NO. 81216-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT

THE HONORABLE SUZANNE PARISIEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Other Jurisdictions:

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. Has Rivers failed to show that Black underrepresentation on King County venires is severe enough to render the entire system for summoning jurors constitutionally defective?

2. Has Rivers failed to demonstrate that Black citizens are systematically excluded from King County venires?

3. Does article I, section 22, of the Washington constitution provide the same right to an impartial jury as the Sixth Amendment?

4. During deliberations, the jury asked a hypothetical question concerning the *mens rea* of "suffocation." The court's instructions contained a correct answer. Did the court act within its discretion by referring the jury to their instructions?

5. Did the trial court act within its discretion by admitting a nurse's expert testimony on general symptoms of strangulation?

5. Even if, *arguendo*, evidentiary error occurred, was it harmless?

6. The State concedes that Rivers is entitled to re-sentencing.

B. STATEMENT OF THE CASE

Summer Power met Paul Rivers in 2017 and they began an on-and-off dating relationship. RP 899. The couple never cohabitated; Power stayed with a friend in Fremont while Rivers lived in West Seattle. RP 900.

At 2 a.m. on February 11, 2018, police responded to a 911 call about Rivers and Power fighting in the street. RP 679, 992-93. The reporting party saw Power slap Rivers on his arm. RP 992-94.

Arriving officers found Rivers and Power still at the scene, but no longer fighting. RP 679-80. Power did not have any visible injuries. RP 680-81. Rivers had a bloody lip, but claimed it was from an unrelated accident. RP 692-97. Rivers and Power both admitted that a verbal argument had occurred

but denied any physical contact. RP 681-82, 696-97. The officers decided to separate the two by having one drive Rivers home while another took Power to the precinct to call a taxi. RP 683.

Power made her way to Rivers' apartment later that morning, and they soon began arguing again. RP 907-08. Power at some point told Rivers she was leaving. RP 908. Rivers shoved Power onto the bed and got on top of her. RP 909. After warning her not to make any noise, Rivers lifted Power's shirt and bit her breast. RP 909. Power suffered intense pain and thought "part of my breast was going to be gone." RP 910.

When Rivers stopped biting her, a sobbing Power stood up and tried to retrieve her coat. RP 910-11. When Rivers grabbed her arm, Power shoved him away and said she just wanted to gather her things and leave. RP 910-11.

Rivers quickly subdued Power and forced her back onto the bed. RP 914. He then grabbed Power's throat and strangled her with one hand while using the other to hold her down. RP

914. While Power could still breathe, Rivers' grip was so tight she worried he might crush her trachea. RP 915-16. Power was scared for her life and "didn't know if [Rivers] was going to kill me." RP 915.

After about a minute, Rivers moved his hand to cover Power's nose and mouth, which made it difficult for her to breathe. RP 916-18. Rivers suffocated Power for another minute before he removed his hands and stood up. RP 918. Power immediately began screaming "to get…somebody's attention" and fled the apartment. RP 918-19.

Power ran across the street and tried to use her cell phone to call for help. RP 919-20. Rivers followed Power outside and grabbed the phone away from her. RP 919. Power then ran to a nearby house and started banging on the front door and yelling "for somebody to…call the police." RP 921. A nearby resident called 911 after hearing Power's screams and seeing Rivers "standing over her…trying to grab something…" RP 966-67. The loud commotion prompted Rivers to walk away. RP 922.

Responding officers were flagged down by Power, who appeared "very flustered, she was crying, she seemed out of breath…" RP 568. Power stated that Rivers had "choked" her and bitten her breast. RP 569, 591. Officers and medics both observed that Power's neck was "visibly red" and saw "a bite mark [on] her nipple." RP 572-75, 958-60.

Rivers was arrested nearby and agreed to speak with police. RP 617. He acknowledged Power was his girlfriend but denied assaulting her. RP 621. Rivers admitted he took Power's phone to "mess[] with her," but claimed he was only being playful. RP 622, 625-26.

Power went to the emergency room a few days later to be seen for her injuries. RP 602. She stated that she had been bitten, choked, and smothered by her boyfriend. RP 748-49. Medical staff observed bruising on Power's shoulder and arms, scratches on her face, and a bite mark on her breast. RP 749.

The State charged Rivers with second-degree assault and interfering with domestic violence reporting. CP 1. A jury

convicted Rivers as charged. RP 1132. The court imposed a life sentence under the Persistent Offender Accountability Act (POAA).[1] CP 197. Rivers appeals.

C. ARGUMENT

1. RIVERS' PETIT JURY WAS DRAWN FROM A CONSTITUTIONALLY PERMISSIBLE VENIRE.

Rivers argues his conviction should be reversed because Black jurors are underrepresented on King County venires. While Rivers did present evidence that King County has not achieved optimal representation, its jury system is operating within constitutionally permissible variances.

Furthermore, Rivers has not established that any underrepresentation stems from systematic exclusion. On the contrary, King County has made significant efforts to promote jury diversity. Rivers' theory that Black participation is depressed by external economic factors and past racist housing

[1] RCW 9.94A.570.

policies does not warrant relief in this case because King County's jury system is race-neutral.

Finally, this Court should reject Rivers' argument to replace the U.S. Supreme Court's Duren test with a Washington specific standard. Rivers' proposal – to eliminate any need to show systemic exclusion – is both practically unworkable and constitutionally unnecessary.

a. Additional Facts.

Rivers moved *in limine* for a jury "that fairly represents the population of King County and does not exclude any distinctive group…" CP 66. He proffered data showing that Black citizens are underrepresented on local venires, and further asserted that King County's jury summons process constitutes "systematic exclusion." CP 66-98; RP 175.

Rivers asked that any venire be summarily dismissed if it "does not reflect the composition of the community," and sought to delay his trial indefinitely "until the court is able to provide a jury pool that fairly…reflects the community." CP 97.

The trial court denied Rivers' motion, noting that "merely showing under-representation…is insufficient." RP 177. However, the court's ruling was ultimately based on Rivers' failure to demonstrate systematic exclusion:

> …there is certainly no evidence that there is any kind of systematic exclusion of any diverse groups in our jury selection process. The courts have designed systematic exclusion as requiring blatantly different treatment of under-represented groups, and I think there is simply no evidence of that.
>
> I think it's clear…that the Washington legislature, and King County specifically, has done a lot to expand the minority participation in jury selection. And with this record that we have before us, there is no evidence of any systematic exclusion.

RP 178.

Defense counsel later opined that Rivers' venire contained "no jurors of African American background, [although] it's always hard to tell with appearances." RP 276. While there is little other information in the record about the venire's racial composition, Juror 7 stated they were biracial, and Juror 10 implied they were non-white. RP 374-75; see RP

382 ("…I tend to be the only person who looks like me in the room").

b. King County's System For Summoning Jurors Is Constitutionally Sound.

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants "a jury that is representative of the community." State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977). This means that juries must be sourced from a reasonably fair cross-section of the population. Id. at 440-42. However, representation need not be perfectly proportional, and defendants are not entitled to a "jury…of any particular composition." Id. Because many variables can affect the demographic makeup of any individual panel, trial courts are given "much leeway" in providing a fair cross-section. Taylor v. Louisiana, 419 U.S. 522, 537-38, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

The assembly of King County's master jury list is controlled by RCW Ch. 2.36, *et seq*. Potential jurors are identified from records of registered voters and driver's license or identicard holders. RCW 2.36.054(2). This approach is considered "the best source for compiling a fair cross-section of the community." Hilliard, 89 Wn.2d at 440-41.

