FILED
Court of Appeals
Division I
State of Washington
1/3/2022 4:38 PM

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Mr. Rivers' venire did not represent the King County community. It was drawn from a district in which government actors deliberately excluded Black residents. Mr. Rivers established a violation of his right to a jury drawn from a fair cross section of the community under both the federal constitution and the more protective Washington constitution.

In addition, the court failed in its duty to make assault's intent requirement manifestly apparent to the jury when it refused to answer the jurors' question about whether suffocation must be intentional. This violated Mr. Rivers' right to a fair trial and to have the prosecution prove every element of the offense. Finally, the improper admission of an unqualified witness' "expert" testimony that strangulation can cause memory loss was erroneous and prejudiced Mr. Rivers.

Mr. Rivers is entitled to a new trial, free from evidentiary and instructional error, at which his jury is drawn from a fair cross section of the King County community.

B. ARGUMENT

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

"Having representative and diverse juries promotes fairness in the jury system." Rhaelynn Givens & Emilie Maddison, *Jury Diversity: A Survey of Washington State Trial Courts Analysis of Court Demographic Data Collection and Juror Accommodation*, Wash. State Sup. Ct. Gender & Justice Comm'n 1 (June 10, 2021) (citing Shari Seidman Diamond et al., A*chieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Empirical Legal Stud. 425 (2009)).[1]

Representative and diverse juries are essential to achieving fairness in jury trials, but the current systems fail to achieve this representation. "[R]esearch points to underrepresentation in jury pools of Black, Indigenous, and

[1] The Givens report appears in Wash. State Sup. Ct. Gender & Justice Comm'n, *Final Report 2021: How Gender and Race Affect Justice Now* and is available at https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf at 1157-83.

People of Color (BIPOC)" in Washington. *Id.* at 1 (citing Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 Criminology, Criminal Justice, Law & Society (2021)); *id.* at 13-14.

Mr. Rivers established his jury pool suffered from such an underrepresentation because it was not drawn from a fair cross section of the community under either the Sixth Amendment standard or article I, sections 21 and 22. Brief of Appellant at 9-32; CP 74, 105-120. The prosecution does not dispute that Black jurors are underrepresented in King County jury venires or that they were underrepresented in Mr. Rivers' venire. Instead, the State dismisses the complete absence of any Black juror in the venire as merely evidence the system "has not achieved optimal representation," lauds the county's "significant efforts to promote jury diversity," and urges the Court to reject Mr. Rivers' proposed standard under the

Washington Constitution as “unnecessary.” Brief of Respondent at 6-7.

The State’s claimed “enthusiastic[] support[]” of “efforts to increase minority representation on King County juries” falls short of that required to actually achieve diverse representation and satisfy the fair cross section guarantee. Brief of Respondent at 11. This Court should interpret the state constitution independently and hold article I, sections 21 and 22 provide broader protection from racial disparity in the jury pool than the Sixth Amendment. Alternatively, the Court should find Mr. Rivers satisfied the standard under the Sixth Amendment. Under either test, this Court should reverse his convictions and remand for a new trial.

a. Mr. Rivers demonstrated an underrepresentation of Black jurors in his venire and identified government actions that contributed to the disparity and created systematic exclusions.

Mr. Rivers demonstrated the derivation of jury source lists, summoning practices, and King County district divisions all work to create jury pools that systematically underrepresent Black potential jurors. Brief of Appellant at 12-21. The deliberate methods that result in systematic underrepresentation of Black potential jurors in King County jury venires violate constitutional mandates. The local rule that divides the county into separate jury districts further aggravates the disparity.

The State argues Black potential jurors are not underrepresented in the venire and disparages Mr. Rivers' comparative disparity assessment. Brief of Respondent at 16-25. For the reasons in Mr. Rivers' opening brief, the comparative disparity assessment is appropriate for addressing relatively small populations, such as the Black population in King County, and the percentages reflect disparities other

courts have found sufficient to demonstrate a representation that is not fair and reasonable. Brief of Appellant at 13-15.

