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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 38928-6-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED IN PART
	)	
LANCE RAY HORNTVEDT,	)	
	)	
Appellant.	)	

PENNELL, J. — Lance Ray Horntvedt appeals his convictions for felony sex trafficking, arguing his guilty plea was procured through an improper appeal to racial bias. Mr. Horntvedt is an African American.[1] During plea negotiations, the prosecuting attorney advised Mr. Horntvedt that if he took his case to trial, his jury would "not necessarily be a jury of [his] peers." Clerk's Papers (CP) at 116. Gesturing to herself and Mr. Horntvedt's attorney, both of whom are white, the prosecuting attorney stated, "it'll be a jury of our peers, be a lot of white folks." *Id.* The trial court observed that the prosecuting attorney's comments were improper, but it nevertheless denied Mr. Horntvedt's motion to withdraw his plea, finding the plea was knowing, voluntary, and intelligent.

[1] Mr. Horntvedt prefers the term "African American" to describe his race. Rep. of Proc. (Nov. 17, 2021) at 63.

We reverse. The prosecutor's invocation of the possibility of racial bias in order to leverage a guilty plea violated Mr. Horntvedt's right to due process. A plea cannot be deemed voluntary under such circumstances. Rather, Mr. Horntvedt must be afforded the opportunity to withdraw his plea and, if he withdraws it, to proceed to trial.

FACTS

Mr. Horntvedt faced multiple charges of sex trafficking, attempted sex trafficking, and promoting prostitution in Franklin County, Washington. The charges resulted from a multi-jurisdiction human trafficking investigation. The State intended to seek a 66-year sentence if the case went to trial but offered Mr. Horntvedt a plea agreement specifying a 25-year sentence recommendation.

Plea negotiation meeting

On March 26, 2021, a meeting occurred at the Franklin County Corrections Center to discuss terms of a plea offer. Attendees included Mr. Horntvedt, the deputy prosecutor, Mr. Horntvedt's attorney, and two corrections deputies. With the exception of Mr. Horntvedt, every person in attendance was white. The meeting was recorded and later transcribed.

During the meeting, the prosecutor reviewed the proposed plea agreement with Mr. Horntvedt, including the offer of a 25-year sentence to "wrap up" all of his cases.

CP at 109. The prosecutor stated:

> I'm not here to convince you of anything . . . . [T]his meeting is not to threaten you, intimidate you, scare you, [or] anything like that . . . . [J]ust to tell you kind of what you're looking at, . . . what the potential could be if the case goes to trial.

Id. at 111.

As the group continued to discuss the potential for resolution, the subject of the assigned judge and jury composition came up. The prosecutor explained that because of conflicts, only five judges remained in the pool to be assigned to Mr. Horntvedt's case. The prosecutor explained that of the five judges, "two of those judges are women, which might be difficult for you in a case like this where there are six women victims . . . but those are things for you to consider as well." *Id.* at 116.

The prosecutor then stated:

> [T]he jury is picked from [Department of Licensing] records as well as voting records. So the jury that you will get will not necessarily be a jury of your peers, but it'll be a jury of our peers, be a lot of white folks. And I'm not saying that . . . to scare you. That's reality. We have very few . . . jurors of color that show up or . . . respond to our jury summons. That's just the way it is in Franklin County. . . . But I just want you to know that, and I'm telling you that straight away so you're clear on that.

Id. When the prosecutor said "your peers," she gestured her hand toward Mr. Horntvedt; when she said "our peers," she gestured toward herself and defense counsel. Rep. of Proc. (RP) (Nov. 17, 2021) at 27, 39.

Defense counsel added:

> [Mr. Horntvedt had] asked me to file a motion to [change] . . . venue. The problem I—you know, uh, and—and that's something that your experience will tell you the likelihood of—of having anything moved further than Walla Walla or Yakima is almost nonexistent.
>
> . . . .
>
> And Walla Walla's more Caucasian than—than the [T]ri[-C]ities. And Yakima, I have—honestly have no idea what the—I mean, when I was working there, I . . . worked with people of a number of different races, but I don't know what the percentages are.