The party challenging the master list has the burden of demonstrating:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).[2] All three Duren factors are required to establish a *prima facie* constitutional violation. Id. 364. If a *prima facie* violation is shown, the government must then demonstrate that

[2] The State does not dispute the first factor, as African-Americans are obviously a distinct group in the community.

providing a fair cross-section is "incompatible with a significant state interest." Id. at 368.

The trial court's rulings on challenges to the venire process are reviewed for abuse of discretion. State v. Clark, 167 Wn. App. 667, 674, 274 P.3d 1058 (2012), aff'd, 178 Wn.2d 19, 308 P.3d 590 (2013).

i. Rivers has not shown that the current rate of Black participation is unfair and unreasonable.

The State enthusiastically supports efforts to increase minority representation on King County juries, which unquestionably benefits the entire criminal justice system. But the issue presented here is much narrower: whether the degree of Black participation that currently exists rendered the entire jury selection process constitutionally defective. The answer to that question is no.

(A) Absolute versus comparative disparity.

Most authorities assess disproportionality in terms of absolute disparity, comparative disparity, or a combination of both.[3]

Absolute disparity "is determined by subtracting the percentage of a [distinct group] in the jury pool…from the percentage of [that group] in the local, jury eligible population." Berghuis v. Smith, 559 U.S. 314, 323, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010). For example, if Group X makes up 10 percent of the population, but is only 5 percent of the jury pool, there is an absolute disparity of 5 percent.

"Comparative disparity"[4] "expresses the absolute disparity as a percentage of the…group's overall representation

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[3] There are other less common methods as well, but these were neither discussed in detail below nor relied on by Rivers' proffered study. CP 79 ("Professor Beckett…has focused on the comparative disparity test").

[4] The terms "comparative disparity" and "relative disparity" are often used interchangeably and refer to the same methodology.

in the community." Colleen P. Fitzharris, Can We Calculate Fairness and Reasonableness? Determining What Satisfies the Fair Cross-Section Requirement of the Sixth Amendment, 112 Mich. L. Rev. 489, 501 (2013). Comparative disparity is calculated by dividing the absolute disparity "by the percentage of [a distinct group] in the jury eligible population." Id. The resulting quotient purports to state the percentage by which that group is underrepresented. Id. Continuing the above example, Group X would have a comparative disparity of 50 percent, meaning half of the jurors from Group X are missing from the average venire. Id.

Both methods can be misleading, especially when the group at issue is a relatively small percentage of the total population. Berghuis, 559 U.S. at 329. But comparative disparity has been especially criticized because it "exaggerates the effect of any deviation." Thomas v. Borg, 159 F.3d 1147, 1150 (9th Cir. 1998); People v. Smith, 463 Mich. 199, 204, 615 N.W.2d 1 (2000).

Hilliard, the last Washington Supreme Court case to address this topic in detail, relied solely on absolute disparity. 89 Wn.2d at 442-43. However, neither Hilliard nor any other Washington case has expressly precluded the consideration of other methodologies.

Likewise, the U.S. Supreme Court found "no cause to take sides…on the method or methods by which underrepresentation is appropriately measured." Berghuis, 559 U.S. at 329. While the Ninth Circuit recently abandoned its exclusive reliance on absolute disparity, it simultaneously "decline[d] to confine district courts to a particular analytical method…" United States v. Hernandez-Estrada, 749 F.3d 1154, 1164-65 (9th Cir. 2014).

(B) Professor Katherine Beckett's report.

Rivers relies heavily on a report by Professor Katherine Beckett that found Black jurors were underrepresented in King County venires. CP 106. Her report used demographic data

gathered from summonsed jurors on 20 consecutive court days in early 2015. CP 69, 111-12. The underlying data has never been updated, and the record is therefore silent as to whether Black participation has changed since 2015. CP 106.

The response rate for Professor Beckett's survey was also relatively low . CP 113. Over 30 percent of Seattle jurors declined to participate in the survey, and it is impossible to know how much this might have affected the resulting demographic data. CP 113.

Professor Beckett found that Black citizens comprised 2.3 percent of jurors at the Seattle courthouse, but 4.1 percent of the jury-eligible population in the Seattle Jury Assignment Area. CP 113. In the Kent Jury Assignment Area, Blacks were 5.4 percent of the venires, but 8.1 percent of the jury-eligible population. CP 113. Across the entire county, 3.6 percent of venirepersons were Black, compared to 5.6 percent of the total population. CP 113-14.

(C) Rivers has not shown a constitutionally significant disparity.

The State does not dispute that African-Americans are likely underrepresented to some degree in King County. But underrepresentation does not automatically create a constitutional defect. In re Pers. Restraint of Yates, 177 Wn.2d 1, 20, 296 P.3d 872 (2013).

The defendant in Hilliard, for example, demonstrated that Black citizens were 4 percent of the county's population, but only 1.3 percent of the jury pool. 89 Wn.2d at 442-43. Despite resulting in an absolute disparity of 2.7 percent - similar to Professor Beckett's findings for King County - Hilliard concluded there was "not a constitutionally significant disparity." 89 Wn.2d at 442; CP 115.

In Yates, the supreme court emphasized that underrepresentation alone does not satisfy the second Duren factor:

> [M]ere "underrepresentation," in the sense that a group's representation is not at least equal to its proportion of the community, is not sufficient to show that the representation is not "fair and reasonable," Duren, 439 U.S. at 364, 99 S. Ct. 664. For example, in United States v. Orange, 447 F.3d 792, 796 (10th Cir.2006), a defendant presented evidence that in a given year, four groups were underrepresented in jury venires: African–Americans comprised 8.63 percent of the eligible population but only 5.06 percent of the venires, Native Americans comprised 4.27 percent of the eligible population but only 2.64 percent of venires, Asians comprised 1.64 percent of the eligible population but only 0.80 percent of venires, and Latinos comprised 2.74 percent of the eligible population but only 1.49 percent of the venires. The court held that this failed to establish the second Duren factor (i.e., that the representation of the groups was not fair and reasonable in relation to the population). Id. at 798–99. Although there is no single test to determine whether underrepresentation runs afoul of the fair and reasonable requirement, Berghuis v. Smith, 559 U.S. 314, 130 S. Ct. 1382, 1393–94, 176 L.Ed.2d 249 (2010), Orange illustrates that a mere allegation of "underrepresentation" is insufficient to establish the second Duren factor.

177 Wn.2d at 20-21.

The absolute disparities found by Professor Beckett plainly do not establish unreasonable representation under Duren. Hilliard, 89 Wn.2d at 442; United States v. Davis, 854 F.3d 1276, 1295 (11th Cir. 2017) (absolute disparities less than

10 percent cannot establish second Duren factor); Ramseur v. Beyer, 983 F.2d 1215, 1232 (3d Cir. 1992) (14.1 percent absolute disparity was "of borderline significance"). Presumably anticipating this result, Rivers asks this Court to find a violation based on comparative disparity. Brief of App. at 14.

No published Washington opinion has discussed comparative disparity in detail.[5] However, this Court's recent unpublished decision in State v. Lopez-Ramirez, 2 Wn. App. 2d 1032, 2018 WL 827172 (2018 Unpublished Opinion), is helpful. Notably, Rivers seems to have relied on the same report considered in Lopez-Ramirez.[6]

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[5] The data from Hilliard would have produced a comparative disparity of approximately 68 percent, much higher than that found by Professor Beckett here. CP 115. However, the Hilliard opinion did not address comparative disparity.

