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STATE OF WASHINGTON  
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Supreme Court No. 99793-4

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent

v.

TYLER BAGBY,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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### **A. IDENTITY OF THE RESPONDENT**

The State, represented by Dan LeBeau, asks this Court to find that there was no intentional racism as discussed in *Monday* and that any implicit bias did not affect the outcome of the trial.

### **B. RESTATEMENT OF THE ISSUES**

Mr. Bagby received a fair trial because the State did not resort to racial bias or racial stereotypes. The evidence in the record demonstrates that the State was establishing the basis for proving the charges beyond a reasonable doubt and responding to issues raised by the defense.

### **C. SUPPLEMENTAL STATEMENT OF THE CASE**

The State and Mr. Bagby each had their own theory of the case. The State focused on the elements it needed to prove that Mr. Bagby committed an assault, harassment, malicious mischief and a residential burglary. The State's presented

evidence that Mr. Bagby committed these acts after Kailah Crisostomo, whom he had been dating, refused to see him and didn't want to go home with him. Mr. Bagby committed the crimes in relation to Mr. Davis and Ms. Roberson as they tried to intercede on Ms. Crisostomo's behalf. Mr. Bagby's case focused on the credibility of the State's witnesses, with special focus on Mr. Davis and Ms. Roberson.

Tyler Bagby and his close friend of 4 years, Shyla Roberson, were both students at Washington State University. RP 22-23, 219, 224.<sup>1</sup> In the four years they knew each other they got along well and helped each other, including Ms. Roberson caring for Mr. Bagby's dog. *Id.*

On the evening of February 3, 2018 Ms. Roberson joined Mr. Bagby, Kailah Crisostomo and Solomon Cooper and they

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<sup>1</sup> The transcript titles are repetitive and confusing. RP in this brief refers to the transcripts titled volume I 11/26-11/27/18, and volume II 11/27/18. The sequence of numbers is continuous. If any other Volume is reference the State will list the date of the transcript.

all went to a fraternity party at the Sigma Pi house. RP 27, 234-35. Mr. Bagby and Ms. Crisostomo had been dating for a short time and this was the first time Ms. Roberson met Ms. Crisostomo. RP 26-27, 228. The party was crowded and attended by as many as 200 people. RP 41, 52, 236. Tyler Bagby and Ms. Crisostomo split off to go dancing and Shyla Roberson lost track of them. RP 27, 42, 238.

Sometime after midnight on February 4, 2018, Ms. Roberson went to the bathroom to check on Ms. Crisostomo at Mr. Bagby's request. RP 27, 44, 240. Ms. Roberson found Ms. Crisostomo in a bathroom stall and she was hysterical, crying, and told Shyla Roberson that she didn't want to go home with Mr. Bagby. RP 28, 48.

Mr. Bagby later went to the bathroom and found both women in the same stall. RP 31, 240. The bathroom was extremely crowded and chaotic with at least 15-20 men and women in the bathroom. RP 241-42. Mr. Bagby asked what was

going on and Ms. Roberson told him that “it does not look good” and that Ms. Roberson could get Ms. Crisostomo home. RP 28, 48. Mr. Bagby continued to argue with Ms. Roberson through the stall door and became more aggressive, frightening Ms. Roberson and Ms. Crisostomo. RP 32, 78.

As Mr. Bagby pounded on the door and demanded that Ms. Crisostomo come with him, Austin Davis, Sabrina Manzo and Leann Griffith watched the events unfold. RP 59-62, 78-81, 93-98. Ms. Manzo and Ms. Griffith were friends and knew each other but nobody else. *Id.* Mr. Davis had never met any of the other people involved. RP 60, 63, 70, 84, 94.

Mr. Davis, whose arm was in a cast, attempted to intervene on behalf of Ms. Roberson and Ms. Crisostomo. RP 59-62, 64, 78-81, 93-98. Mr. Bagby punched Mr. Davis several times, knocking Mr. Davis unconscious and causing several visible injuries. RP 59-62, 65, 78-81, 93-98. The jury heard this testimony and saw pictures of those injuries. *Id.* Ms. Manzo

was the only witness from the bathroom assault that could identify Mr. Bagby in the courtroom. RP 70, 79, 84, 89, 94, 104.

Ms. Roberson and Ms. Crisostomo then went to Ms. Roberson's apartment where Ms. Crisostomo went to sleep. RP 132-162. Over the next 40 minutes Mr. Bagby repeatedly contacted Ms. Roberson calling her names and threatening her. RP 132-136, 265-68. *RP* 135.