CP at 116-17.

As Mr. Horntvedt was leaving the meeting, he told one of the corrections officers, "'[t]hat's some racist shit right there.'" RP (Nov. 17, 2021) at 57.

After the meeting, defense counsel told the prosecutor his client was upset by her comment about Franklin County juries. In response, the prosecutor wrote a letter to defense counsel. In the letter, the prosecutor reiterated the plea offer, then explained:

> You have shared that your client was upset at my comment about the makeup of Franklin County juries. Please understand that I shared that solely to make him aware of the fact that, on the whole, our jury panels are not racially diverse and are unfortunately not usually representative of our community in total. This comment was based on my experience of trying nearly sixty jury trials here throughout my career. Nothing was meant to imply that we would be unable to seat a fair jury in Franklin County as it is of course my ethical obligation (and yours) to endeavor to pick jurors who are fair and impartial and free of bias . . . I just did not want him to reject the offer and then be surprised with the composition of our typical jury pools.

CP at 101.

Guilty plea

Soon after, Mr. Horntvedt agreed to plead guilty in accordance with the State's offer. At the April 27, 2021, hearing, the trial court explained the significance of a guilty plea and then asked Mr. Horntvedt if anyone threatened him to get him to plead guilty. Mr. Horntvedt replied, "No." RP (Apr. 27, 2021) at 8. Defense counsel then interjected, "I will just make a brief record that [Mr. Horntvedt] was concerned about a statement that was made out of court, but we discussed that and that's not really a threat. It was just a statement of fact, and we'll leave it at that for now." *Id*. The court did not inquire into the out-of-court statement.

The court accepted Mr. Horntvedt's guilty plea and found it was "knowingly, intelligently, and voluntarily made; not the product of fear, coercion, or ignorance." *Id.* at 19; *see also* CP at 25. The court ordered the State to prepare a presentence investigation report and continued the case for sentencing.

Motion to withdraw guilty plea

At the start of the June 2, 2021, sentencing hearing, defense counsel informed the court that Mr. Horntvedt's grandmother wished to play a 60-second excerpt from

the recorded remarks made by the prosecutor during the plea negotiation meeting.

After the court questioned why it should grant the request, defense counsel explained:

> The issue is one that Mr. Horntvedt has struggled with the idea of whether to withdraw his plea based on whether or not he was intimidated into entering this plea. We have reached an agreement that he would move forward with this but that he would play this snippet for your Honor to determine whether or not he was coerced in any way into entering this plea. And yet he has agreed to move forward with this change of plea. So again part of the last-minute issues here we had drafted a motion to withdraw the plea, shared that with the state. Talked until late last night with Mr. Horntvedt. He decided he would prefer to go forward with this today, but he still wants the Court to be aware of the situation during the sentencing as to why, as to part of why he's going forward with this.

RP (June 2, 2021) at 6-7. The court responded, "So he wants the benefit of a motion to withdraw a guilty plea without the risk?" *Id.* at 7. Defense counsel replied:

> I don't think that's quite how I would phrase it. I think he wants to make sure that your Honor is aware of all of this. There is an agreed recommendation, which I am asking you to follow. The state will ask you to follow. It's within the standard sentencing range. It is actually I think the low end of the standard sentencing range, which we will all discuss momentarily.

Id.

The court asked a few questions about the nature of the recording, then told defense counsel his client had a binary choice: "Your client either wants to adhere to the plea, or he wants to attempt to withdraw it." *Id.* at 11.

Defense counsel conferred with Mr. Horntvedt, then informed the court that his client wanted to withdraw the plea. The court stated it would allow the motion to proceed, requested additional briefing on the issue of admissibility of the recording under ER 410, then recessed the hearing.

