *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600-01 (6th Cir. 2015) (3.45% and 1.66% absolute and 42% and 27.64% comparative disparities not "fair and reasonable"); *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008) (comparative disparities of 18% and 34% sufficient), *rev'd*, 559 U.S. 314 (2010) (reversing for insufficient showing of systematic exclusion); *Azania v. State*, 778 N.E.2d 1253, 1260 (Ind. 2002) (4.1% absolute and 48.2% comparative disparities); *see also United States v. Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996) (over 30% comparative disparity met underrepresentation prong where African Americans comprised only 1.87% of jury-eligible population); *United States v. Osorio*, 801 F. Supp. 966, 978-79 (D. Conn. 1992) (exclusion of two-thirds of distinctive

population demonstrated underrepresentation even though absolute disparities were only 3.26% and 4.3%).

Third, Mr. Rivers showed the underrepresentation of Black potential jurors, "generally and on his venire, was due to their systematic exclusion in the jury-selection process." *Duren*, 439 U.S. at 366; CP 76-90. Proof of "a large discrepancy" that occurs regularly in the jury selection process "indicates that the cause of the underrepresentation [is] systematic—that is, inherent in the particular jury-selection process utilized." *Duren*, 439 U.S. at 366.

Washington courts derive jury source lists from "the list of all registered voters for any county, merged with a list of licensed drivers and identicard holders who reside in the county." RCW 2.36.010(8); RCW 2.36.054; GR 18. Mr. Rivers presented evidence the summoning practices result in an oversampling of areas with a higher concentration of potential jurors who were white and an undersampling of areas with a higher concentration of potential jurors who were people of color. CP 80-86. This demonstrates a systematic exclusion.

In addition, the choice to divide King County into two different jury districts also exacerbates the systematic exclusion of Black jurors. CP 86-90. RCW 2.36.055 authorizes the division of the jury source lists into separate assignment areas within a single county where that county has

more than one court. The legislature intended this measure to accommodate the desire for shorter travel distances for jurors "while continuing to provide proportionate jury source list representation from distinctive groups within the community." Laws of 2005, ch. 199, § 1. Nothing in the statute required King County to create more than one judicial district. But King County chose to adopt Local General Rule (LGR) 18, creating separate geographic jury assignments of Seattle and Kent based on zip codes.

In *State v. Lanciloti*, the court analyzed RCW 2.36.055 and LGR 18 and held the procedure of dividing the county into two jury districts did not violate the constitutional right to an impartial jury under either article I, section 22 or the Sixth Amendment.[5] 165 Wn.2d 661, 671-72, 201 P.3d 323 (2009). While the court upheld the constitutionality of the statute and the legislature's authority to create a procedure dividing the county into two jury districts, the court did not consider a claim the procedure resulted in a racial demographic disproportionality between the two districts. *Lanciloti*, 165 Wn.2d at 672 n.7. Thus, *Lanciloti* did not address the racist

[5] Although *Lanciloti* rejected a claim under both the state and federal constitution, the court analyzed the challenges separately. *Compare* 165 Wn.2d at 667-71 (analyzing RCW 2.36.055 under Washington Constitution), *with id.* at 671-72 (applying *Duren* to analyze claim under Sixth Amendment). In conducting the article I, section 22 analysis, the Court reviewed Washington legislative history of "effort[s] to make the pool of eligible jurors more inclusive and representative." *Id.* at 668. The separate analyses under the state and federal constitutions supports interpreting Washington's provisions as different from the federal requirement. *See* Section E.1.c *infra*.

roots of geographical locations of Black people within King County. Nor did it examine the process by which King County places certain neighborhoods in one or the other of the districts.

The choice of neighborhoods is a critical aspect of the systemic problem. King County's history of racial covenants and redlining segregated Blacks from whites into separate neighborhoods. Throughout the 20th and early 21st centuries, federal, state, and local policies gave rise to racial segregation in housing. Richard Rothstein, *The Color of Law* xii (2017). Through state- and county- backed racial restrictive covenants and federal agency redlining, Seattle and King County segregated Black people to a handful of neighborhoods. When King County drew the boundaries of the two judicial divisions, the result was to include the predominantly Black neighborhoods in the Kent assignment area. Conversely, the Seattle division included the predominantly white neighborhoods. As a result, the racial disparity and segregation that began with redlining is now replicated in judicial divisions.

Racial restrictive covenants were a ubiquitous feature of residential deeds in the first half of the twentieth century. Rothstein, *supra*, at 77; Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 Minn. L. Rev. 739, 751 (1993). In Seattle and King County, recorded deeds and plats

prohibited anyone not a member of the "White or Caucasian race" from occupying the premises. These racial covenants covered large areas of Seattle and south King County.[6] The result was to exclude Black people from most Seattle neighborhoods.

Restrictive covenants are "contracts entered into by private individuals." *Corrigan v. Buckley*, 271 U.S. 323, 331, 46 S. Ct. 521, 70 L. Ed. 969 (1926). But racial covenants are meaningless without judicial enforcement, a form of state action. *Shelley v. Kraemer*, 334 U.S. 1, 19, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). Likewise, the county bears a share of the blame for accepting such blatantly racist covenants for recording. *May v. Spokane Co.*, 16 Wn. App. 2d 505, 516-36, 481 P.3d 1098 (Fearing, J., dissent), *review granted*, 2021 WL 2734969 (2021) (discussing history of racial covenants and government's role in maintaining them); *Mayers v. Ridley*, 465 F.2d 630, 638 (D.C. Cir. 1972) (Wright, J., concurring).