[6] While Lopez-Ramirez did not specify the report by name, it was described as a "20-day study by a University of Washington professor" that found the "comparative disparity for Black residents in…Seattle…is 35.5 percent." Lopez-Ramirez, 2018 WL 827172 at *4-5. The report provided by Rivers was also authored by a University of Washington

Like Rivers, Lopez-Ramirez urged this Court to adopt comparative disparity based largely on Professor Beckett's conclusions. This Court rejected Lopez-Ramirez's argument:

> Lopez-Ramirez suggests the comparative disparity method would be more appropriate here, but courts have recognized this method overstates the underrepresentation when used with groups that are a small percentage of the community's population. It is undisputed that the [B]lack population in King County is relatively small and, according to the data presented by Lopez-Ramirez, the comparative disparity for black residents in the Seattle jury assignments is 35.5. percent. In dealing with similar population sizes, courts have rejected constitutional claims involving disparities equal to or higher than that offered by Lopez-Ramirez. Lopez-Ramirez does not establish that the underrepresentation is constitutionally unfair or unreasonable in relation to the size of the black population in the community.

Id. at *5 (citing United States v. Weaver, 267 F.3d 231, 243 (3d Cir. 2001)).

Many other jurisdictions have also recognized that comparative disparity exaggerates the underrepresentation of

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professor, used survey data from "twenty consecutive dates," and found a comparative disparity of 35.5 percent for King County. CP 112, 122.

relatively small groups. Hernandez-Estrada, 749 F.3d at 1163 ("…the comparative disparity test…can overstate the underrepresentation of a group that has a small population percentage…"); Orange, 447 F.3d at 798 ("the smaller the group is, the more the comparative disparity figures distorts the proportional representation…"); People v. Bryant, 491 Mich. 575, 605, 822 N.W.2d 124 (2012) ("the comparative-disparity test is particularly defective when the claim involves a small population…"); State v. Gibbs, 254 Conn. 578, 591, 758 A.2d 327 (2000) (Hispanic population of 7% was "small enough…to render…comparative disparity unreliable").

As the Third Circuit explained:

> The comparative disparity method has drawn a great deal of criticism in situations like the one before us, that is, where a small population is subjected to scrutiny. See Smith v. Yeager, 465 F.2d 272, 279 n. 18 (3d Cir.1972) ("[T]he comparative [disparity] approach reaches absurd results ... where the [African–American] population at the time was 4.4% of the total, and the [African–American] jury participation ranged as low as 2% of the jury list"). Courts considering this analysis have said that while "these numbers may be more indicative of a Sixth Amendment violation, they ... are distorted by the small

> population of the different minority groups." Shinault, 147 F.3d at 1273. It has been argued that "a small variation in the figures used to calculate comparative disparity can produce a significant difference in the result, and .... there is reason to doubt the accuracy of the figures...." United States v. Pion, 25 F.3d 18, 23 (1st Cir.1994); see also United States v. Sanchez–Lopez, 879 F.2d 541, 548 (9th Cir.1989) ("A comparative analysis is disfavored because it exaggerates the effect of any deviation."); United States v. Hafen, 726 F.2d 21, 24 (1st Cir.1984) ("[T]he comparative disparity calculation might be a useful supplement to the absolute disparity calculation, ... [but] the smaller the group is, the more the comparative disparity figure distorts the proportional representation."); United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir.1974) (stating that comparative disparity calculation "is ordinarily inappropriate" where a very small proportion of the population is involved and opining that it "distorts reality"). **When comparative disparity has been used, it has been emphasized that the significance of the figure is directly proportional to the size of the group relative to the general population, and thus is most useful when dealing with a group that comprises a large percentage of the population.**

Weaver, 267 F.3d at 242 (emphasis added).

The weight of academic opinion also cautions against relying on comparative disparity to assess small populations. Colleen P. Fitzharris, *supra*, at 502 ("The comparative-disparity test is a particularly poor indicator of underrepresentation

because it tends to exaggerate underrepresentation when the distinctive group's representation in the community is low"); Peter A. Detre, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel, 103 Yale L.J. 1913, 1928 (1994) (comparative disparity "cannot be a good [test] to apply generally."); John P. Bueker, Jury Source Lists: Does Supplementation Really Work?, 82 Cornell L. Rev. 390, 403 (1997) ("…comparative disparity must only be used carefully and in the appropriate circumstances."); Stephen E. Reil, Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under Duren v. Missouri, 2007 B.Y.U.L. Rev. 201, 251 (2007) ("absent any finding of active discrimination or defect in the jury selection system, even comparative disparity approaching 100% may be unsubstantial.").

To support his position, Rivers identifies other jurisdictions that have found the second Duren factor satisfied based on comparative disparities similar to those calculated by

Professor Beckett. Brief of App. at 14. While a handful of such examples admittedly exist, some of these counties had Black populations proportionally double that of King County, presumably leading to more credible conclusions.[7]

More importantly, the majority of courts to consider the issue have declined to find a Duren violation based on similar degrees of comparative disparity, particularly when considering a small subset of the population. Howell v. Superintendent Rockview SCI, 939 F.3d 260, 268 (3d Cir. 2019) (comparative disparity of 54.49% was not unreasonable); United States v. Chanthadara, 230 F.3d 1237, 1257 (10th Cir. 2000) (no error from comparative disparity of 58.39%); United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) (comparative disparity of almost 60% acceptable where the numbers "are

[7] Garcia-Dorantes v. Warren, 801 F.3d 584, 587 (6th Cir. 2015) (Kent County, Michigan) and Azania v. State, 778 N.E.2d 1253 (Ind. 2002) (Allen County, Indiana). United States Census Data, https://www.census.gov/quickfacts/kentcountymichigan, https://www.census.gov/quickfacts/fact/table/allencountyindiana/POP010210 (last accessed 9/14/2021).

distorted by the small population of the…groups"); Smith v. Yeager, 465 F.2d 272, 278-79 (3d Cir. 1972), n.18 (3rd Cir. 1972) (noting it would be "absurd" to employ comparative analysis where Blacks made up only 4.4% of the population); United States v. Smith, 457 F. Supp. 3d 734, 731 (D. Alaska 2020) (comparative disparity of 57.27% was acceptable for small group); Bryant, 491 Mich. at 607 (49.45% disparity was not unconstitutional); United States v. Taylor, 663 F. Supp. 2d 1157, 1166 (D.N.M. 2009) (40.2% comparative disparity was insufficient to make out *prima facie* claim); State v. Dixon, 125 N.J. 223, 235, 593 A.2d 266, 266 (1991) (82.26% comparative disparity did not show constitutional underrepresentation because the implicated group was "very small"); United States v. Pepe, 747 F.2d 632, 649, n.18 (11th Cir. 1984) (declining to consider comparative disparity of 67.3 percent because "the relative measure may distort the significance of the deviation").

Rivers' claim of a 59.1 percent comparative disparity at the Seattle courthouse is also misleading. Brief of App. at 13.

This value represents the percentage of Black jurors who appeared in Seattle compared with the Black population of the entire county. CP 115. But the comparative disparity is 44.7 percent when the number of Black jurors in Seattle is instead compared to the Black population of the Seattle Jury Assignment Area. CP 115. As noted, *supra*, similar comparative disparities, and certainly the county-wide figure of 35.5 percent, have generally failed to satisfy the second Duren prong. CP 115.