Defense counsel later filed a written motion to withdraw the guilty plea on behalf of Mr. Horntvedt. In an accompanying declaration, defense counsel stated:

> When Mr. Horntvedt entered into the plea agreement, there was an indication that he entered into the plea agreement freely and voluntarily without coercion . . . . However, Mr. Horntvedt declared, a few days later, he no longer felt that he entered his plea agreement freely and voluntarily.

CP at 31.

The hearing resumed a few weeks later. The court decided ER 410 did not prevent it from listening to the recording of the plea negotiation meeting. It determined that both the prosecutor and defense counsel would be witnesses during an evidentiary hearing on the motion and requested successor conflict counsel be appointed for both sides.

Withdrawal of guilty plea evidentiary hearing

At the November 2021 evidentiary hearing, the court heard testimony from the prosecutor, defense counsel, Mr. Horntvedt, and the two corrections officers who were present at the plea negotiation meeting.

The prosecutor explained the nature of the plea negotiation meeting and the hand gesture she made. Counsel testified she wanted to explain to Mr. Horntvedt the consequences of a guilty plea, the complexity of his case, and the negotiated plea agreement. She then testified about the purpose of her remarks about jury composition:

> My purpose was kind of two fold [sic]. Mr. Horntvedt, I've prosecuted him a couple times before. He's never had a case that has gone to a jury trial. So I wanted to kind of let him know a little of what to expect. Sometimes peoples' expectations of what a jury pool will look like or will be is not the reality.
> . . . .
> Secondly, I've had cases before where a defendant comes into court and sees a jury pool, and it's not what they expect, and then they want to change their mind at the last minute. So I was telegraphing to him that we get the jury pool that we get.

RP (Nov. 17, 2021) at 35. During the prosecutor's testimony, the court admitted into evidence the letter she wrote to defense counsel about her jury composition remarks.

Defense counsel testified that following the plea negotiation meeting and receipt of the prosecutor's letter, he and Mr. Horntvedt discussed the difference between how he perceived the prosecutor's remarks, how she explained them in her letter, and whether to go forward with trial or a plea.

Mr. Horntvedt testified the prosecutor told him if he went to trial, he would not be afforded a jury of his peers. He testified he was shocked by the bluntness of the prosecutor's remarks and he felt he was being attacked. Mr. Horntvedt said he told his

counsel how the deputy prosecutor's "racist" remarks made him feel and that he wanted the ability to present to the court what was said and how he felt. *Id.* at 51.

The court concluded the hearing by stating it would listen to the plea negotiation recording, review the briefing and a transcript of the evidentiary hearing once that was available, and then determine if argument on the plea withdrawal motion was necessary.

Subsequent proceedings

After considering the record, the court held a hearing with the parties and denied the motion to withdraw the plea. The court found the prosecutor's statements "improper." CP at 125. Nevertheless, the court determined Mr. Horntvedt's guilty plea was knowing, voluntary, and intelligent. The court then sentenced Mr. Horntvedt to serve 25 years of confinement and 36 months of community custody.

Mr. Horntvedt has filed a timely appeal, challenging the trial court's denial of his motion to withdraw the plea.

ANALYSIS

A trial court must permit a defendant to withdraw their plea in order to correct a "manifest injustice." CrR 4.2(f). In this context, a manifest injustice refers to "'an injustice that is obvious, directly observable, overt, not obscure.'" *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596,

521 P.2d 699 (1974)). A defendant seeking to withdraw their plea based on a manifest injustice bears a significant, though not insurmountable, burden of proof. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). We review a trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010).

One type of manifest injustice that warrants withdrawal of a plea occurs when a plea is involuntary. *Ross*, 129 Wn.2d at 284. A plea may be involuntary due to circumstances such as misinformation, threats, or mental coercion. *See State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) (per curiam); *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003); *State v. Frederick*, 100 Wn.2d 550, 556-57, 674 P.2d 136 (1983), *overruled on other grounds by Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 794-95, 798, 982 P.2d 601 (1999). The constitutional right to due process protects against entry of an involuntary plea. *Weyrich*, 163 Wn.2d at 556.