Mr. Bagby then left a voicemail telling Ms. Roberson "when I see you I will break your nose ... get a restraining order against me now, because again when I come to you, I will fuck you up when I see you." RP 137-40.

Ms. Roberson heard the message and believed he was capable of carrying out this threat so she locked her door and windows. RP 134, 140-41. Ten minutes after Ms. Roberson heard the voicemail Mr. Bagby forced his way past the locked door. RP 140-42. Ms. Roberson was yelling for Mr. Bagby to



get out while dialing 911. *Id.* During the 911 call, Ms. Crisostomo ran into Ms. Roberson's bedroom and locked the door. RP 144. The jury heard the voicemail and 911 call during the trial. RP 140, 149.

Rebecca Nelson and Daniel Robinette both heard Ms. Roberson's screams and went into the apartment because they were concerned. RP 146, 179-81, 187-90. Ms. Nelson and Mr. Robinette tried to get Mr. Bagby to leave, and during this short interaction officers from the Pullman Police Department arrived and escorted Mr. Bagby out and the events came to an end. RP 147, 179-81, 187-90, 198, 206.

Mr. Bagby testified after the State rested. *Id.* at 209, 218. Mr. Bagby discussed his friendship with Ms. Roberson and described how they hung out with friends, went out drinking and that she would do laundry at his house. *Id.* at 222-28. Mr. Bagby further discussed on direct examination how he and Ms.

Roberson were close friends because he would also let her watch and care for his dog, Poseidon. *Id.* at 227, 234.

Closing arguments from the State and Mr. Bagby's counsel referred to the trust he put in Ms. Roberson specific to Poseidon, twice for the defense and three times for the state. *Id.* at 323, 331, 349, 354.

At no point during opening statement nor closing argument did the State make reference to any person's color of skin, nationality or ethnicity. RP 9-17, 306-27, 349-61.

Ms. Roberson's reactions to Mr. Bagby in the bathroom was a focal point of the defense theory. Mr. Collins, Counsel for Mr. Bagby, constantly questioned the credibility and motive of Ms. Roberson, alleging that she gave false testimony about drinking and may have been in love with Mr. Bagby. RP 18, 20-21, 39-40, 42, 47, 328-29, 331-37, 347. Mr. Collins addressed these issues during opening statement, cross-examination of the State's witnesses and closing arguments. *Id.*

**D. ARGUMENT**

Mr. Bagby was not deprived of a fair trial because no explicit racial stereotypes were used by the State at trial and there is no prima facie showing that implicit bias played a factor in regards to the jury verdict.

The Petitioner simultaneously asserts two theories: first that the prosecutor improperly injected racist arguments and therefore deprived Mr. Bagby of a fair trial. Second, that the State subtly and intentionally drew attention to Mr. Bagby's race to bias the jury against him. It is unclear if the Petition implicates that implicit bias played a role in this trial.

The record will show that the State did not improperly assert racist arguments to secure a conviction. In addition, while implicit bias absolutely exists, there is no prima facie showing in the record that it had an effect on the jury's verdict in Mr. Bagby's trial.

Regarding implicit bias, "[I]dentifying the influence of ... implicit bias ... presents unique challenges. *State v. Berhe*, 193 Wash.2d 647, 657 (2019). "[I]mplicit racial bias exists at

the unconscious level, where it can influence our decisions without our awareness” and the “biased person is unlikely to be aware that it even exists.” *Id.* at 658, 663. In *Berhe*, there had been only one African American juror serving on the jury, that juror came forward and stated that she experienced racial bias directed at her during deliberations. *Id.* at 651-54. The trial court failed to properly control proceedings and conduct a hearing on the matter, and the case was sent back in order for that hearing to occur. *Id.* at 661-62. This Court held that if there is a prima facie showing that race was a factor in the verdict the trial court must conduct an evidentiary hearing. *Id.* at 665. “A ‘prima facie showing’ is defined ... as ... ‘evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.’” *Id.*

Regarding the theory that the State injected racial prejudice in to the trial, *State v. Monday* is the most direct application. “Defendants are among the people that a prosecutor

represents.” *State v. Monday*, 171 Wash.2d 667, 676 (2011). A prosecutor who intentionally seeks to secure a conviction by resorting to racist arguments violates the constitutional promise of an impartial jury trial. *Id.* at 680. “[R]esorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system” that it does not need to be explained. *Id.* “[A]ppeals to racial prejudices cannot be minimized or easily rationalized as harmless.” *Id.* Therefore, when a prosecutor intentionally resorts to racist arguments the test is constitutional harmless error. *Id.* Emphasis added. Under the constitutional harmless error standard a conviction will be vacated unless the misconduct did not affect the verdict beyond a reasonable doubt. *Id.*

The record does not support Mr. Bagby’s claims.