Rivers has not met his burden of showing that Black representation "is not fair and reasonable in relation to the number of such persons in the community" Duren, 439 U.S. at 364.

ii. Rivers has not shown that King County systematically excludes Black citizens from its jury rolls.

Underrepresentation of a distinct group is "systematic" when it is "inherent in the particular jury-selection process utilized." Duren, 439 U.S. at 366. Systematic exclusion need

not be deliberate. Hilliard, 89 Wn.2d at 441. However, underrepresentation alone is insufficient; the movant must show the implicated group receives "blatantly different treatment" than other citizens. Randolph v. People of the State of Cal., 380 F.3d 1133, 1141 (9th Cir. 2004); Lopez-Ramirez, 2018 WL 827172 at *6 (citing Duren, 439 U.S. at 366).

The Washington legislature has a "history of revising the methods for compiling the jury lists in an effort to make the pool of eligible jurors more inclusive and representative." State v. Lanciloti, 165 Wn.2d 661, 668-69, 201 P.3d 323 (2009). For example, the jury source list was originally derived solely from voter rolls. LAWS OF 1993, ch. 408, § 5. In 1993, the legislature began including driver's license holders to diversify the reservoir of potential jurors. Id.

In 2005, the legislature began allowing counties with multiple superior court facilities to create separate "jury assignment areas." RCW 2.36.055. King County judges determined that "'lower income and racial minority citizens

were less likely…to report to a courthouse more distant from their home.'" Lanciloti, 165 Wn.2d at 664. Thus, with the express intent of increasing minority participation, the county created the Kent and Seattle jury assignment areas by enacting Local General Rule (LGR) 18. Id. at 665.

In 2009, the legislature again expanded the category of eligible jurors by restoring the voting rights of felons who are no longer being supervised by the Department of Corrections. LAWS OF 2009, ch. 325. Consequently, such persons are now eligible to serve as jurors.

More recently, King County began using Zoom, a remote video program, to conduct *voir dire*. Nicole Jennings, King County jury duty summons more than doubling this year, My Northwest, https://mynorthwest.com/2974018/king-county-jury-duty-increasing/ (June 16, 2021). One effect of "Zoom voir dire" is that "[o]ur diversity of our jurors has greatly increased." Id. While originally implemented as a COVID-19 precaution, the county may retain this system indefinitely. Id.

Rivers' criticisms must be evaluated with this history in mind. It is simply not credible to suggest that Black citizens are being blatantly excluded considering the longstanding legislative pursuit of proportional representation. Lanciloti, 165 Wn.2d at 668.

U.S. v. Sanchez, 156 F.3d 875 (8th Cir. 1998), is instructive. The defendant in Sanchez demonstrated that minorities were underrepresented on Nebraska juries, purportedly due to that state's sole reliance on voter rolls to summon jurors. Id. at 879. The court rejected Sanchez's challenge, concluding that "racial disparities…do not by themselves invalidate the use of voter registration lists and cannot establish…'systematic exclusion.'" Id. Instead, the movant must also show "that certain racial…groups face obstacles in the voter registration process…" Id.

When Washington relied solely on voter registration, our supreme court described it as "the best source [for] compiling a fair cross-section of the community." Hilliard, 89 Wn.2d at

440-41. Since Hilliard, King County's methodology has only become *more* inclusive. Accordingly, this Court should accept Sanchez's reasoning and find Washington's "voter/motor" system immune to claims of systematic exclusion without a showing that Black citizens face barriers in registering to vote or obtaining driver's licenses. Sanchez, 156 F.3d at 879.

Rivers claims that King County's "summoning practices" oversample the White population and under-sample Black citizens. Brief of App. at 15; CP 80-86. This is so, Rivers argues, because zip codes with a higher minority population had a lower response rate than less diverse areas. CP 81. Rivers' argument has misconstrued the appropriate metric.

The dispositive question is whether King County systematically under-summons Black citizens, not whether properly summonsed jurors fail to respond for personal reasons. Rocha v. King County, 7 Wn. App. 2d 647, 656, 435 P.3d 325 (2019). Economic hardships, whatever their genesis, "do not prevent potential jurors…from being included in the master

jury list…" Id. These are individual factors rather than "systematic exclusion" under Duren. People v. Currie, 87 Cal. App. 4th 225, 236, 104 Cal. Rptr. 2d 430 (2001);[8] see United States v. Rioux, 97 F.3d 648, 658 (2d Cir. 1996) (underrepresentation due to "external forces" is not systematic exclusion).

Rivers speculates as to why some areas have lower response rates. However, he does not allege that Black citizens are prevented from registering to vote or obtaining driver's licenses. Thus, he cannot establish that Black citizens have any less *opportunity* to appear than similarly situated Whites.

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[8] The appellant in Currie claimed systematic exclusion was caused by "the county's failure to adequately follow up on jurors who fail to appear after being summoned…and the failure to make available adequate transportation for jurors…" Currie, 87 Cal. App. 4th at 235. The court rejected Currie's argument, holding that "underrepresentation of minority groups resulting from race-neutral…practices does not amount to 'systematic exclusion' necessary to support a fair-cross section claim…systematic exclusion…cannot be established through appellant's claim that the county has failed to adopt other measures, which he suggests might increase the racial representation of African-Americans on jury venires…" Id.

Rivers also asserts that the third Duren factor can be shown simply by identifying an ongoing racial disparity. This argument relies on language from Duren suggesting that systematic exclusion results from "a large discrepancy [that] occur[ed] not just occasionally but in every weekly venire for… nearly a year…" Brief of App. at 15 (quoting Duren, 439 U.S. at 366). This language does not support Rivers' position for several reasons.

First, the study in Duren spanned "nearly a year," while Rivers provided data for only 20 days. Duren, 439 U.S. at 366; see Ford v. Seabold, 841 F.2d 677, 685 (6th Cir. 1988) ("this case is supported only by the results of two samples"). Rivers must also show that systematic exclusion was occurring "near the time of his trial," but Professor Beckett's data was almost five years old by that point. Singleton v. Lockhart, 871 F.2d 1395, 1398 (8th Cir. 1989).

Rivers also ignores a crucial component of Duren's reasoning – that the Court "was able to establish when in the

system the exclusion took place." Ford, 841 F.2d at 685. While Duren could identify a single root cause for the gender disparity in that case, and show it related to the State's summoning practices, Rivers has not proven that the Black underrepresentation alleged here is "due to the system itself." Id. If King County's methodology is race-neutral, it does not constitute "systematic exclusion." Id.

Finally, courts have rejected this reading of Duren because "[i]f underrepresentation by itself were sufficient…the second and third prong…would effectively collapse into one inquiry." Randolph, 380 F.3d at 1141. The language cited by Rivers has been interpreted simply to mean that (1) underrepresentation need not be intentional, and (2) that isolated disparities are insufficient. See Weaver, 267 F.3d at 244; Timmel v. Phillips, 799 F.2d 1083, 1086 (5th Cir. 1986).

Rivers has not identified any systemic barriers preventing Black citizens from registering to vote or obtaining a driver's license, and thus being included on King County's jury rolls.

Nor has he shown that King County's system for summoning jurors deviates from the "random selection" required by statute. RCW 2.36.065. Thus, he has failed to show systematic exclusion. Randolph, 380 F.3d at 1141.

iii. King County's division into jury assignment areas does not constitute systematic exclusion.