Mr. Horntvedt argues his plea was involuntary in violation of due process because it was predicated on race-based prosecutorial misconduct. Our case law has yet to address whether this type of prosecutorial misconduct can render a plea involuntary. We conclude that it can. And here, based on an objective review, we conclude the prosecutor's

invocation of race to leverage a guilty plea rendered the plea involuntary as a matter of law.

Reliance on racial or ethnic bias has no place in the justice system. *See State v. Zamora*, 199 Wn.2d 698, 723, 512 P.3d 512 (2022); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *State v. Sum*, 199 Wn.2d 627, 640, 511 P.3d 92 (2022). Appeals to bias not only cause personal harm and undermine the integrity of the judicial system, they distort the deliberative process. "[E]ven the simplest racial cues can trigger implicit biases . . . [that] affect . . . decision-making more so than even explicit references to race." *State v. Bagby*, 200 Wn.2d 777, 795, 552 P.3d 982 (2023) (plurality opinion).

Our case law has primarily addressed the impact of a prosecutor's invocation of racial bias on the decision-making of jurors. *See, e.g.*, *id.* But bias impacts everyone. *See* Jessica Salvatore & J. Nicole Shelton, *Cognitive Costs of Exposure to Racial Prejudice*, 18 PSYCH. SCI. 810, 810-11 (2007); Isabel Bilotta et al., *How Subtle Bias Infects the Law*, 15 ANN. REV. L. & SOC. SCI. 227, 228-29 (2019). Just as racial bias odiously infects a jury's deliberations, it can have a deleterious impact on the decision-making of a defendant weighing the merits of a plea offer. The abrupt injection of racial bias into

one's decision-making process can engender feelings of inferiority, distrust, helplessness, and self-doubt. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Henderson v. Thompson*, 200 Wn.2d 417, 432 n.6, 518 P.3d 1011 (2022) (observing that racial microaggressions can cause anger, frustration, and self-doubt). An individual who has been subjected to a lifetime of racial bias is vulnerable to having wounds reopened through posttrauma reactions, especially when confronted by the State's agents. *See* Antoinette Kavanaugh et al., *Taking the Next Step in* Miranda *Evaluations: Considering Racial Trauma and the Impact of Prior Police Contact*, 47 L. & HUM. BEHAV. 249, 253 (2023); *see also* Sydney Baker et al., *A Critical Discussion of Youth* Miranda *Waivers, Racial Inequity, and Proposed Policy Reforms*, 29 PSYCH., PUB. POL'Y, & L. 320, 326 (2023) (describing how awareness of racial stereotypes impairs one's ability to control emotional and cognitive processes and "resist pressure" from governmental actors). Invocations of racial bias may also cloud an individual's decision-making by triggering painful memories of historic injustices and systemic inequality under the law. *See United States v. Knights*, 989 F.3d 1281, 1297-98 (11th Cir. 2021) (Rosenbaum, J., concurring); Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J. L. & PUB. POL'Y 257, 272-73 (2019). Thus, in the context of a plea offer, the taint of racial bias

inherently subverts a defendant's ability to rationally weigh the options and make a "calculated" move as to whether to take a plea. *Cf. State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981).

The distortive power of racial bias applies to all human decision-making processes. Regardless of whether such bias has been injected into a jury's decision-making or a defendant's participation in plea bargaining, "a verdict affected by racism violates fundamental concepts of fairness and equal justice under law." *Henderson*, 200 Wn.2d at 421. In order to eradicate the pernicious impact of racism on our justice system, claims of race-based prosecutorial misconduct must be subjected to a heightened standard of review "to ensure there is no constitutional violation." *Bagby*, 200 Wn.2d at 788.