The prosecution misses the mark by pointing to the legislative and judicial intent behind current methods of jury source lists and the creation of separate jury assignment areas. Brief of Respondent at 26-28, 33-35. The judicial and legislative intent behind the methods and district division is irrelevant. Mr. Rivers need not show the systematic exclusion was intentional or deliberate. *State v. Hilliard*, 89 Wn.2d 430, 441, 573 P.2d 22 (1977). Black jurors are underrepresented in King County as a whole, and the disparity is greater in the Seattle versus Kent courthouse. *See* CP 74, 105-120 (report from Katherine Beckett, The Under-Representation of Blacks in the King County Jury Pool, Univ. of Wash. 10 (2016)).

The Seattle-Kent district divide exploits the government-sponsored actions that contributed to excluding Black residents from areas of Seattle. Twice as many jury-eligible Black people per capita live in the Kent jury assignment area as in the Seattle

area. CP 115. Black defendants are much more likely to face a jury with no Black members in Seattle than Kent. Mr. Rivers faced such a venire and jury here.

The race disparity between the Seattle and Kent jury districts causes real, practical harm to Black defendants. Because Mr. Rivers was less likely to have any Black jurors in the Seattle jury pool than in Kent, he was also more likely to be convicted. Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. Econ. 1017, 1017 (2012).[2] Diverse juries are also more careful in their deliberations. "Evidence shows diverse juries consider more facts, make fewer errors, and discuss racism more often than all-white juries." Givens, *supra,* at 2 (citing *Collins, supra,* and Samuel R. Summers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597 (2006)).

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[2] Available at https://doi.org/10.1093/qje/qjs014

Mr. Rivers demonstrates both racial disproportionality and systematic exclusion of Black jurors from King County jury panels. He established a prima facie violation under the Sixth Amendment. However, as explained in the opening brief and below, the underrepresentation alone should be sufficient to establish a violation under the more protective guarantees of article I, sections 21 and 22.

b. The Washington Constitution provides greater protection of the right to a jury drawn from a fair cross section of the community and tolerates less racial disparity than the Sixth Amendment.

While the Sixth Amendment guarantees all criminal defendants a jury representative of the community, the *Duren*[3] standard rarely delivers on that promise. Instead, the generous "leeway" this standard allows trial courts in deciding how to source jury venires makes establishing a violation all but

[3] *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) (setting out three-factor test to establish prima facie violation under Sixth Amendment).

impossible. *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

The Sixth Amendment's fair cross section case law imposes unreasonably high hurdles that make the right all but illusory.[4] *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1166 n.8 (9th Cir. 2014); David M. Coriell, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 Cornell L. Rev. 463, 465 (2015). The second and third elements, in particular, raise a "high hurdle" imposing significant "logistical and financial difficulties." *Hernandez-Estrada*, 749 F.3d at 1166 n.8. This Court should recognize the *Duren* test as insufficient to satisfy Washington's concerns and should interpret the state constitution to provide broader

[4] In addition to the nine Washington cases Mr. Rivers cites in the opening brief that have all rejected challenges under the *Duren* test, Brief of Appellant at 30 n.17, this Court recently rejected another challenge under *Duren* in *State v. Severns*, No. 81668-3-I, 2021 WL 5768988, at *1-3 (Wash. Ct. App. Dec. 6, 2021) (unpub.).

protections of the right to an impartial jury drawn from a fair cross section of the community.