1) There was no reliance on stereotype to reinforce the myth that black men are dangerous.

Mr. Bagby claims that the State focused inappropriately on two lines of questioning to make an appeal to racial

stereotypes. First, that the State “asked one of [its] witnesses in the bathroom stall why she was scared of Mr. Bagby.” BP 16. Second, that the State inappropriately questioned Mr. Bagby regarding his dog ownership “rather than focus on the facts of the case.” BP 17. Both of these issues are resolved within the record and demonstrate there was no appeal to racial stereotypes.

a) Ms. Roberson’s fear was a necessary element for two of the counts Mr. Bagby was charged with.

Mr. Bagby’s brief states that “a witness” was asked “why she was scared of Mr. Bagby.” BP 16, *citing* RP 33. That “witness” was Ms. Roberson. Ms. Roberson was a key player, not some random witness, and the State needed to prove that Ms. Roberson experienced reasonable fear in order to prove its case. In addition, the State did not ask this question without context. Ms. Roberson had already testified that she had known Mr. Bagby for four years and that they had hung out regularly on the weekends. RP 23-24. Ms. Roberson then described going

to the party with Mr. Bagby and the others and how she ended up in the bathroom stall with Ms. Crisostomo, who was hysterical and acting fearful of Mr. Bagby. RP 27-28.

Sometime later Mr. Bagby came to the stall to talk with both women, but Ms. Roberson told him to go and she would take care of Ms. Crisostomo. RP 31. Ms. Roberson testified that as she continued to talk with Mr. Bagby he got more aggressive, started shaking the door, and she became scared. RP 32. The following dialogue took place:

Prosecutor: Were you scared initially when he first came to talk to you?

A: No.

Q: Had you ever had any problems with Mr. Bagby before this?

A: No.

Q: Okay, but you started to get scared, why?

RP 32-33. Ms. Roberson then continued to explain why she was frightened, and how Mr. Bagby became more aggressive until he was stopped by other witnesses. RP 33. The State would

have been remiss not to ask the question as to why she was scared.

The State asked Ms. Roberson several times why she was afraid, including after hearing the voicemail where Mr. Bagby threatened to break her nose and that she should get a restraining order. RP 140-41.

There is no place in the record where the State refers to Mr. Bagby as Dangerous, much less connects his danger to his race. However, the State *did* focus on fear from start to finish in this case. During opening statement, the State told the jury that Ms. Roberson had been placed in fear after hearing the voicemail about breaking her nose. RP 17. In order “to convict” Mr. Bagby of the charge of harassment the State had to prove Ms. Roberson was placed in “reasonable fear” that the threat to cause her bodily injury in the future would be carried out. RP 298. In addition, to prove the burglary the State had to prove that Ms. Roberson was placed in “imminent fear” per the



assault instruction. RP 301. The State appropriately focused on this aspect as part of the closing argument, citing to the jury instruction and stating where Ms. Roberson was placed in fear for both the harassment and the assault aspect of the burglary. RP 312, 315, 320, 321, 326, 358. Defense counsel spent time arguing to the jury that Ms. Roberson was *not* in reasonable fear. RP 347. The State never eludes to the fact that Mr. Bagby is dangerous due to his race. The State does however regularly cite the record as to *why* his *actions* caused reasonable fear in Ms. Roberson.

b) The question and regular discussion about Mr. Bagby's dog Poseidon emphasized his care and love for Poseidon.

The main point of contention for the trial was the credibility of witnesses against Mr. Bagby. Mr. Collins established the foundation for this attack during opening statement, when he focused on the situation in the bathroom stall. Mr. Collins told the jury that that Ms. Roberson's refusal

to leave the bathroom was confusing and Mr. Bagby couldn't understand what was going on. RP 18. In addition, during cross-examination of Ms. Roberson, Mr. Collins focused on getting Ms. Roberson to say she "used" Mr. Bagby and wasn't really good friends with him. RP 174. Mr. Collins also focused on the fact that prior to the incident she had never been afraid of Mr. Bagby. *Id.*