Federal housing programs deepened Black people's exclusion from Seattle neighborhoods. The Federal Housing Administration ("FHA") offered mortgage insurance so families could obtain affordable home

[6] The University of Washington's Seattle Civil Rights and Labor History Project built a map using covenants recorded in the King County Recorder's Office. Racial Restrictive Covenants Map, The Seattle Civil Rights & Labor History Project, University of Washington, https://depts.washington.edu/civilr/covenants_map.htm. The covenants are available at the project's website. Racial Restrictive Covenants, https://depts.washington.edu/civilr/covenants.htm. These recorded deeds and plats are subject to judicial notice. ER 201; *In re App'n of Warren*, 10 Wn. App. 2d 596, 599, 448 P.3d 820 (2019).

loans. *Dubin*, *supra,* at 751. However, the agency cautioned its agents not to insure loans in neighborhoods with "racially inharmonious groups." Federal Housing Administration, Underwriting Manual ¶ 1412(3).d (1938).[7] The FHA went so far as to recommend "restrictive covenants" to ensure residences would be occupied only "by the race for which they are intended." *Id.* at ¶ 980(3).

The Home Owners' Loan Corporation ("HOLC"), a creation of Congress, pioneered "redlining." Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining,* 12 Seattle J. for Soc. Just. 1, 13-14 (2013); *see* Home Owners' Loan Act, Pub. L. 73-43, § 4, 48 Stat. 128, 129 (1933). Agents used maps to sort neighborhoods by lending risk. Szto, *supra*, at 13. Areas where Black people lived were colored red to indicate high risk. *Id.* at 13–14.

Seattle is no exception. An HOLC agent produced a color-coded map of Seattle in 1936, redlining much of the Central District.[8] Redlining continued for decades. A task force found banks assigned "higher risks to neighborhoods whose residents differ in race." Draft Report of the

[7] *See* https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf; *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 824 n.3 (9th Cir. 2011) (taking judicial notice of government manuals).
[8] The full map and the agent's area descriptions are available from the Seattle Public Library. https://cdm16118.contentdm.oclc.org/digital/collection/p16118coll2/id/377/rec/3

Mayor's Reinvestment Task Force 14 (1976).[9] Banks refused to lend in the Central District and Rainier Valley, both of which had a large Black population. Redlining and Disinvestment in Central Seattle: How the Banks Are Destroying Our Neighborhoods, A Report to the Community by the Central Seattle Community Council Federation 9 (1975).[10]

Banks' refusal to lend forced Black homeowners and buyers to turn to mortgage companies, which charged higher rates and foreclosed eight times as often. *Id.* at 11; Henry W. McGee, Jr., *Seattle's Central District, 1990–2006: Integration or Displacement?* 39 Urb. Law. 167, 215 (2007). The result was depressed home values and decay and the dislocation of Black people from much of Seattle. McGee, *supra*, at 209.

The displacement of Black people from Seattle is also well documented in census data. Between 1990 and 2000, the Black population of Seattle fell from 10.1 to 8.4 percent, while the Black populations of Renton and Kent rose from 6.5 to 8.5 percent and from 3.8 to 8.2 percent. McGee, *supra*, at 183–84. As of 2019, these percentages were 9.2 percent in Seattle and 12.7 and 12.4 percent in Renton and Kent.[11]

[9] This official report is available from the Seattle Municipal Archives at http://archives.seattle.gov/digital-collections/index.php/Detail/objects/239245.
[10] Available from the Seattle Municipal Archives, at http://archives.seattle.gov/digital-collections/index.php/Detail/objects/243972.
[11] 2019 data are from data.census.gov.

The disparity is more pronounced when comparing the Seattle and Kent jury assignment areas as a whole. Black people make up 8.11 percent of the Kent area and only 4.14 percent of the Seattle area. CP 115. By splitting King County into different jury pools, the superior court created jury venires with disparate percentages of Black jurors. This disparity arose from local, state, and federal action to exclude Black people from Seattle neighborhoods.

By choosing to divide King County based upon neighborhood, the county replicated the discrimination baked into redlining. This systemic choice leads to significant underrepresentation of Black jurors in jury pools in King County in general and Seattle in particular.[12] Therefore, Mr. Rivers establishes a prima facie case under the Sixth Amendment.

c. The Washington Constitution provides greater protections of the right to a jury drawn from a fair cross section of the community than the Sixth Amendment.

"[S]tate courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.3d 1199 (1980). In determining whether the Washington State Constitution "should be considered as extending broader rights to its

[12] The county's division also violates RCW 2.36.055 because the division results in disproportionate jury source list representation.

citizens than does the United States Constitution," courts may consider the following nonexclusive criteria: (1) textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the two constitutions; and (6) whether the matter is of particular state interest. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

A *Gunwall* analysis is not necessary for a court to address a state constitutional claim, but the factors may help guide the analysis. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009). This analysis demonstrates article I, sections 21 and 22 provide broader protections of the right to a jury drawn from a fair cross section of the community than the Sixth Amendment.

i. *Structural and textual differences show Washington provides greater protections of the fair cross section right.*

First, the structural differences between the state and federal constitutions always favor independent analysis—the federal constitution is a limited "grant of power from the states," while "the state constitution represents a limitation" on the State's inherent powers. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

Second, the state constitution decrees the jury trial right "shall remain inviolate." Const. art. I, § 21. This means the jury right "must not

diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). The federal constitution contains no words sanctifying the jury right to such a degree. U.S. Const. amend. VI.