King County has two superior court locations – the King County courthouse in downtown Seattle and the Regional Justice Center in Kent. Initially, a juror's assignment was randomly selected regardless of where they lived. Lanciloti, 165 Wn.2d at 663. But, as noted, *supra*, this exacerbated racial disparities because minority jurors were less likely to respond if summoned to the courthouse farther from their home. Id.

In 2005, the legislature responded by modifying RCW 2.36.055 to allow the generation of jury source lists from a subset of the county rather than the county at-large:

> . . . . In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury

assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on most current United States census data at the request of the majority of the judges on the superior court when required for the efficient and fair administration of justice…

LAWS OF 2005, ch. 199 (HB 179).

In 2006, the King County Superior Court promulgated LGR 18 to implement the new law:

GR 18. Jury Assignment Area

(e) Location for Jury Assignment Areas for Civil and Criminal Cases Filed in King County.

(1) Designation of Jury Assignment Areas. The jury source list shall be divided into a Seattle jury assignment area and a Kent jury assignment area, that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. The area within each jury assignment area shall be identified by zip code and documented on a list maintained by the chief administrative officer for the court.

(2) Assignment or Transfer by Court. This rule shall not create a right in any individual to have a case tried before a jury from a specific jury assignment area. The Court on its own may assign cases to be heard by jurors drawn from another case assignment area in the county, or from the entire county, or may assign or transfer

> cases to another case assignment area pursuant to LR 82(e)(4)(C) or LCrR 5.1(d)(2)(C), as applicable, whenever required for the just and efficient administration of justice in King County.
>
> (3) Where Jurors Report. Individuals receiving a jury summons shall report for service to the Court facility in the jury assignment area identified on the face of the summons.
>
> (4) Adjustment of Jury Assignment Area Boundaries. The jury assignment areas contained in this rule may be adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

LGR 18.

As a general rule, cities north of Interstate 90 are in the Seattle case assignment area, and all other cities are in Kent. LCrR 5.1(d)(2). The boundaries of the jury assignment areas can be changed by a majority of the superior court judges, contingent on approval by the Administrative Office of the Courts.[9] LGR 18(e)(4); RCW 2.56.030.

[9] The Administrative Office of the Courts is supervised by the chief justice of the supreme court. RCW 2.56.030.

In Lanciloti, 165 Wn.2d at 667, the Washington Supreme Court addressed whether having multiple jury assignment areas violated the state constitution. In a unanimous opinion, the court concluded that "the legislature was within its power to authorize counties with two superior courthouses to divide themselves into two districts." Id. at 671.

Lanciloti also alleged that the jury assignment areas constituted systematic exclusion under Duren. Id. The court declined to address this argument in detail because the record was insufficient. Id. at 672. However, the opinion strongly suggested that demographic disparities alone did not, without more, amount to systematic exclusion. See id. at 671-72.[10]

[10] "Lanciloti notes that the populations of the two…jury districts vary based on income, home ownership, and education. It is not clear from the record…whether the jury source lists mirror the differences…[h]owever, assuming for now that is true…he has not carried his burden of showing that these demographic differences amount to a systematic exclusion of a distinctive group." Lanciloti, 165 Wn.2d at 671-72.

Rivers claims that having two jury assignment areas constitutes systematic exclusion because minority populations are concentrated in south King County, and thus the Kent judicial district, due to racist housing policies that were once prevalent in King County. Brief of App. at 17.

Rivers' position is logically untenable. While he presumably favors reinstating a unitary jury pool, this "solution" was previously abandoned because it *caused* racial disparities. Lanciloti, 165 Wn.2d at 664, n.1. It is also unclear that drawing jurors from *farther* away will necessarily make venires more representative of the immediate community.[11] For example, the venire of a Black man in Kent will not necessarily become more diverse by importing jurors from Shoreline.

[11] In fact, requiring Black jurors to travel greater distances to serve might itself be a constitutional violation. See Hardin v. City of Gadsden, 837 F. Supp. 1113, 1122-23 (N.D. Ala. 1993) (fair cross section violation found, in part, because "geographical distances are great, and substantial percentages of [B]lack citizens…lack vehicular transportation").

While the county could attempt to gerrymander districts with more proportional representation, this would likely defeat the whole point of the subdivision: to promote minority participation by making jury service more convenient. This theory is supported by the fact that "Zoom *voir dire*," which makes appearing even easier, immediately increased jury diversity. Jennings, *supra*, at 26.

The Ninth Circuit rejected an argument similar to Rivers' in U.S. v. Cannady, 54 F.3d 544 (9th Cir. 1995). Cannady was prosecuted in the Central District of California, which spanned seven counties. Id. at 545. The district was further subdivided into three judicial divisions. Id. The Central District also had two courthouses, in Los Angeles and Santa Ana, respectively. Id.

The district eventually enacted a policy whereby jurors for the Santa Ana courthouse were drawn only from the Southern and Eastern Divisions, while jurors for the Los Angeles courthouse were drawn solely from the Western Division. Id. at

545-46. Cannady argued this system resulted in minorities being underrepresented on his venire. Id.

The Ninth Circuit disagreed, finding "no constitutional right to a jury drawn from an entire judicial district, rather than from one division of the district." Id. at 547. The court concluded that "[o]nly in those cases where the use of a [subdivision] constitutes gerrymandering, resulting in the systematic exclusion of a 'distinctive group'… is there a potential violation." Id. In other words, Cannady's claim failed because there was no evidence the judicial districts were manipulated to suppress minority jurors. Id.

Other jurisdictions to consider the issue have also rejected comparable geographic challenges. United States v. Ashley, 54 F.3d 311, 314-15 (7th Cir. 1995); State v. Carolina, 40 Conn. App. 762, 769, 673 A.2d 562 (1996) (no fair cross-section violation when a venire was assembled from a judicial subdivision); Pratt v. State, 870 So. 2d 1241, 1244 (Miss. Ct. App. 2004) (jury drawn from a single judicial district did not

violate Sixth Amendment); Williams v. Superior Court, 49 Cal. 3d 736, 781 P.2d 537, 263 Cal. Rptr. 503 (1989) (subdivided judicial districts are constitutional as long as no community member is arbitrarily excluded).

Describing the unjust policies of the 20th century does not help potential Black jurors get to the courthouse today; having two convenient judicial districts does. Combatting racial disparities by resurrecting a system proven to cause them borders on the absurd. Rivers' argument should be rejected.

iv. The Washington and Federal constitutions provide coextensive protection of the right to an impartial jury.

Rivers asks this Court to abandon the Duren test and create a more stringent standard under the Washington constitution. His goal is essentially to discard the third Duren factor so that a constitutional violation is made out solely by showing underrepresentation "even absent proof of a systematic cause." Brief of App. at 28.

The practical problems with Rivers' proposal are obvious before even reaching his Gunwall[12] analysis. If underrepresentation is systemic, the system can be changed. But by disconnecting cause and effect, Rivers would place the entire judicial system at the mercy of variables over which it has no control.

Suppose, for example, that a distinct group refused to appear for jury duty as an act of protest. Under Rivers' standard, a constitutional venire could no longer be assembled even if the court used a representationally perfect system for mailing out summons - the courts would grind to a halt. Since his test would not consider a disparity's underlying cause, trials would be impossible, yet there would be no corresponding improvement in the system. The constitution does not require this result.

[12] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

In addition to these practical problems, Rivers' argument is also legally deficient.