The unique text of the state provisions, structural differences in the state and federal constitutions, and Washington courts' interest in fighting race bias in the criminal legal system call for reading article I, sections 21 and 22 to provide more protection against race disparity in jury pools than the Sixth Amendment. Brief of Appellant at 21-32; *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). The Supreme Court held article I, section 21's unique provision that the jury right is "inviolate" shows the state constitution affords more protection than the Sixth Amendment. *City of Pasco v. Mace*, 98 Wn.2d 87, 96-97, 99, 653 P.2d 618 (1982). The state provision allows for variation in jury administration, but only to the extent it "does not affect enjoyment of the right of trial by jury." *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Article I, section 21 limits state power to "take away the right of trial by jury." *State v. Ellis*, 22 Wash. 129, 131, 60 P. 136

(1900), *overruled on other grounds, State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952).

Dividing King County into jury areas rendered racially disparate by state action is not a trivial "modification of the details of administration." *Furth*, 5 Wn.2d at 19. It strikes at the heart of the jury right itself. Section 21's unique text calls for broader protection from race disparity in jury pools.

Despite the prosecution's claimed enthusiastic support of efforts to increase minority representation on King County juries, it argues the *Gunwall* factors do not favor a more expansive right under Washington's constitution. Brief of Respondent at 42-48. The cases the prosecution cites do not defeat Mr. Rivers' argument. Brief of Respondent at 44-46. For example, *State v. Munzanreder*, 199 Wn. App. 162, 173-74, 398 P.3d 1160 (2017), mentions article I, section 21, but does not analyze its text. *State v. Rivera*, 108 Wn. App. 645, 648 n.2, 32 P.3d 292 (2001), never even mentions section 21. *State v. Brown*, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), found

section 21 "of little relevance" to the question of death-qualified juries, but this issue is irrelevant since the Court struck down the death penalty as racially biased. *State v. Gregory*, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018).

Washington's Supreme Court departs from federal standards when those standards do not adequately protect the right to a fair jury free from race bias. *See State v. Jefferson*, 192 Wn.2d 225, 242-43, 249, 429 P.3d 467 (2018) (departing from federal precedent to provide more protection from race-biased peremptory strikes). *Jefferson* and other cases demonstrate Washington courts' interest in eliminating race bias from Washington juries is "unique to the State of Washington." *State v. Foster*, 135 Wn.2d 441, 465, 957 P.2d 712 (1998); *see* Brief of Appellant at 23-31 (discussing cases).

This Court should follow the Supreme Court's lead in *Jefferson* and hold the jury guarantee of article I, sections 21 and 22 offers more protection than the Sixth Amendment. Specifically, entrenched underrepresentation should violate the

right to a fair, representative jury even without proof of the systematic exclusion required under the Sixth Amendment. To combat underrepresentation, the focus should be on the disproportionality, even absent proof of a systematic cause. In the alternative, where courts decline to follow article I, section 22's mandate to draw a jury from the entire county but instead establish jury districts that coincide with racial disparities in neighborhoods, the disparities are systematic.

c. Mr. Rivers is entitled to a new trial with a jury drawn from a fair cross section of the community.

Mr. Rivers was convicted by a jury drawn from a pool that disproportionately underrepresented Black potential jurors. This Court should hold Washington's Constitution affords greater protections of the right to a jury drawn from a fair cross section of the community and find a violation based on the disproportionate underrepresentation. Alternatively, Mr. Rivers demonstrated a systematic exclusion sufficient to establish a violation under the Sixth Amendment. This Court should

reverse Mr. Rivers' convictions and remand for a new trial by a jury drawn from a fair cross section of the 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.

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). The trial court was confronted with such an inquiry here when the jury asked whether assault by suffocation requires proof a person acted with intent. CP 62. The court failed in its obligation when it did not correct the jury's misunderstanding, refused to answer the jury's question, and instead told the jury to reread the instructions. CP 63; RP 1122-27.

That the jury posed its question within a hypothetical factual scenario changes neither the answer the court should have given to the jury's question nor the court's obligation to

ensure it makes the law manifestly apparent to the jurors. Mr. Rivers' proposed response that "suffocation requires the intent to obstruct a person's ability to breathe" was an accurate statement of the law that answered the jury's question without engaging in the hypothetical. RP 1123. The court erred in refusing to give Mr. Rivers' proposed response or to otherwise answer the question and in instead referring the jury to the original instructions. CP 63.