The Supreme Court has already acknowledged section 22 provides different rights than the Sixth Amendment in the context of the selection of jurors from other counties. *Barnhart*, 172 Wn.2d at 232-33. *State v. Hicks* also recognized "[t]he increased protection of jury trials under the Washington Constitution." 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

These structural and textual differences support finding a broader right under the Washington Constitution. This broader reading should abandon the requirement of demonstrating an independent "systematic" reason for the disparity and instead focus on the disparity itself. This is particularly appropriate for King County, given its decision to divide the county into two judicial districts. Such a choice is not mandated, nor is the choice to use neighborhoods as the basis for the divisions.

ii. *Preexisting state law and Washington's particular concern with racially disproportionate juries show Washington is more protective of the fair cross section right.*

Actions by the legislature and our Supreme Court also show eliminating and repairing the effects of racism is a matter of special local and state concern. The legislature recognizes "[r]acism, discrimination,

and inequity have been prevalent throughout the United States of America since 1619, which has cost Black/African Americans life, liberty, and prosperity." Laws of 2021, ch. 295, § 1; *see also* Laws of 2021, ch. 197, § 1(2) (resolving to rid schools of "institutional racism"); RCW 49.60.040(21), Laws of 2020, ch. 85, § 1(27) (updating anti-discrimination law to protect Black hairstyles). Following the murder of George Floyd, our Supreme Court called on the bench and bar to do the "hard and necessary work" of ridding the justice system of racism against Black Americans. Wash. Sup. Ct., Letter to Members of the Judiciary and the Legal Community (June 4, 2020).

The Supreme Court's recent opinions have sought to redress current and historic wrongs against communities of color. The Court overruled a 1960 decision upholding racial discrimination in cemetery plots in recognition of its role "in devaluing black lives." *Garfield Cty. Transp. Auth. v. State*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020). It vacated a century-old conviction for illegal fishing, overruling a 1916 holding that the Yakama Nation had no sovereign rights. *State v. Towessnute*, --- Wn.2d ---, 486 P.3d 111, 112-13 (2021). Perhaps most significantly, it struck down the death penalty because Black defendants received death sentences many times more often than other defendants. *State v. Gregory*, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018).

Our Supreme Court freely departs from federal precedent to address race bias in juries. The landmark federal opinion governing racially motivated peremptory challenges is *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Yet *Batson* did "very little" to "prevent prosecutors from exercising race-based challenges"—indeed, Washington appellate courts did not reverse a denial of a *Batson* challenge in the decades following *Batson*. *State v. Saintcalle*, 178 Wn.2d 34, 44, 45-46, 309 P.3d 326 (2013), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). Our Supreme Court revised the *Batson* rule to prohibit all strikes based on racial bias, rather than only those based on "purposeful discrimination." *State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018).

Statutory and common law history also demonstrates the greater protections for fair and representative juries under Washington law. Chapter 2.36 RCW and GR 18 govern jury selection in Washington. Aside from the Sixth Amendment mandate, Washington has made unique efforts to expand the pool of eligible jurors and provide for inclusive participation. "The purpose of Washington's jury selection statutes is to promote efficient jury administration and the opportunity for widespread participation by citizens." *State v. Marsh*, 106 Wn. App. 801, 807, 24 P.3d 1127 (2001) (citing Laws of 1988, ch. 188, § 1); 2 Wash. Prac., Rules

Prac., GR 18 at 3 (March 2020 update) (explaining history of GR 18, adopted in response to RCW 2.36.057).

These state and local concerns weigh heavily in support of finding the right to a fair cross section more protective under the Washington constitution. One of the fundamental rights of state citizenship is jury service. *Rocha v. King Co.*, 195 Wn.2d 412, 423, 460 P.3d 624 (2020); *see also* Const. art. I, §§ 21, 22; RCW 2.36.080(1); *Rocha v. King Cty.*, 7 Wn. App. 2d 647, 661-63, 435 P.3d 325 (2019) (Bjorgen, J. dissenting), *affirmed*, 195 Wn.2d 412 (2020). Supporting this right are Washington's declared policies. RCW 2.36.080(1)-(2). The legislature established all qualified citizens have the opportunity and obligation to serve as jurors when summoned. RCW 2.36.080(1). It is also the policy of this state "to maximize the availability of residents of the state for jury service" and "to minimize the burden on the prospective jurors, their families, and employers resulting from jury service." RCW 2.36.080(2).

A jury drawn from a fair cross section of the community implicates the rights not only of the person on trial, but also prospective jurors to serve and the community to have confidence in the process "free from any taint of bias." *State v. Beliz*, 104 Wn. App. 206, 213, 15 P.3d 683 (2001). The exclusion of a "large and identifiable segment of the community" from the jury process removes from the jury process "qualities of human

nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). The judiciary's exercise of authority is clearly warranted to protect the rights of the accused, the public, and potential jurors to a jury drawn from a fair cross section of the community. S*ee Jefferson*, 192 Wn.2d at 242 (judiciary has inherent authority to adopt procedures to further administration of justice).

In sum, the jury guarantee in article I, sections 21 and 22 tolerate less racial disparity in jury pools than the Sixth Amendment.

iii. *The complete absence of any Black potential jurors from Mr. Rivers' venire demonstrates Mr. Rivers' jury was not drawn from a fair cross section of the community.*

The underrepresentation or exclusion of diverse jurors from the jury pool harms accused persons, the excluded potential jurors, and the community at large. Just as "[s]election procedures that purposefully exclude black persons from juries undermines public confidence in the fairness of our system of justice," so too does the underrepresentation, purposeful or not, of Black persons from the jury pool undermine public confidence in the fairness of our system. *Batson*, 476 U.S. at 87. Entrenched underrepresentation suffices to violate the right to a fair, representative jury under the Washington Constitution, even without proof of the systemic exclusion mandated by the Sixth Amendment.