To determine whether the state constitution provides greater protection than its federal counterpart, the court examines six nonexclusive criteria: "(1) the textual language of the state constitution, (2) 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) structural differences between the federal and state constitutions, and (6) matters of particular state interest or local concern." State v. Bassett, 192 Wn.2d 67, 79, 428 P.3d 343 (2018).

The first four factors all favor the State. The variations between the Washington and Federal constitution are either immaterial or inapplicable. There is nothing that suggests the drafters of the Washington constitution thought the Sixth Amendment insufficiently protected the right to an impartial jury, from which the right to a fair-cross section is derived.

The right to a jury trial is protected by article I, section 22 of the Washington constitution, which states, *inter alia*, that "the accused shall have the right…to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Sixth Amendment slightly varies, guaranteeing "an impartial jury of the State and district wherein the crime shall have been committed…" U.S. CONST. amend. VI.

The Sixth Amendment requires an *impartial* jury, and the "fair cross-section" requirement is simply a means to this end. Holland v. Illinois, 493 U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990) ("traditional understanding" of an impartial jury "includes a representative venire"); United States v. Grisham, 63 F.3d 1074, 1078 (11th Cir. 1995) ("The representativeness requirement serves the goal of impartiality…"); United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996) (noting that fair-cross section requirement is "a

means of assuring, not a *representative* jury…but an *impartial* one…") (citing Holland, 493 U.S. at 474)).

This Court recently observed that the guarantee of an "impartial jury" is "almost identical in text and structure" between the two provisions, and thus Washington's constitution provides coextensive protection. State v. Munzanreder, 199 Wn. App. 162, 173, 398 P.3d 1160 (2017). Other Washington opinions have consistently reached the same conclusion. See State v. Rivera, 108 Wn. App. 645, 548, n.2, 32 P.3d 292 (2001) ("no significant difference" between article I, section 22 and the Sixth Amendment; see State v. Brown, 132 Wn.2d 529, 598, 940 P.2d 546 (1997) (in context of death qualification); see also State v. Turnbough, 53921-7-II, 2021 WL 3739178 (Wash. Ct. App. Aug. 24, 2021) ("the Washington right to an impartial jury provides the same protection as the United States constitution…").

Rivers claims an independent analysis is required by article I, section 21, of the Washington constitution, which

states that "[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record…" This clause has no direct federal analogue. City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). However, Munzanreder previously rejected this argument. See 199 Wn. App. at 172 ("Munzanreder's analysis relies heavily on article I, section 21's right to a jury trial").

Article I, section 21, "was simply intended as a limitation of the right of the legislature to take away the right of trial by jury." State v. Ellis, 22 Wash. 129, 131, 60 P. 136 (1900) (overruled in part on other grounds by State v. Lane, 40 Wn.2d 734, 246 P.2d 474 (1952)). This protection was considered necessary because federal law at the time did not require jury trials for "petty offenses." Mace, 98 Wn.2d at 91-92.

Article I, section 21, "does not prohibit modification of the details of administration which does not affect enjoyment of the right of trial by jury…" State v. Furth, 5 Wn.2d 1, 19, 104

P.3d 925 (1940) (overruled on other grounds by State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003)). Thus, while this provision might provide greater protection in some contexts, it is irrelevant here. See Brown, 132 Wn.2d at 595 (greater protection provided regarding "petty" offenses "is of little relevance to this case…").

The State acknowledges that the fifth Gunwall factor "will always point toward pursuing an independent…analysis because the federal constitution is a grant of power from the states while the state constitution represents a limitation of the State's power." State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). But this factor, standing alone, generally fails to justify a more protective reading of the state constitution. State v. Foster, 135 Wn.2d 441, 466, 957 P.2d 712 (1998).

The final factor is whether Rivers' argument implicates local, as opposed to national, concerns. Gunwall, 106 Wn.2d at 58. This requires a showing that the issue is "of such singular state or local concern that our constitution should be interpreted

independently…" Foster, 135 Wn.2d at 461. But as this Court previously observed:

> Of course, it might be argued that every provision of the state constitution is a matter of particular state concern. But if that were, by itself, reason to embark on an independent analysis, the entire Gunwall framework would be rendered superfluous.

State v. Martin, 151 Wn. App. 98, 115-16, 210 P.3d 345 (2009).

Rivers claims this factor favors him because the Washington legislature and supreme court have taken specific actions to address jury diversity. Rivers has misconstrued the required analysis. The question is whether inclusivity concerns are unique to Washington, not whether Washington has devised unique solutions to a common problem. Foster, 135 Wn.2d at 461.

Washington's interest in producing impartial and representative juries is shared by every court nationwide. E.g., Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) ("the central concern of the…Fourteenth Amendment was to put an end to governmental discrimination

on account of race"). It is not "unique to the State of Washington." See Foster, 135 Wn.2d at 465 (in context of right to confrontation).

This Court should adhere to Munzanreder, *supra*, which is in accord with the weight of Washington precedent finding no material difference between article I, section 22, and the Sixth Amendment. State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001) ("Washington law does not recognize that article I, section 22…provides more protection than does the Sixth Amendment…"); see State v. Hatt, 11 Wn. App. 2d 113, 152, 452 P.3d 577 (2019) (Sixth Amendment and Article I, Section 22 provide coextensive protection of the right to a speedy trial).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFERRING THE JURY TO ITS INSTRUCTIONS, WHICH PROPERLY EXPLAINED THE *MENS REA* OF INTENT.

During deliberations, the jury asked a hypothetical question about the intent required to murder someone by suffocation. The question was unexpected considering Power

survived Rivers' assault. The court simply referred the jury to its instructions, which contained a correct answer to the question.

Rivers claims the trial court erred by not providing a substantive response because the jury might have remained confused. Rivers' argument has been rejected by binding authority that forbids this Court from impeaching the final verdict based on a single jury question.

a. Additional Facts.

The State proposed, and the trial court ultimately provided, a standard pattern instruction defining "intent":

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 48; WPIC 10.01. Defense counsel did not offer an alternative instruction, nor did he object to the standard WPIC. RP 985, 1020.

During deliberations, the jury submitted the following question:

> Regarding Instruction 14. 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. Instruction 14 provided the definition for suffocation:

> "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.

The prosecutor's preference was to simply refer the jury to its instructions. RP 1122. Defense counsel, however, wanted to instruct the jury that blocking someone's airway *without* intending to stop them from breathing is not "suffocation." RP 1123.

The court was concerned that answering a hypothetical question, especially one involving inapplicable facts, would only distract the jury:

> I have deep concerns with answering a hypothetical question "If someone accidentally killed someone" completely not at issue in this case. And I really want to focus on the questions that are being asked in the verdict forms, and focus only on those questions.

> And going down a rabbit hole of hypotheticals, I've never done that before, and I can't imagine a good reason to start now.

RP 1123. The court ultimately issued the following response:

> The court cannot answer a hypothetical question. Please refer to the jury instructions.

CP 63.

b. The Jury Was Properly Instructed On The *Mens Rea* Of "Intent."

An assault is, by definition, an intentional act. State v. Chaten, 84 Wn. App. 85, 87, 925 P.2d 631 (1996); CP 17. The to-convict instruction emphasized this point, requiring the jury to find that Rivers "intentionally assaulted" Power. CP 16.

"Jury instructions are proper if they are not misleading, are a correct statement of the law, and allow the defendant to argue his…theory of the case." State v. McReynolds, 104 Wn. App. 560, 581, 17 P.3d 608 (2000).