The direct examination of Mr. Bagby also focused on the friendship between Mr. Bagby and Ms. Roberson and it is at this time that Mr. Bagby first brings up his dog, Poseidon. Mr. Bagby stated he had felt safe enough and comfortable enough with Ms. Roberson to let her watch Poseidon. RP 227. Mr. Bagby was asked by Mr. Collins if he knew the men at the fraternity house and Mr. Bagby replied "they recognized me from my dog." RP 234. Mr. Collins then asked Mr. Bagby about the breed of his dog, and the reply was "a Husky and German Shephard mix." *Id.* Mr. Bagby then volunteered that he

was known as Poseidon's owner, and that Poseidon had "baby blue eyes." *Id.*

Mr. Collins referenced Poseidon in closing argument stating that Ms. Roberson did not have credibility and that was a basis for reasonable doubt. RP 327-49. Mr. Collins begins by reminding the jury that Ms. Roberson and Mr. Bagby had been close friends, she did laundry at his apartment and watched Poseidon for him. RP 331. Mr. Collins then reminded the jury that they were the sole judges of credibility and that Ms. Roberson's manner on the stand was odd. RP 332. Mr. Collins emphasized her testimony that she "used" Mr. Bagby and asked "would a normal person say that?" *Id.* Mr. Collins then alludes to the possibility Ms. Roberson was in love with Mr. Bagby and was perhaps angry about Ms. Crisostomo's presence and wouldn't come out of the bathroom stall out of spite. RP 332-33.

Then Mr. Collins continued to argue that Ms. Roberson acted weirdly in the bathroom stall, why didn't she diffuse the situation rather than escalate it? RP 336. "She made a decision that doesn't make any sense." *Id.* Ms. Roberson was so protective "of this total stranger that she's not even willing to answer any of her friend's questions." RP 336-37.

The State's argument took the opposite approach and emphasized that Ms. Roberson was credible and reliable *because* Mr. Bagby had trusted her with Poseidon. During the State's closing argument the prosecutor pointed out that Mr. Bagby cared for and trusted Ms. Roberson enough to watch his beloved dog. RP 323-24. The State pointed out that Mr. Bagby then trusted Ms. Roberson to check on his girlfriend and Ms. Roberson honored that trust again. *Id.*

In rebuttal closing the State returned to this issue. The State agreed with Mr. Collins that everything about the case had come down to the 4-year friendship. RP 349. Mr. Bagby had

been to her house and she had not been afraid. *Id.* She went to Mr. Bagby's apartment and did her laundry and was "taking care of the dog, taking care of *his* dog." *Id.* emphasis added. The State refuted Mr. Collin's theory that Ms. Roberson had only ever been "using" Mr. Bagby due to the fact she had watched his dog for him. RP 354. The State points out that Ms. Roberson was acting rational in the bathroom and that Mr. Bagby should have trusted her judgment rather than getting angry. *Id.* The State relied on these statement to prove that it was Mr. Bagby's *actions* on that night that caused her fear. RP 306-327. The State focused on Mr. Bagby as a caring dog owner to support the theory that Ms. Roberson was a trustworthy and reliable friend who exercised good judgment on the night in question.

2) Identity was an issue in the trial and the use of the word "nationality" was not an intentional attempt to differentiate Mr. Bagby from other participants.

The brief of the petitioner asserts several erroneous factual statements. First, that the State asked three witnesses to describe Mr. Bagby by his “nationality” despite identity not being an issue. Brief of Petitioner (BP) at 13. The second incorrect assertion is that the State never asserted nationality in relation to white witnesses. BP 14. Third, that the State asked every witness to distinguish Mr. Bagby based on race. *Id.* Finally, Mr. Bagby asserts that identity was not an issue because “[a]lmost every witness knew Mr. Bagby” and “Mr. Bagby did not contest his identity, agreeing in his testimony that he was present in both” locations. *Id.*

2(a). The Nationality question primarily occurred with one witness.

The first two assertions in the Petitioner’s Brief can be addressed together. The claim is that the State asked three witnesses to describe Mr. Bagby by his “nationality” and that the State never asserted nationality in relation to white witnesses. BP 13-14. For these assertions Mr. Bagby cites to RP

79, 80 and 94. That testimony encompasses Ms. Manzo and Ms. Griffith's testimony, only two of the witnesses. The State incorrectly and awkwardly used "nationality" in three questions with Ms. Manzo. The State first asked Ms. Manzo about Ms. Roberson, then Mr. Bagby, then Mr. Davis. The State asked Ms. Manzo about the "heritage" of the woman in the stall, to which Ms. Manzo replied "she looked to be Asian." RP 79. The State followed up with "Okay, darker skin?" and Ms. Manzo replied "yeah." *Id.* Then the State asked about the "nationality" of Mr. Bagby, to which she replied "He was African American." Next, the State asked about the "nationality" of Mr. Davis, to which Ms. Manzo replied that "he looked white." The State then asked about his height which was "tall" and "kind of thin." RP 80.