Rules may effectively combat racism in the jury selection process only if they recognize "racism is often unintentional, institutional, or unconscious." *Saintcalle*, 178 Wn.2d at 36. Similarly, to combat racism in the jury summons process effectively, rules must recognize racial disproportionality in jury pools may be unintentional, institutional, and unconscious.

Focusing on the effect of a rule, as opposed to the intent of the actor, better serves to address problematic practices. For example, because "implicit, institutional, and unconscious biases . . . have resulted in the unfair exclusion of potential jurors," GR 37 prohibits challenges where "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" without consideration of "purposeful discrimination." GR 37. Washington's rule regarding the right to a jury from a fair cross section should also focus on racial disproportionality, even absent proof of a systematic cause.

"Racial bias is a common and pervasive evil that causes systemic harm to the administration of justice." *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019). One way courts may attempt to minimize racial bias and advance the administration of justice is to ensure jury pools are

representative of the community. Wash. State Supreme Ct. Minority & Just. Comm'n, *Annual Report 2017-2018* 10-19.[13]

Two recent studies verify Washington jury pools underrepresent potential jurors from communities of color compared to their representation in the jury eligible population. *Annual Report*, *supra*, at 17 (citing King County Superior Court Judge Steve Rosen's 2016 study[14] and Katherine Beckett, The Under-Representation of Blacks in The King County Jury Pool, Univ. of Wash. (May 11, 2016)[15]). "[M]arginalized groups," in particular Black, Indigenous, and other women of color, experience "significant" and "tangible" hurdles to participate in the jury process. Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 Criminology, Criminal Justice, Law & Society 1, 5, 18 (2021).[16]

Here, Mr. Rivers demonstrated the complete absence of any Black jurors from his venire. RP 275-76. In addition, he demonstrated Black jurors are underrepresented by a 35.5 percent comparative disparity compared to their population in the King County community. CP 74.

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[13] https://www.courts.wa.gov/committee/pdf/AnnualReportMJC2017-2018.pdf
[14] Judge Rosen's results are available at https://www.courts.wa.gov/subsite/mjc/docs/2017/Juror%20Data%20Issues%20Affecting%20Diversity%20and%20WA%20Jury%20Demographic%20Survey%20Result%20-%20Judge%20Rosen%20and%20SU.pdf.
[15] Professor Beckett's report appears at CP 105-20.
[16] https://ccjls.scholasticahq.com/article/21973-answering-the-call-an-analysis-of-jury-pool-representation-in-washington-state

Finally, in Seattle, where Mr. Rivers was tried, Mr. Rivers demonstrated the venire underrepresents the jury-eligible Black population of King County by a large comparative disparity of 59.1 percent. CP 74. Despite these demonstrated disparities, courts continue to reject challenges under the *Duren* test, just as Mr. Rivers' trial court did.[17] RP 176-78. David M. Coriell, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury,* 100 Cornell L. Rev. 463, 465 (2015). This further demonstrates the need for Washington to recognize a different standard.

In 2017, Washington Supreme Court's Minority and Justice Commission created a Jury Diversity Task Force. Jury Diversity Task Force, *Interim Report 2019* 1.[18] The Task Force studied factors that contribute to the problem of "minority underrepresentation in juries" and recommended adopting measures targeting those factors. *Interim Report*, *supra*, at 2. The recommendations of the Task Force – and the Task Force's very creation – demonstrate Washington State's unique

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[17] *See, e.g., Yates*, 177 Wn.2d at 21–23; *Lanciloti*, 165 Wn.2d at 671–72; *State v. Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987); *State v. Abbott*, 79734-4-I, 2020 WL 6561541, at *2 (Wash. Ct. App. Nov. 9, 2020) (unpub.) (cited as nonbinding authority under GR 14.1); *Johnson v. Seattle Pub. Utils.*, 76065-3-I, 2018 WL 2203321, at *3 (Wash. Ct. App. May 14, 2018) (unpub.) (same); *State v. Lopez-Ramirez*, No. 75546-3-I, 2018 WL 827172, at *5–6 (Wash. Ct. App. Feb. 12, 2018) (unpub.) (same); *State v. Lazcano*, No. 32228-9-III, 2017 WL 1030735, at *14–15 (Wash. Ct. App. Mar. 16, 2017) (unpub.) (same); *City of Camas v. Gruntkovskiy*, No. 44184-5-I, 2014 WL 2547690, at *3 (Wash. Ct. App. June 3, 2014) (unpub.) (same).

[18]https://www.courts.wa.gov/subsite/mjc/docs/Jury%20Diversity%20Task%20Force%20Interim%20Report.pdf

recognition of the problem and its desire to address the issue. The Task Force endorsed as high priority recommendations:

> (1) expand the source list from which potential jurors are drawn and update it more frequently;
> (2) increase juror compensation and ensuring job security;
> (3) explore the feasibility of childcare;
> (4) change the language of the statute and qualification questionnaires to explain convicted felons are eligible to serve in many cases;[19]
> (5) streamline the summons process to a single step, provide reminders for service, and research non-paper methods of summons; and
> (6) collect juror demographic data.

Interim Report, *supra*, at 3-7.