Rivers does not dispute that the instructions correctly defined the *mens rea* of assault. RCW 9A.08.010(1)(a); CP 48; State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997);

Brief of App. at 35 ("Despite the instructions requiring the jury to find a person acted with intent…"). Likewise, he does not claim the instructions were inherently misleading or that he was unable to present his defense. Instead, he asserts the court was obligated to substantively answer the jury's question to ensure it understood the element of "intent." Rivers is incorrect.

CrR 6.15(f) allows deliberating juries to ask written questions. However, the rule does not require that the court provide a substantive answer. CrR 6.15(f). The appropriate response, if any, is left to the sound discretion of the trial court. State v. Sublett, 176 Wn.2d 58, 82, 292 P.3d 715 (2012).

The Washington Supreme Court previously rejected a similar argument in State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). Ng was charged with felony murder stemming from first-degree robbery. Id. The jury was instructed on Ng's defense of "duress," as well as two lesser-included offenses. Id. During deliberations, the jury asked: "Does the term duress apply to all lesser charges?" Id.

Ng urged the trial court to answer "yes," which was a legally correct response. Id. at 43. The trial court refused, opting instead to refer the jury to its instructions "[s]ince the instructions answered the [question] that was being asked of the court." Id. at 42-43.

Ng argued on appeal that the instructions had insufficiently explained the availability of the lesser-included offenses. Id. at 43. His argument was based on the aforementioned question, a juror's post-verdict statement, and markings the jurors had left on the instruction packet. Id.

The supreme court refused to consider these facts as evidence of ongoing confusion, explaining:

> The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. Here, the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. "[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict." Similarly, we refuse to speculate as to the meaning of the marks made on the instructions by the jury. Also, jurors' post-verdict

> statements regarding matters which inhere in the verdict cannot be used to attack the jury's verdict.

Id. at 43-44 (internal citations omitted); see also State v. Bockman, 37 Wn. App. 474, 493, 682 P.2d 925 (1984) ("The question sent to the judge is not a professed final determination by the jury").

Ng is dispositive of Rivers' argument. Like Ng, Rivers is attempting to use the jury's question to impeach the final verdict. But Ng forbids the inference that jurors remained confused after re-reading their instructions, especially where, as was the case here, the inference is based entirely on a single question. Id. It is therefore noteworthy that the jury expressed no further confusion on this topic following the court's response.[13] State v. Sutton, __ Wn. App. 2d __, 489 P.3d 268, 271 (2021).

[13] The jury later asked a second question, but it concerned an unrelated topic. RP 1127.

Rivers relies on language from State v. Sanjurjo-Bloom, 16 Wn. App. 2d 120, 479 P.3d 1195 (2021), that, at first glance, appears to support his argument. But Sanjurjo-Bloom is, upon closer inspection, easily distinguishable.

Sanjurjo-Bloom was charged with committing a robbery that was captured on surveillance footage. Id. at 123-24. During his trial, a police officer gave opinion evidence regarding the identity of the perpetrator in the recording. Id. Although the officer knew Sanjurjo-Bloom from prior arrests, this evidence had been excluded. Id. The jury, however, assumed as much, and asked during deliberations what crime Sanjurjo-Bloom had previously been arrested for. Id. The trial court nevertheless refused defense counsel's request for a limiting instruction. Id.

This Court found error not because the trial court failed to clarify the jury's understanding of the offense, but because it allowed the jury to consider improper propensity evidence. Id. at 128; ER 404(b). It is well-settled that a limiting instruction *must* be given upon request whenever evidence is admitted

under ER 404(b). State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). There is no similar error alleged in this case; Sanjurjo-Bloom is inapplicable.

Citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997), State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), and State v. Backemeyer, 5 Wn. App. 2d 841, 428 P.3d 366 (2018), Rivers claims the instructions must "make the relevant legal standard manifestly apparent to the average juror." But this language applies only to self-defense, which was at issue in all three cases. Id.; see also State v. Studd, 137 Wn.2d 533, 556, 973 P.2d 1049 (1999) (Sanders, J., concurring). The State is unaware of any opinion applying this heightened standard in any other context.

Finally, Rivers' reliance on State v. Campbell, 163 Wn. App. 394, 260 P.3d 235 (2011) (reconsideration granted on other grounds), is also misplaced. The issue in Campbell was not that the jury misunderstood correct instructions, but that the *instructions themselves* did not properly state the law. Id. at

402-03. It was error not to answer the jury's question in Campbell because it identified an issue that the instructions did not address. Id. Rivers' case is different because the instructions provided a correct and easily ascertainable answer to the jury's question.

The instructions in this case properly informed the jury of the law, and a "single question does not overcome the presumption [that] the jury followed the court's instructions." Sutton, 489 P.3d at 271. Rivers' convictions should be affirmed.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY ADMITTING NURSE STEWART'S TESTIMONY ON THE EFFECTS OF STRANGULATION.

Rivers argues that Sexual Assault Nurse Examiner (SANE) Terri Stewart was not qualified to discuss the general symptoms of strangulation, which can include memory loss. Rivers is mistaken. While Stewart was not a neurologist, her extensive training and experience regarding strangulation gave

her knowledge more advanced than, and helpful to, the trier of fact.

Furthermore, any error in admitting Stewart's testimony was harmless because the evidence of guilt was strong, and the prosecutor largely abandoned the theory that Power's memory loss was caused by strangulation.

a. Pre-Trial Litigation.

The State offered Stewart's testimony regarding, *inter alia*, the potential effects of strangulation on short term memory. RP 83. Stewart's proposed testimony concerned only her general medical knowledge, and the State conceded Stewart could not diagnose the specific cause of Power's memory loss. RP 86.

Rivers argued that Stewart was unqualified to provide even general testimony on the connection between strangulation and memory loss. RP 84-87. The court reserved ruling so that defense counsel could *voir dire* Stewart on her training and experience. RP 87.

Stewart was later examined outside the presence of the jury. RP 728. Stewart testified that: (1) she has been employed as a nurse at Harborview Medical Center for the past 17 years; (2) she has participated in several specialized trainings on the treatment of strangulation; (3) Stewart now conducts trainings on strangulation for "nurses, law enforcement, prosecutors, and advocates;" (4) she performs "strangulation examinations" in the normal course of her work as a SANE nurse; and (5) she has previously been qualified as an expert on strangulation by other courts. RP 729-33.

Stewart then explained how strangulation can affect memory. RP 729-30. Obviously, a person might suffer memory loss if they are rendered unconscious. RP 730. But even if the victim remains awake, a brain experiencing acute trauma often "goes into…survival mode" and does not "record all of the memories that occur." RP 730. What memories do exist are often scattered and difficult to recall linearly. RP 730.

Stewart testified that, in her experience, memory issues are common in victims of strangulation. RP 730-31. However, Stewart had not examined Power and was thus unable to render any opinion on the cause of her specific memory issues. RP 731.

Defense counsel again argued that Stewart was not qualified as an expert on this subject. RP 737. The court disagreed and found Stewart's testimony admissible:

> I am going to allow the testimony…certainly the cases are replete with cases of expertise that come about…from actually on-the-job training. I think 17 years at Harborview with the training that she received, the training that she does, and her experience in clinical practice dealing with victims is sufficient for purposes of her to testify about the correlation between…strangulation…and how its correlated oftentimes with a lack of memory…this general information she intends to testify to is appropriate.