The test adopted by our Supreme Court for assessing whether a judgment was impermissibly affected by racism is the objective observer standard. This test demands that we resist the urge to speculate about the precise impact of a purportedly racist comment and instead ask whether "*an* objective observer *could* view the prosecutor's . . . comments . . . as an appeal to . . . prejudice, bias, or stereotypes" about a racial or ethnic group. *Zamora*, 199 Wn.2d at 718 (emphasis added). "The objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful

discrimination" that has resulted in injustices against people of color in the criminal justice system. *Id.*

An objective observer could readily interpret the prosecutor's comments during Mr. Horntvedt's plea negotiation meeting as an apparently intentional appeal to the impact of racial bias. The prosecutor explicitly told Mr. Horntvedt that, should he take his case to trial, he would be unlikely to receive a jury of his "peers." CP at 116. The prosecutor also emphasized that Mr. Horntvedt was different from herself and defense counsel because they, like the anticipated jurors, were "white folk[]." *Id.* Our Supreme Court has recognized that this type of us-versus-them language carries an implication that racial minorities will not be treated equally under the law. *See Bagby*, 200 Wn.2d at 794.

An objective observer could construe the prosecutor's comments as leveraging the possibility of racial bias in order to secure Mr. Horntvedt's guilty plea. The prosecutor's statement was not merely an innocuous comment on the realities of Franklin County's jury pools. An objective observer could fairly understand the comments to mean that Mr. Horntvedt's chances for a fair trial in Franklin County would turn on his race, as opposed to the strength of the evidence. Because Mr. Horntvedt is African American, the message was clear that he would be less likely to receive a fair trial than a white

defendant.[2] This message of unfairness based on personal identity was underscored when the prosecutor warned Mr. Horntvedt that his case might also be made "difficult" by the possible involvement of a female judge. CP at 116.

The fact that the prosecutor's comments were an apparently intentional appeal to racial bias does not mean that the prosecutor was actually motivated by animus. Although misguided, the prosecutor's comments may have been well intentioned. Undoubtedly the prosecutor believed the plea offer was in Mr. Horntvedt's best interests. And she appeared motivated to go out of her way to make sure Mr. Horntvedt understood the risks involved in taking his case to trial. But the prosecutor's apparently benign intentions are irrelevant to the objective observer standard. *See Bagby*, 200 Wn.2d at 791 ("[S]ubjective intent is not considered in race-based prosecutorial misconduct claims."). The objective observer analysis is "concerned with the impact of racial bias—not a person's intent."

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[2] The appearance of the conversation to an objective observer would likely be different had it occurred solely between Mr. Horntvedt and his own attorney. "[I]t is not considered misleading or coercive for an attorney to honestly discuss with [their] client the potential obstacles that may arise at trial (including the demographics of the jury pool) and how those issues may affect the outcome or potential sentence." *Polk v. State*, 605 S.W.3d 427, 432 (Mo. Ct. App. 2020). But the prosecutor plays a different role. The prosecutor is a representative of the State. By suggesting, on behalf of the State, that a defendant might not receive a fair trial due to the defendant's race, the State strips a defendant of any faith in the justice system.

Id. at 792-93.

Our objective review of the record shows the prosecutor appealed to fears of racial bias in order to leverage Mr. Horntvedt's guilty plea. This is an "inherently prejudic[ial]" circumstance that can be remedied only by reversal. *Zamora*, 199 Wn.2d at 721. It would be inappropriate to speculate on the extent to which the specter of racism actually impacted Mr. Horntvedt's thought processes or whether subsequent communications from the prosecutor or defense counsel might have alleviated Mr. Horntvedt's concerns. The impact on human behavior of an appeal to racial bias is too difficult to measure. *See Bagby*, 200 Wn.2d at 802-03. When a defendant's plea is sustained in violation of due process, our courts "decline to engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying [their] decision to accept the plea bargain." *State v. Mendoza*, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006).[3] Instead, given the nature of the

[3] *Mendoza* and its progeny were not decided in the context of racial misconduct, nevertheless like *Zamora* and *Bagby* these cases reject a harmless error approach. As outlined in *Mendoza*, when a defendant is provided misinformation about the direct consequences of a guilty plea, the defendant will be entitled to withdraw the plea without having to show the misinformation impacted their subjective decision to enter a plea. 157 Wn.2d at 590-91. *Mendoza*'s rule against harmless error applies in equal force when the misinformation constitutes the distorting impact of racial bias.

harm, the defendant must be allowed the option to withdraw the plea. *See Weyrich*, 163 Wn.2d at 557.[4]

CONCLUSION

All members of the legal community—law enforcement, attorneys, and judges—bear responsibility for addressing racial inequities in our justice system. This is hard work. None of us has all the answers and all of us will sometimes get things wrong. Yet we must move forward with humility, compassion, and dedication to constant improvement.