The Task Force's recommendations seek to address some of the major factors that result in the underrepresentation of people of color on juries in Washington, including the ways in which the financial hardships of jury service may disproportionately affect communities of color. *Id.* at 2-3. The Commission continued its study of the problem with a Jury Diversity & Community Engagement Pilot Project that explores the barriers to responding to jury summons.[20]

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[19] After the *Interim Report*, the legislature amended RCW 2.36.010 to define "civil rights restored" as "a person's right to vote has been provisionally or permanently restored prior to reporting for jury service." Laws of 2019, ch. 41, § 1. Effective January 1, 2022, "automatically" replaces "provisionally or permanently." Laws of 2021, ch. 10, § 6.
[20] Commission Meeting Packet, Jan. 15, 2021, at 29-41, available at https://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20210115_p.pdf

To combat underrepresentation and ensure proportionality in comparison to the community, this Court should find under the Washington Constitution, unlike the Sixth Amendment, evidence of underrepresentation of a distinctive group in the jury pool sufficiently establishes a fair cross section claim. Because Mr. Rivers established such an underrepresentation, the Court should find he established a prima facie violation of the right to have a jury drawn from a fair cross section under the Washington Constitution.

d. The violation of Mr. Rivers' rights requires reversal.

Where a jury selection process deprives a person of their Sixth and Fourteenth Amendment and article I, section 21 and 22 rights to an impartial jury trial, reversal is required. *Taylor*, 419 U.S. at 525. Because Mr. Rivers made a prima facie showing of an infringement on his right to a jury drawn from a fair cross section of the community, the court should have required the prosecution to show "attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368. In the absence of such a showing, Mr. Rivers may have his convictions reversed and the matter remanded for a new trial following the selection of a jury drawn from a fair cross section of the King County community.

2. The court failed in its duty to make assault's intent requirement manifestly apparent to the jury when it refused to answer the jury's question, denying Mr. Rivers his right to a fair trial and to have the prosecution prove every element of the offense.

a. Due process requires jury instructions to be clear and to state the law correctly.

Due process demands that jury instructions, read as a whole, must correctly state the law and "must make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Where the instructions fail to inform the jury of the correct law or mislead the jury, the instructions fail to satisfy the constitutional demands of a fair trial. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

The court must make the relevant legal instructions "manifestly apparent." *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated on other grounds by O'Hara*, 167 Wn.2d 91. Where the jury may read the instructions to permit an erroneous interpretation of the law, the instructions are fatally flawed. *Id.* at 902.

Jury instructions that relieve the prosecution of its burden to prove each element of the offense beyond a reasonable doubt to a unanimous jury violate due process. U.S. Const. amend. XIV; Const. art. I, § 3. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where jury instructions fail to convey the necessary legal standard to the

jury accurately and completely, an error of constitutional magnitude occurs, and prejudice is presumed. *LeFaber*, 128 Wn.2d at 900; *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). A defendant may raise this challenge for the first time on appeal. RAP 2.5(a)(3); *State v. Stein*, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001).

b. To prove an assault by suffocation, the government must prove a person *intends* to obstruct the breathing of another person.

An assault is an unlawful touching. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). An assault is intentional. *State v. Sullivan*, 196 Wn. App. 314, 324, 382 P.3d 736 (2016). To prove an assault, the State must prove "intent to do the physical act constituting assault." *State v. Keend*, 140 Wn. App. 858, 867, 166 P.3d 1268 (2007).

Consistent with that requirement, the court instructed the jury that to convict Mr. Rivers of second degree assault, the prosecution must prove beyond a reasonable doubt, "That on or about February 11, 2018, the defendant *intentionally* assaulted Summer Power by (a) strangulation or (b) suffocation." CP 46 (Instruction No. 10) (emphasis added). The "to convict" instruction did not explain what suffocation means.

The court also told the jury an assault "is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person." CP 47 (Instruction No. 11). This definition did not mention suffocation.

Finally, the court instructed the jury, "'Suffocation' means to block or impair a person's intake of air at the nose and mouth, whether by smothering or other means, with the intent to obstruct the person's ability to breathe." CP 50 (Instruction No. 14). Thus, the instructions purportedly informed the jury it could not find Mr. Rivers guilty of assault by suffocation unless it found the prosecution proved beyond a reasonable doubt he acted with the intent to obstruct Ms. Power's ability to breathe.

c. <u>The jury's note demonstrates it did not understand that suffocation requires the intent to obstruct the ability to breathe.</u>

Despite the instructions requiring the jury to find a person acted with the intent to obstruct the ability to breathe to satisfy the suffocation element, the jury was confused by this requirement. The jury's confusion is reflected in its first note.

> Regarding instruction 14:[21] If someone accidentally killed someone by impairing their ability to breathe without the intent of obstructing airflow, would the defendant be found guilty of suffocation.

CP 62.

Mr. Rivers recognized the jury's question showed the jurors did not understand the intent requirement of suffocation. RP 1123-26. He suggested two responses. First, he asked the court answer the question directly and respond, no, "a person who blocks or impairs a person's

[21] Instruction No. 14 defines suffocation. CP 50.

intake . . . of air at the nose and mouth, whether by smothering or means without the intent to obstruct the person's ability to breathe does not commit an act of suffocation." RP 1123. Alternatively, he asked the court to instruct the jury, "suffocation requires the intent to obstruct a person's ability to breathe." RP 1123. Mr. Rivers' proposed responses were a correct statement of the law and made manifestly apparent suffocation requires the intent to obstruct the person's ability to breathe. RP 1122-25.