RP 738.

b. Relevant Trial Testimony.

Physician's assistant Michelle Tepper examined Power, at which time Power stated her memory of the incident was

"poor." RP 609. Power also described her memory as "poor" to nurse Kathleen Kearney. RP 749. Power acknowledged that she was drinking heavily on the date in question. RP 933-37, 944.

Stewart later testified about the potential symptoms of strangulation and suffocation. RP 772-74. Her specific testimony about memory, however, was both brief and generic:

> …we…[are] trained around the trauma response and what happens to people who experience trauma…in a traumatic event, people may 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…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.

Stewart conceded that she could not connect the alleged strangulation with Power's memory loss in this case. RP 779. She acknowledged that alcohol can also affect memory, and that it was impossible to determine whether Power's partial

amnesia resulted from strangulation or intoxication. RP 779, 797.

c. The Trial Court Acted Within Its Discretion By Admitting Stewart's Testimony.

The admission of expert testimony is governed by ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony is sufficiently helpful when "it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." In re Det. of Pettis, 188 Wn. App. 198, 205, 352 P.3d 841 (2015).

The dispositive question is whether Stewart had specialized knowledge that would assist the jury in reaching a proper verdict. Behr v. Anderson, __ Wn. App. 2d __, 491 P.3d 189, 206 (2021). While medicine is a classic subject for expert

testimony, Wuth ex rel. Kessler v. Lab. Corp. of Am., 189 Wn. App. 660, 691, 359 P.3d 841 (2015), the State acknowledges that an expert in one type of medicine may nevertheless be unqualified to discuss an issue "outside [their] area of expertise." State v. Weaville, 162 Wn. App. 801, 824, 256 P.3d 426 (2011).

Trial courts have "broad discretion" to determine whether a witness is qualified as an expert on a particular subject. Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 354, 333 P.3d 388 (2014). The trial court's decision is reviewed only for abuse of that discretion. In re Det. of A.S., 138 Wn.2d 898, 917, 982 P.2d 1156 (1999). "As long as helpfulness is fairly debatable, a trial court does not abuse its discretion by allowing an expert to testify." Pettis, 188 Wn. App. at 205.

Rivers claims the court abused its discretion because: (1) Stewart's experience was clinical rather than academic; and (2) her practice did not focus on neurological issues. Brief of App.

at 45. These arguments are both individually and collectively without merit.

Whether a witness is qualified to give expert testimony depends on "the scope of [their] knowledge and not artificial classification by professional title…" Wuth ex rel. Kessler, 189 Wn. App. at 691. Thus, a nurse can opine on issues outside their formal specialty if they have "sufficient expertise to demonstrate familiarity with the…medical problem at issue." Id.; see also Johnston-Forbes, 181 Wn.2d at 355 ("we have repeatedly held that 'an expert may be qualified by experience alone.'") (quoting Katare v. Katare, 175 Wn.2d 23, 38, 283 P.3d 546 (2012)).

Stewart's formal specialty was evaluating victims of sexual assault. But Stewart's title is irrelevant; what matters is whether her knowledge of strangulation materially exceeded that of a layperson and was not misleading. Pettis, 188 Wn. App. at 205.

Stewart has a bachelor's degree in nursing supplemented by 40 hours of SANE certification. RP 728, 732. She has received specialized training on the treatment of strangulation, and now trains other professionals on the subject as well. RP 733. Stewart has 17 years of nursing experience, during which she regularly performed "strangulation examinations." RP 729. Her knowledge regarding the signs, symptoms, and treatment of strangulation plainly exceeds that of the average layperson. Rivers does not argue that this information was incorrect or misleading.

It is irrelevant that Stewart is not a neurologist. Expert testimony can be based on practical experience, not just academic credentials. Acord v. Pettit, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013). Stewart's opinion in this case was based largely on her experience that "in a traumatic event, people have difficulty recording the memories." RP 778-79. It is indisputable that Stewart has an enormous amount of experience working with victims of trauma.

Courts have previously found similar qualifications sufficient. Katare, 175 Wn.2d at 33. The respondent in Katare requested travel restrictions to prevent her husband from taking their children to India. Id. She offered the testimony of an attorney "regarding risk factors for child abduction and the consequences of abduction to India." Id. Her husband objected that the attorney did not qualify as an expert on child abduction. Id. The trial court disagreed, and imposed travel restrictions based in part on the attorney's expert opinion. Id.

The supreme court affirmed, noting that while the attorney-witness had no formal education related to child abduction, he "had 17 years of experience in the field…during which he participated in related organizations, attended numerous conferences, consulted with governmental entities, and testified as an expert in other abduction cases." Id. at 38-39.

The attorney-witness's experience in Katare is comparable to Stewart's qualifications in this case. Like the attorney in Katare, Stewart has practiced in the relevant field

for 17 years, received specialized training, and testified as an expert in other cases. The trial court plainly acted within its broad discretion when it determined Stewart was qualified to discuss memory loss as a general symptom of strangulation.

d. Any Error Was Harmless.

The improper admission of expert testimony is not error of constitutional magnitude. State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). Evidentiary error is harmless unless "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005).

Stewart gave no opinion as to the source of Power's memory issues. She stated only in general terms that memory loss was one possible symptom of strangulation. RP 778. Ultimately, both Stewart and Power agreed that Power's memory loss might also be attributable to alcohol use. RP 797, 932-33.

More importantly, the prosecutor's closing argument largely abandoned the theory that Power's memory loss was caused by strangulation:

> Look, Summer Power was probably drinking heavily that night, and that's probably one of the reasons why she does not remember everything that happened to her. And it would not be a fair execution of justice to just say, well, she was drunk, so that's the end of that.

RP 1071-72. It is therefore unlikely the jury attributed Power's poor recollection solely, if at all, to the assault.

Finally, the State's case was strong even after discounting Stewart's brief testimony on memory loss. Rivers left a bite mark on Power's breast that, while not direct evidence of strangulation, powerfully corroborated her overall account. RP 909. Similarly, an independent witness saw Power frantically trying to attract attention and Rivers grabbing her phone. RP 966.

Power told officers at the scene that she had been strangled, and several first responders observed red marks on Power's neck "consistent" with strangulation. RP 568, 572,

958. Furthermore, Power recalled the critical details of the incident, and the gaps in her memory were largely inconsequential.

Taken as a whole, the evidence against Rivers was strong, if not overwhelming. Given that Stewart's opinion regarding memory was ultimately immaterial, there is no chance it affected the outcome of the trial.

4. THE STATE AGREES RIVERS IS ENTITLED TO RE-SENTENCING.

Rivers was sentenced to life in prison under the Persistent Offender Accountability Act based in part on two prior convictions for second-degree robbery. CP 194; RP 1191. After Rivers' sentencing, however, the legislature removed second-degree robbery from the list of "most serious offenses." Engrossed Substitute S.B. 5288, 66th Leg., Reg. Sess. (2019).

The legislature later passed Engrossed S.B. 5164, 67th Leg., Reg. Sess. (2021), which provides that defendants "must have a resentencing hearing if a current or past conviction for robbery in the second degree was used as a basis for the finding

that the offender was a persistent offender." Accordingly, the State agrees that Rivers is entitled to a new sentencing hearing.

D. CONCLUSION

The State respectfully requests this Court affirm Rivers' convictions and remand for re-sentencing.

This document contains, 11,771 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 6 day of October, 2021.

Respectfully submitted,

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