The prosecution agrees assault is an intentional act and agrees assault by suffocation requires a person act with the intent to obstruct someone's ability to breathe. Brief of Respondent at 50-52. However, it claims the court had no obligation to answer the jury's note because the initial jury instructions were accurate. Brief of Respondent at 51-54. The State is wrong.

Technically correct jury instructions may still fall short of what due process requires if the law is not manifestly apparent to the jury. *See State v. LeFaber*, 128 Wn.2d 896, 900,

913 P.2d 369 (1996); *State v. Backemeyer*, 5 Wn. App. 2d 841, 428 P.3d 366 (2018). Mr. Rivers proposed a response that answered the jury's question and accurately informed it that suffocation requires proof of intent. RP 1123-26. While framed within a hypothetical factual scenario, the legal question was whether suffocation requires intent. The answer is yes, suffocation requires proof of intent. RCW 9A.04.110(27) (suffocation requires "intent to obstruct the person's ability to breathe"); *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (assault requires intent).

Due process requires jury instructions to be clear and to state the law correctly. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *LeFaber*, 128 Wn.2d at 900. Contrary to the prosecution's argument, a court's obligation to make the relevant legal instructions manifestly apparent to the average juror is not limited to self-defense instructions. Brief of Respondent at 56. Regardless of the substantive charge or any proffered defense, the court must make the relevant legal

instructions manifestly apparent. *State v. Weaver*, 198 Wn.2d 459, 465-66, 496 P.3d 1183 (2021) (applying *O'Hara* and *LeFaber* to jury instructions in criminal trespass case not involving any self-defense claim). The instructions here failed to do so because the jury did not understand suffocation required the actor intended to impede the person's breathing.

The prosecution does not rebut the presumption of prejudice from failing to answer the jurors' question and to provide manifestly clear jury instructions. Mr. Rivers relies on his arguments in the opening brief regarding prejudice. Brief of Appellant at 40-41. This Court should construe the prosecution's absence of a response on this point as a concession. *In re Det. of Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

Because the jury's question "went to the heart of th[e] issue" and because the evidence was not overwhelming, this

Court should reverse the convictions and remand for a new trial.[5] *Sanjurjo-Bloom*, 16 Wn. App. 2d at 129.

3. The trial court's improper admission of the nurse's unqualified "expert" testimony prejudiced Mr. Rivers and deprived him of a fair trial, requiring reversal.

ER 702 permits a witness to testify to matters within the witness' "scientific, technical, or other specialized knowledge" if such testimony will help the trier of fact and if the witness is "qualified as an expert by knowledge, skill, experience, training, or education." The trial court permitted Terry Stewart, a sexual assault nurse who did not examine the complainant, to testify as an expert on strangulation. The court overruled Mr. Rivers' objection asking the court to limit her testimony to the areas in which she had expertise by her knowledge, skills, experience, training, or education. Instead, the court admitted her "expert" testimony even on the alleged correlation between strangulation and memory loss, a topic as to which she was

[5] The error requires reversal of both the assault and interfering with domestic violence reporting convictions. Brief of Appellant at 41.

unqualified. Because Ms. Stewart had no expertise in this area, the admission of her testimony on this topic exceeded the scope of her expertise and was improper.

In justifying this improper "expert" testimony, the prosecution largely focuses on Ms. Stewart's qualifications as a sexual assault nurse and argues no error occurred because the court properly qualified her to testify as an expert on some subject areas about strangulation. Brief of Respondent at 64-67. That Ms. Stewart was properly qualified to testify on *some* portions of her testimony matters not. A witness qualified as an expert in one area does not have carte blanche to testify as an expert in other areas. Instead, a witness' qualifications limit the permissible scope of their expert testimony. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 243, 393 P.3d 776 (2017). Ms. Stewart exceeded the scope of her expertise when she opined on the effects of strangulation on memory.