The court rejected both proposed responses. Regarding the first suggestion, the court said it could not answer a hypothetical question. RP 1123-26. It also refused Mr. River's alternative proposal not to answer the hypothetical but simply to tell the jury suffocation requires the intent to obstruct a person's ability to breathe. Instead, the court responded, "The court cannot answer a hypothetical question. Please refer to the jury instructions." CP 63.

d. <u>The court violated its duty to make the law manifestly apparent when the jury's note demonstrated it did not understand assault by suffocation requires intent but the court refused to answer the jury's question.</u>

When a court is "[c]onfronted with an inquiry that show[s] the jury misunderstood the applicable law, the court [is] obligated to correct the jury's misunderstanding." *State v. Sanjurjo-Bloom*, 16 Wn. App. 2d 120, 128, 479 P.3d 1195 (2021). It is "incumbent upon the trial court to issue a corrective instruction" when a deliberating jury indicates an erroneous

understanding of the law that applies in a case. *State v. Campbell*, 163 Wn. App. 394, 402, 260 P.3d 235 (2011).[22]

Similarly, where a deliberating jury seeks clarification on the law, "Trial judges should make every effort to respond fully and fairly to questions from deliberating jurors. Judges should not merely refer them to the instructions without further comment." Wash. State Jury Comm'n Recommendation 38; *see also* Comment to 11A Wash. Prac.: Pattern Jury Instructions: Crim. 151.00 (4th ed. 2016). Recommendation 38 encourages judges to respond in a way "to ensure juror comprehension."

Here, the jurors' question clearly demonstrated the jury did not understand the court's instructions on assault by suffocation. Mr. Rivers suggested a direct answer that would inform the jury suffocation requires the intent to obstruct a person's ability to breathe. RP 1123-26. The proposed response was a correct statement of the law, consistent with the instructions, and would clarify the jury's confusion and make the intent requirement manifestly apparent. But the court refused to give Mr. Rivers' proposed answers and said "[t]he Court cannot answer" the jury's question, indicating an active refusal to engage with the jurors. RP 1122. Instead, the court did exactly what the Jury Commission recommends

[22] The court reversed *Campbell* on reconsideration because the underlying law at issue changed. 172 Wn. App. 1009 (2012) (unpub.). The court's discussion of the duty to make jury instructions manifestly clear remains good law.

against: It simply told the jury to re-read the same instructions the jury already informed the court it did not understand. The jury asked the court for guidance but the court refused to provide it.

Courts may reverse convictions and remand for new trials where the court fails to answer a jury's questions or refuses to clarify instructions the jurors do not understand. In *Sanjurjo-Bloom*, the jury's note demonstrated the jury misunderstood a police witness' testimony about prior contact with Mr. Sanjurjo-Bloom and was improperly considering it as propensity evidence. 16 Wn. App. 2d at 127-28. The defense requested a limiting instruction, but the court instead "compounded its error" by simply telling the jury to base its decision on the evidence already admitted. *Id.* at 128. This Court held the trial court's failure to give a limiting instruction when the jury's note indicated the jurors misapprehended the law was error. *Id.* Because the jury's question "went to the heart of th[e] issue" and because the evidence was sufficient but not overwhelming, this Court reversed the conviction. *Id.* at 129.

Similarly, in *State v. Backemeyer*, the court considered a self-defense instruction. 5 Wn. App. 2d 841, 428 P.3d 366 (2018). The jury asked two questions regarding whether the defendant's potentially illegal act of possessing marijuana in a bar negated his right to be in the bar and

his right to use self-defense. *Id.* at 846-47. The defendant agreed to the court's decision to respond, "Please read your instructions." *Id.* at 847.

This Court reversed and remanded for a new trial, holding the defendant "was denied effective assistance of counsel when the jury's questions to the court made it manifest that the jury did not understand the law of self-defense and counsels' agreed response did not provide the jury any clarity." *Id.* at 848. The court stated that had counsel requested a tailored instruction rather than the "generic response," it saw "no reason why, if asked, the trial court would have refused such a request." *Id.* at 849. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Id.* at 849-50 (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946)).

Finally, in *Campbell*, the jury requested clarification on the special verdict form. Over objection, the court merely referred the jury to the existing instructions. 163 Wn. App. at 398-99. This Court held "the trial court abused its discretion in determining not to further instruct the jury." *Id.* at 397. Where a jury's question suggests a misunderstanding of the jury instructions, the court needs to offer further instructions. *Id.* at 402.

e. <u>This Court should reverse Mr. Rivers' convictions and remand for a new trial.</u>

Here, the jury asked the court if suffocation requires the intent to obstruct the person's ability to breathe. The correct answer was yes. Like

Sanjurjo-Bloom, *Backemeyer*, and *Campbell*, the court refused to give the jury any further information and instead referred it back to the original instructions.

The jury's note demonstrates its confusion over the intent requirement. The court's refusal to answer the question and tell the jurors the State had to prove intent violated Mr. Rivers' right to a fair trial and to have the State prove every element of the offense beyond a reasonable doubt. The jury's question shows jurors were confused about whether they needed to find he acted with the intent to obstruct Ms. Power's breathing. The court failed in its duty to make the law manifestly clear to the jury.

This error prejudiced Mr. Rivers because, like *Sanjurjo-Bloom*, the jury's question went to the heart of Mr. Rivers' defense. Central to Mr. Rivers' defense was that, whatever contact he had with Ms. Power, he did not intentionally suffocate or strangle her. The defense introduced an expert who agreed Ms. Power had injuries but not injuries consistent with an intentional suffocation or strangulation. RP 883. He argued the same in closing. RP 1092-95, 1106-07. The issues of what contact Mr. Rivers had with Ms. Power and what he intended by that contact were crucial to his defense. A reasonable probability exists that, had the court given Mr. Rivers' proposed answers to the jury note and made the legal requirement of intent to suffocate manifestly apparent to the jury, the jury would not

have convicted Mr. Rivers of assault. Therefore, this Court should reverse his conviction. *Sanjurjo-Bloom*, 16 Wn. App. 2d at 129-30.