Mr. Horntvedt has established a manifest injustice impaired the voluntariness of his guilty plea. He therefore must be given the option to withdraw. We remand for the trial court to allow Mr. Horntvedt to withdraw his plea and, if he withdraws it, to set this matter for trial.

[4] Our concurring colleague takes a different methodological approach, insisting that a court can find a plea was subjectively voluntary, despite the prosecutor's use of a manifestly unjust appeal to racial bias. We disagree that this type of subjective inquiry is either possible or appropriate. It is akin to the harmless error approach that the Supreme Court abandoned in *Zamora*. 199 Wn.2d at 721 ("[W]hen a prosecutor flagrantly or apparently intentionally appeals to . . . racial or ethnic prejudice, bias, or stereotypes, the resulting prejudice is incurable and requires reversal."). Rather than take a subjective approach, or speculate as to Mr. Horntvedt's internal thought processes, we conclude Mr. Horntvedt's plea was rendered involuntary as a matter of law.

A majority of the panel having determined that only the foregoing portion of this opinion, and the concurring opinion in its entirety, will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

RAP 10.10 permits a defendant to file a pro se statement of additional grounds for review (SAG) if the defendant believes their appellate counsel has not adequately addressed certain matters in the briefing. Mr. Horntvedt raises two issues in his SAG, which we discuss in turn.

CrR 3.3 time-for-trial violations

Mr. Horntvedt contends the trial court violated CrR 3.3. We review alleged violations of CrR 3.3 de novo. *State v. Walker*, 199 Wn.2d 796, 800, 513 P.3d 111 (2022). To preserve a claim for a CrR 3.3 violation, the defendant must timely object to the setting of a trial that is outside of the time-for-trial period and move to reset trial within the time-for-trial period. CrR 3.3(d)(3).

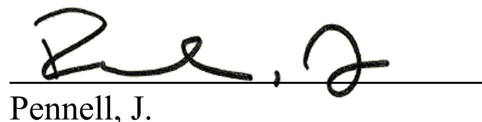
Mr. Horntvedt contends he objected to all continuances. However, the record before us does not show when Mr. Horntvedt was arraigned nor does it show any time-for-trial objections. The record is therefore insufficient for us to determine whether a

violation occurred or not. Issues that involve facts or evidence not in the record on review are more properly raised through a personal restraint petition, not a SAG. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Because Mr. Horntvedt fails to identify the specific occurrence of any objection or error, review here is not warranted. RAP 10.10(c).

Plea negotiation meeting attendees

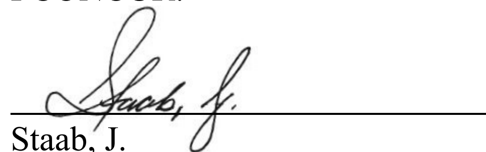
In his second SAG issue, Mr. Horntvedt identifies the persons present during the plea negotiation meeting and their race. However, he fails to identify any error for this court to review. RAP 10.10(c). Both parties' briefing and the trial court's findings correctly account for the persons present during the meeting and their race. Since Mr. Horntvedt fails to identify the occurrence of any error, review here is not warranted. *Id*.

We remand for the trial court to allow Mr. Horntvedt to withdraw his plea and, if he withdraws it, to set this matter for trial.



Pennell, J.

I CONCUR:



Staab, J.