During Ms. Griffith's testimony she stated that there was a girl locked in the bathroom and a guy was "trying to get in to talk to her." RP 93. Ms. Griffith did not see the woman in the

stall and “didn’t really pay attention” to the guy talking to her. RP 94. The State asked Ms. Griffith “did you ever pay attention to his nationality or anything else?” *Id.* Ms. Griffith responded with “No.” *Id.* The State said “ethnicity, sorry.” *Id.* Ms. Griffith then said “he was black, I think.” *Id.* Ms. Griffith could not identify Mr. Bagby in the courtroom. RP 94-95.

That is it. Two witnesses were asked about “nationality” and it wasn’t limited to Mr. Bagby but applied to Mr. Davis as well. The term “nationality” was largely limited to the questions asked of Ms. Manzo and applied both to Mr. Bagby and Mr. Davis.

Mr. Bagby asserts that these questions about “nationality” were a subtle attempt to differentiate Mr. Bagby based on his race. BP 14-15. There are two problems with this assertion. First, Mr. Bagby cites to the report of proceedings to prove *how* the State differentiated Mr. Bagby. BP 15, ¶ 1. The record cited to includes RP 33, 71,72, 80, 80-81, 86, 88, 95-96,



97 and 180. However, only about half of those citations were questions by the State, the other half were by defense counsel. The cited RP for 71, 72, 86, 88 & 97 were all from cross-examination by defense counsel.

The second is that the record shows it was an awkward attempt to help witnesses identify participants in the altercation. The State, while inappropriately using “nationality” was fumbling around for the right term to use. In a matter of minutes the State used the terms “heritage,” “nationality,” and “ethnicity.” This demonstrates an awkward attempt to be mindful of the issue of race. This was confirmed by defense counsel on the cross-examination of Ms. Griffith shortly after the State fumbled through terms. Defense counsel asked:

And you indicated at one point, and I don't, I'm not trying to say this in an adverse way, but the guy with red hair that you saw in the pictures?

Defense counsel then differentiated Mr. Bagby from Mr. Davis by color of skin or race as well. RP 103-104. Lawyers for both

parties referred to race during direct and cross-examination with Ms. Manzo and Ms. Griffith because they had never met the people in the bathroom. RP 84, 105.

The Petitioner has not articulated how misuse of the word “nationality” unfairly prejudiced Mr. Bagby when there was no factual dispute about anybody’s nationality at trial.

Furthermore, the State only briefly misused the term and did so in reference to both Mr. Bagby and Mr. Davis. Noting these questions in context and the fact that not all of the claimed statements were attributable to the State, the Court of Appeals reached the decision that there was nothing to support the inference of racial bias in that misuse of the term. COA 10.

2(b) The State did not ask every witness to distinguish Mr. Bagby based on his race.

The Petitioner asserted that the State asked every witness to distinguish Mr. Bagby based on his race. The State only asked Ms. Manzo and Ms. Griffith about Mr. Bagby’s race, and defense counsel repeatedly did the same thing. RP 75-105. Ms.

Griffith and Ms. Manzo were the two witnesses who were not connected to any other person present at the trial. The State did briefly ask Ms. Roberson about Mr. Davis and he was identified as a White Male (she had never met Mr. Davis and only briefly saw him on the ground as she was leaving). RP 33-34. There was no need to ask Ms. Roberson questions about Mr. Bagby because she clearly knew and could identify him. RP 23. Likewise, the State never asked Ms. Nelson or Mr. Robinette about Mr. Bagby's race and both were able to identify him in the courtroom.

2(c) Identity was an issue at the trial.

The Petitioner's fourth point is that no questions needed to be asked about race because Mr. Bagby's identity was never an issue. BP 14. For this, the petitioner cites to the fact that "almost every witness knew Mr. Bagby" and also that "Mr. Bagby did not contest his identity, agreeing in his testimony that he was present" in both locations." *Id.* The citation in the

Petitioner's brief to "almost every witness" knowing Mr. Bagby is to RP 116, which was during the testimony of Mr. Cooper, who was Mr. Bagby's friend. However, of the other lay witnesses only Ms. Roberson knew Mr. Bagby, the other five did not know him nor each other. RP 57-58, 70, 84, 105, 180, 182, 190-91.