This error requires reversal of not only the assault conviction but also the interfering with domestic violence reporting conviction. The "to convict" instruction for the latter offense told the jury it must find Mr. Rivers committed the crime of second degree assault to convict him of the interference offense. CP 53; *see also* CP 1-2. Therefore, the error resulting in the assault conviction affects both charges. This Court should reverse Mr. Rivers' convictions and remand for a new trial.

3. The court improperly admitted the nurse's "expert" testimony on the alleged correlation between strangulation and memory loss when she was not qualified on that subject.

Over Mr. Rivers' objection, the trial court permitted the prosecution to offer testimony about the alleged relationship between strangulation and memory problems through a nurse. This sexual assault nurse examiner had no specialized education, training, or experience in neurological or memory issues, and her testimony far exceeded the bounds of her area of expertise. The nurse's improperly admitted opinion testimony permitted the jury to forgive the complainant's lack of memory of the evening by concluding she must have been strangled. The prejudicial effect of this testimony undermines the fairness of the trial. This Court should reverse and remand for a new trial.

a. Expert witnesses may testify only about subject matters within their area of expertise.

Evidence Rule 702 permits a witness "qualified as an expert by knowledge, skill, experience, training, or education" to testify to matters within that person's "scientific, technical, or other specialized knowledge" if such testimony will help the jury to understand the evidence or to determine a fact in issue. When expert testimony is permitted, the court must limit the expert to subject matters "concerning [the expert's] fields of expertise," where the subject matter is "not within the understanding of the average person," and where "those opinions will assist the trier of fact." *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

The party calling the witness must present a sufficient foundation to establish the witness qualifies as an expert. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999). Where a witness does not possess the skill, knowledge, experience, or education necessary to form the opinion he or she offers, the testimony is improper. *Id.*

b. Ms. Stewart was not qualified to offer opinion testimony about the alleged relationship between strangulation and memory loss because it was beyond her area of expertise.

The State called Teri Stewart, a sexual assault exam nurse, as an expert witness on strangulation. The prosecution selected her even though no one alleged Mr. Rivers committed any sexual assault and her testimony did not involve any discussion of sexual assault. Ms. Stewart did not

witness the incident and she never examined Ms. Stewart. She was not a lay witness, and her testimony was admissible only to the extent the State properly qualified her as an expert. ER 602; ER 701; ER 702.

Mr. Rivers sought to limit the nurse's testimony to her expertise on relevant matters. CP 16-17; RP 83-91, 722-39. Specifically, he moved to exclude her from testifying about an alleged correlation between strangulation and memory loss. The court allowed voir dire of Ms. Stewart before deciding Mr. Rivers' motion to limit her testimony. RP 722-39.

Ms. Stewart explained she trained and worked as a sexual assault nurse. RP 728-29. As part of her work, she also received training on treating strangulation. RP 729. Ms. Stewart's anecdotal observations and a training video produced by an organization founded by prosecuting attorneys formed the basis of her knowledge about the alleged relationship between strangulation and memory loss. RP 731, 733, 737, 778, 790-91. Ms. Stewart admitted she had no training as a psychologist, neurobiologist, or neuroscientist. RP 732. She was not involved in research or treatment of people with memory issues. RP 732. She had not participated in any studies addressing the causes of memory loss. RP 736.

No scientific, technical or specialized knowledge supported Ms. Stewart's opinion that strangulation may cause memory loss or recovery disruption and the alleged correlation between strangulation and memory

problems. Despite her lack of qualifications or medical support, the court permitted Ms. Stewart to testify people who are strangled have difficulty remembering the event. RP 83-91, 738. Ms. Stewart testified:

> As part of our sexual assault training and part of the work that we do, we learn and [are] trained around the trauma response and what happens to people who experience trauma, which would include both sexual assault, strangulation, domestic violence. And the fact that in a traumatic event, people have difficulty recording the memories. So they may particularly have gaps in their memory, there may be things that they don't remember, and they definitely -- certainly in my experience with sexual assault patients, really struggle to give a history that is a nice clean linear history that goes from A to Z. It's sort of a disrupted history, they'll remember some things. They may be able to remember some things with one of the people that they encounter, and then different things with other people that they encounter.

RP 778-79.

Training or practical experience may qualify someone as an expert, and formal education is not required. *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). However, a witness' testimony is still constrained to the area of his or her expertise, whatever the basis of that expertise. "An expert may not testify about information outside his area of expertise." *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012).

Testimony from "an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise." *Farr-Lenzini*, 93 Wn. App. at 461. Instead, an expert witness' testimony is

bound by the "particular scope of practice and expertise" of the witness. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 243, 393 P.3d 776 (2017). Where a party lays an insufficient foundation to qualify a witness as an expert on a particular subject, ER 702 prohibits its admission. *Farr-Lenzini*, 93 Wn. App. at 461.

Ms. Stewart lacked the knowledge to support her claim there was a correlation between strangulation and memory loss. Her testimony on this subject was beyond her area of expertise and therefore not helpful to the jury's understanding of the evidence. As Mr. Rivers said in his objection, Ms. Stewart is a sexual assault nurse trained in and working to treating patients. She is not a researcher, psychologist, neurologist, or "someone with expertise in formation or retention of memories." RP 86, 732. She did not treat or study memory issues. RP 732. Because Ms. Stewart did not have sufficient expertise to testify a scientifically supported correlation exists between strangulation and memory loss, the court erred in admitting her testimony on the subject over Mr. Rivers' objection. ER 702.