Ms. Stewart testified traumatic events such as strangulation can cause people to experience "gaps in their

memory," may make them "struggle to give a … linear history," and can create inconsistent memories where they remember "some things" with some people and then remember "different things with other people." RP 778-79. This testimony was improper under the Rules of Evidence.

Ms. Stewart admitted she did not study the alleged correlation between strangulation and memory loss, she did not research the possible correlation or effects of strangulation, and she did not treat people for memory issues. RP 732. Her education, training, and professional experience all focused on treating sexual assault victims, which included sometimes treating strangulation. RP 728-29. She acknowledged this did *not* include treating memory issues or researching the cause. RP 732, 736. Because Ms. Stewart did not have "knowledge, skill, experience, training, or education" that gave her "scientific, technical, or other specialized knowledge" on the alleged correlation between strangulation and memory loss, she was not qualified to testify as an expert on this topic. ER 702.

The prosecution misunderstands Mr. Rivers' argument and attempts to rebut it by explaining clinical experience is as qualifying as academic experience. Brief of Respondent at 63-67. While true, that point is irrelevant. Ms. Stewart was not unqualified because her expertise came from clinical rather than academic experience. Ms. Stewart was unqualified because she had no expertise in any form from any source.

Contrary to the prosecution's attempt to reframe Mr. Rivers' issue, the question is not whether the court abused its discretion "in admitting expert testimony on general symptoms of strangulation." Brief of Respondent at 1. A court does not have the discretion to admit expert opinion testimony from a witness who does not possess an expertise in the subject. Mr. Rivers assigned error to the court's admission of "expert" opinion testimony absent proof the nurse possessed an expertise in the subject. Brief of Appellant at 2, 4. Thus, as Mr. Rivers explained in his issue statement and argument, the question is whether the court erred in permitting an unqualified witness to

testify as an expert where she had no training, experience, or specialized knowledge in the subject. Brief of Appellant at 41-48.

It is irrelevant that a properly qualified expert perhaps could have offered the testimony. Ms. Stewart lacked the qualifications to offer "expert" opinion testimony on the alleged correlation between strangulation and memory loss because she did not have training, experience, or specialized knowledge in that subject. This Court should reject the State's attempt to distract from the trial court's error by arguing a properly qualified witness could have offered the same testimony.

This Court should reverse Mr. Rivers' conviction because a reasonable probability exists that the improper admission of the nurse's unqualified testimony as an "expert" materially affected the outcome of the trial. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Ms. Stewart's unqualified "expert" testimony allowed the prosecution to explain away every claimed memory loss and every

contradiction in the complainant's testimony as indicative of strangulation, bolstering the complainant's testimony and selective memory of the events.

Introducing this unqualified "expert" testimony wrongly permitted the jury to conclude what the prosecution argued at trial and continues to argue in the response brief – that the complainant accurately recalled "critical details of the incident" and that those select details were reliable, despite the massive gaps in her memory elsewhere. Brief of Respondent at 69. The inadmissible expert testimony permitted the jury to attribute this memory loss to strangulation.

The evidence that the complainant was also "quite intoxicated" and "hammered" and the suggestion that her intoxication could have been the source of her memory problems does not erase the prejudicial effect of the unqualified "expert" testimony. RP 716-17. The evidence of strangulation was not overwhelming, and Ms. Stewart's improper testimony

corroborated the complainant's account while explaining away her incomplete memory.

The erroneous testimony prejudiced Mr. Rivers and undermined the fairness of his trial. This Court should reverse his convictions and remand for a new trial.

C. CONCLUSION

Mr. Rivers is entitled to a new trial, free from evidentiary and instructional error, at which his jury is drawn from a fair cross section of the community.

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 3,797 words.

DATED this 3rd day of January, 2022.

Respectfully submitted,

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

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

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