Contrasting the bathroom incident from the incident at Ms. Roberson's apartment, Ms. Nelson and Mr. Robinette were also strangers to each other and the other participants. *RP* 180, 182-83, 189-90. However, both witnesses could identify Mr. Bagby in the courtroom, and no questions were asked of either witness regarding identifying information for Mr. Bagby nor his race. *RP* 182, 191. Therefore, where identity was *not* an issue, neither the State nor Defense Counsel asked questions about identifying characteristics. However, for the bathroom incident which was described as crowded and chaotic by those who were there, both counsel did ask such questions and race was among

the identifying characteristics. Identity wasn't an issue at Ms. Roberson's apartment but it was an issue in the chaotic bathroom at the fraternity.

Regarding Mr. Bagby's testimony, for obvious reasons, he didn't testify until after the State rested. The State needed to prove identity beyond a reasonable doubt and could not rely on Mr. Bagby to provide that information.

"To establish guilt in a criminal case, the State must prove ... the defendant's identity, and any statutory elements of a charged crime beyond a reasonable doubt in order to sustain a conviction." *State v. Cardenas-Flores*, 189 Wash.2d 243, 274 (2017), *citing City of Bremerton v. Corbett*, 106 Wash.2d 569, 573-74 (1986). The defendant can't be forced to testify against himself. Wash. Const. art. 1 § 9. Therefore, in order for the State to prove identity, the State can't rely on the testimony of the defendant.

In *Monday*, the prosecutor vouched for the credibility of the State's case during opening statement and was admonished by the Court not to do so, and further admonished not to give personal views on the credibility of the case or the guilt of any person. *State v. Monday*, 117 Wash.2d at 671. Despite the admonishment, during trial the prosecutor also used the term "po-leese" when examining an African American witness, and referred to a code that "black folk don't testify against black folk" both during examination of that witness and in closing argument. *Id.* at 671-74. This Court held that "appeals to racial prejudice cannot be minimized or easily rationalized as harmless" unless they pass the constitutional harmless error doctrine. *Id.* at 680. In order to make this determination the Court will examine the conduct of the prosecutor "in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the

jury.”” *Id.* at 675, *Citing and quoting State v. McKenzie*, 157 Wash.2d 44, 52 (2006).

The State concedes that “nationality” was the wrong word to use and was clearly an error. However, there is no evidence it was an intentional use of the word in order to differentiate Mr. Bagby or discredit him based on his race. The term nationality never appeared in opening statement or closing argument, and the term was used during the testimony of Ms. Manzo to help identify Mr. Bagby and Mr. Davis.

In addition, the questions about Mr. Bagby’s dog were elicited by the defense on direct examination, and responded to by the State on cross examination. Both sides directly connected Mr. Bagby to positive dog ownership, not the negative stereotype enumerated in the Brief of Petitioner. The questions about Ms. Roberson’s fears were also appropriate to establish she had a reasonable fear for the harassment charge

and that she had been placed in apprehension of fear of assault for the burglary charge.

Based on the total circumstances of the trial, opening statements, closing argument, issues, crimes charged, and questions asked as well as how they were asked, the State did not intentionally seek to secure a conviction by resorting to racist arguments. There was no explicit racial bias in Mr. Bagby's trial.

Regarding implicit bias, there is nothing in the record like there was in *Berhe* that would indicate a prima facie showing of implicit bias. The jury found Mr. Bagby not guilty of malicious mischief, a count with a significant amount of evidence, including pictures and testimony from three witnesses. The jury then found him guilty on three other counts where the evidence included voicemail recordings, 911 recordings, pictures of Mr. Davis' injuries, and a significant amount of consistent testimony. Within the context of the full



trial, the discussion of race was a very small portion of the trial and would have had little to no effect on the verdicts.

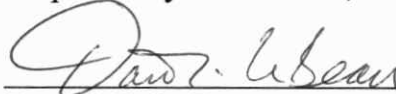
### **E. CONCLUSION**

The State did not violate Mr. Bagby's right to a fair and impartial trial. There was no intentional or unintentional use of race in this case. There is no prima facie showing that discrimination was a factor in the verdicts. The State respectfully requests that this court uphold the decision of the Court of Appeals.

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Dated this 26th day of January, 2022.

Respectfully Submitted,



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**WHITMAN COUNTY PROSECUTOR'S OFFICE**

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