Ms. Stewart did not study the alleged correlation between strangulation and memory loss. She did not receive any training about this alleged correlation. She did not research the alleged correlation, when it occurred, why it would occur, or how often it would occur. She did not receive any education about this alleged correlation. She had no

"knowledge, skill, experience, training, or education" supporting her testimony on this topic. ER 702.

The portion of Ms. Stewart's testimony explaining the alleged correlation between strangulation and memory loss was unqualified, and the court erred in admitting it. "The expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside of the witness's area of expertise." *Simmons v. City of Othello*, 199 Wn. App. 384, 392, 399 P.3d 546 (2017).

c. The improper admission of Ms. Stewart's unqualified "expert" testimony prejudiced Mr. Rivers and requires reversal.

Evidentiary error requires reversal if, within reasonable probabilities, had the error not occurred the outcome of the trial would have been materially affected. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). Where an expert exceeds the scope of his or her expertise or offers testimony as an expert that lacks scientific basis, the admission of such evidence may be reversible error, particularly where the expert has "impressive credentials." *State v. Steward*, 34 Wn. App. 221, 223, 660 P.2d 278 (1983).

Here, it is reasonably probable the improper "expert" testimony affected the outcome of the trial. The evidence was far from overwhelming. Ms. Power was the only witness to the alleged assault. She remembered little from the evening, other than the few minutes during which she claimed Mr. Rivers assaulted her. The parties disputed the reason for her memory loss. Mr. Rivers argued she was intoxicated or selectively remembered only part of the evening. Ms. Stewart's unqualified opinion testimony offered the jury a different reason for Ms. Power's memory loss: that Mr. Rivers must have strangled her.

The competing witnesses disagreed on whether the physical evidence and medical records supported Ms. Power's claim she was strangled and suffocated. Without Ms. Stewart's unqualified testimony claiming a correlation between strangulation and memory loss, the jury would have been far more likely to accept Mr. Rivers' theory that Ms. Power forgot what happened because she intoxicated or because she was lying to cover her own assault on Mr. Rivers.

Had the court excluded Ms. Stewart's unqualified testimony about the relationship between strangulation and memory loss, the jury could have concluded Ms. Power forgot much about the night because she was intoxicated or because she was lying. Instead, the admission of Ms. Stewart's unqualified testimony bolstered the prosecution's key claim that

Ms. Power's inability to remember the strangulation proved that she was strangled. The erroneous admission of Ms. Stewart's unqualified expert testimony on strangulation and memory loss went to the heart of the defense and prejudiced Mr. Rivers. This Court should reverse his convictions and remand for a new trial.

4. Engrossed Senate Bill 5164 entitles Mr. Rivers to resentencing.

The court imposed a sentence of life without the possibility of parole on Mr. Rivers based on two prior second degree robbery convictions. A change in the law prohibiting this sentence for second degree robberies mandates a new sentencing hearing.

A "persistent offender" is a person before the court for sentencing following conviction for a most serious offense who also has two qualifying prior convictions for most serious offenses. RCW 9.94A.030(37)(a). Where a court finds the conviction is a person's third or more most serious offense, the presumptive sentencing guidelines do not apply, and a court instead sentences a person to a term of life without the possibility of parole. RCW 9.94A.570. The legislature defines what constitutes a "most serious offense." RCW 9.94A.030(32).

The court found Mr. Rivers was a persistent offender and imposed a sentence of life without the possibility of parole. CP 194, 197, 200; RP 1191. The court based this sentence on its finding the second degree

assault conviction was Mr. Rivers' fourth most serious offense. CP 194. It also relied on two prior convictions for second degree robbery. CP 200. Because second degree robbery offenses may not be included in a persistent offender calculation, Mr. Rivers is entitled to resentencing.

In 2019, the legislature amended the definition of "most serious offense" to remove robbery in the second degree from the list of qualifying offenses. Laws of 2019, ch. 187, §1; *compare* former RCW 9.94A.030(33)(o) (2019), *with* RCW 9.94A.030(32). In 2021, the legislature passed Engrossed Senate Bill 5164. This legislation states courts may not rely on any second degree robbery convictions to impose a persistent offender sentence, regardless of the date of conviction or the date of sentence. Laws of 2021, ch. 141, § 1 (effective July 25, 2021), enacted as RCW 9.94A.345(1). Engrossed Senate Bill 5164 provides where a court has already used "a current or past conviction for robbery in the second degree . . . as a basis for the finding that the [person] was a persistent offender," the court must hold a resentencing hearing. *Id.*

Here, the court relied on two second degree robbery convictions to sentence Mr. Rivers as a persistent offender. CP 200. Under RCW 9.94A.345(1), Mr. Rivers is entitled to a new sentencing hearing at which the court may not rely on his second degree robbery convictions to impose a persistent offender sentence. *State v. Jenks*, --- Wn.2d ---, 487 P.3d 482,

486 n.2 (2021) (recognizing Senate Bill 5164 "mandates resentencing for those sentenced to life without parole as persistent offenders for those whose strike offenses include second degree robbery").

Mr. Rivers' prior robbery convictions are not most serious offenses, and the court may not rely on them to impose a persistent offender sentence. Mr. Rivers is entitled to a resentencing hearing. This Court should remand for that purpose.

F. CONCLUSION

This Court should reverse Mr. Rivers' convictions and remand for a new trial. If the Court affirms the convictions, Mr. Rivers is entitled to a new sentencing hearing.

DATED this 19th day of July, 2021.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. PAUL RIVERS, Appellant.	)))))))))	NO. 81216-5-I

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