LAWRENCE-BERREY, A.C.J. (concurring) — The majority correctly concludes that Lance Horntvedt is entitled to withdraw his guilty plea. But because it reaches this correct conclusion for the wrong reason, I write separately.

As explained below, the trial court's finding that Mr. Horntvedt's plea was voluntary is supported by substantial evidence, so we should not reverse on that basis. Reversal, nevertheless, is required because the deputy prosecutor committed race-based prosecutorial misconduct.

General standards

CrR 4.2(f) provides in relevant part: "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."

In *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974), our Supreme Court set forth four examples of manifest injustice. They are: (1) denial of effective assistance of counsel, (2) plea was not ratified by the defendant or one authorized to do so, (3) plea was not voluntary, and (4) plea agreement was not kept by prosecution. *Id.* at 597. Any one of the four factors would require a trial court to allow a defendant to withdraw his plea. *Id.* The court added, "If, however, facts presented to the court do not fall within one of the listed categories . . . there must at least be some showing that a manifest (*i.e.*, obvious, directly observable, overt or not obscure) injustice will occur if the defendant is not permitted to withdraw his plea." *Id.* at 598.

We review a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). We review the trial court's findings of fact for substantial evidence, which is evidence sufficient to persuade a reasonable person of the trial court's findings. *A.N.J.*, 168 Wn.2d at 107. Unchallenged findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

Analysis

Mr. Horntvedt argues the deputy prosecutor's statements about jury composition (1) made his plea involuntary and (2) constituted race-based prosecutorial misconduct. I address each of his two arguments in turn.

1. Voluntary plea

We determine voluntariness of a plea by considering the totality of the circumstances. *State v. Snider*, 199 Wn.2d 435, 449, 508 P.3d 1014 (2022). Where a defendant completes a written plea statement and admits to reading, understanding, and signing it, a strong presumption arises that the plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). And where the trial court has also inquired into the voluntariness of the plea on the record, "'the presumption of voluntariness is well nigh irrefutable.'" *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004) (quoting *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)). These safeguards exist

to protect a defendant's rights before a trial court accepts the plea but once these safeguards have been properly employed, a defendant carries a "demanding" burden when seeking to withdraw a guilty plea. *State v. DeClue*, 157 Wn. App. 787, 792, 239 P.3d 377 (2010).

A guilty plea is involuntary and invalid if it is obtained by mental coercion overbearing the will of the defendant. *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). The task of convincing the trial court that the guilty plea was coerced will be "especially difficult where there are other apparent reasons for pleading guilty, such as a generous plea bargain." *State v. Frederick*, 100 Wn.2d 550, 558, 674 P.2d 136 (1983), *overruled on other grounds by Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). A defendant's guilty plea is not involuntary where the decision to plead is a calculated move on the defendant's part to avoid what they consider to be a worse fate. *State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981).

Here, Mr. Horntvedt denied any threats were made to make him plead guilty and acknowledged the voluntary nature of his plea in his written statement on plea of guilty and during his colloquy with the court. Also, defense counsel testified about the thorough discussions he and Mr. Horntvedt had about the deputy prosecutor's remarks and Mr. Horntvedt's decision to plead guilty nevertheless. In addition, the trial court found, on undisputed evidence, that Mr. Horntvedt received substantial benefit from the

plea agreement.[1] Based on these unchallenged findings, substantial evidence supports the trial court's finding that Mr. Horntvedt's guilty plea was voluntary. I would conclude the

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[1] The trial court found, in relevant part:

> (6) At the conclusion of the plea hearing, the court found the defendant's plea to be knowingly, intelligently and voluntarily made, that defendant understood the charges and the consequences of the plea, and that there was a factual basis for the plea. Defendant had acknowledged the knowing, intelligent and voluntary nature of the plea both in his written statement on plea of guilty and in his colloquy with the court.
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> . . . .
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> (8) While the court has some concerns about statements that were made, the meeting that occurred on March 26, 2021 was not itself improper. The only question is whether anything was said during the meeting that overcame the defendant's free will making his plea involuntary.
>
> (9) A period of approximately one month elapsed between the meeting and defendant's entry of his guilty plea. Upon being advised by defense counsel that defendant had concerns about the deputy prosecutor's remarks, the deputy prosecutor wrote a letter to defense counsel clarifying those remarks. The letter was written 10 days before the guilty plea was entered. Defense counsel made a record at the guilty plea hearing that he had fully discussed the matter with his client and that it did not affect his decision to plead guilty.
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> . . . .
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> (11) Statements during the meeting on March 26, 2021, by the deputy prosecutor and defense counsel, although improper, did not overcome defendant's free will so as to render his guilty plea involuntary.
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> . . . .
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> (13) . . . If the matter had proceeded to trial and had defendant been convicted of all potential charges, the State would have asked for a sentence of 66 years, rather than the 25 year (300 month) sentencing recommendation resulting from the plea agreement. Defendant received [a] substantial benefit from the plea agreement.

Clerk's Papers at 124-25.

trial court did not abuse its discretion when it denied Mr. Horntvedt's motion to withdraw his plea.[2]

2. Race-based prosecutorial misconduct

Preliminarily, Mr. Horntvedt did not raise the issue of race-based prosecutorial misconduct to the trial court. Nevertheless, RAP 2.5(a)(3) permits us to review a claim of manifest error affecting a constitutional right. Here, the error is manifest because it is obvious that the deputy prosecutor's appeal to racial prejudice was misconduct. The right also is constitutional because the Sixth Amendment to the United States Constitution prohibits prosecutors from appealing to racial prejudice. *State v. Bagby*, 200 Wn.2d 777, 787-88, 522 P.3d 982 (2023). Review of this unpreserved claim of error is proper.

As noted previously, CrR 4.2(f) permits a defendant to withdraw their guilty plea when necessary to correct a manifest injustice, and the "manifest" component is met if the act is obvious, directly observable, overt or not obscure. *Taylor*, 83 Wn.2d at 598. Here, the deputy prosecutor's remarks to Mr. Horntvedt—that he would not receive a

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[2] In its final footnote, the majority asserts that it is not "possible or appropriate" for trial courts to make determinations of voluntariness should a prosecutor invoke race to leverage a guilty plea. Majority at 17 n.4. I disagree. Washington trial courts are well equipped to make findings about plea voluntariness and have been doing so for more than a century. *See, e.g.*, *State v. Cimini*, 53 Wash. 268, 273-74, 101 P. 891 (1909); *State v. Scott*, 101 Wash. 199, 201-05, 172 P. 234 (1918). This assertion supplants the fact-finding function of trial courts. Nor do I agree with the majority's next assertion that deferring to a trial court's finding of fact is "akin to the harmless error approach" abandoned in *State v. Zamora*, 199 Wn.2d 698, 721, 512 P.3d 512 (2022). Majority at 17 n.4.

jury of his peers, but "a jury of our peers, . . . a lot of white folks"[3]—unquestionably meets this standard.

The next question is whether the remarks amount to an injustice. The State argues there was nothing improper about the plea negotiation conference, the remarks in question are true, and therefore the remarks are not improper. The State's argument sanitizes and ignores the context of the remarks.

When a defendant alleges prosecutorial misconduct implicating racial or ethnic bias, the court considers whether the prosecutor flagrantly or apparently intentionally appealed to racial or ethnic bias.[4] *State v. Zamora*, 199 Wn.2d 698, 715, 512 P.3d 512 (2022). Under this standard for prosecutorial misconduct, the prosecutor's intent is irrelevant. *Id.* at 716. Instead, the court applies the "objective observer" standard that asks "whether 'an objective observer could view race or ethnicity as a factor'" in the purported misconduct. *Id.* at 718 (quoting *State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018). The objective observer is not a person blind or deaf to our past, but is "a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways." *Jefferson*, 192 Wn.2d at 250. To aid this analysis, we consider the apparent purpose of the statement, whether the statement was based on evidence or

[3] Clerk's Papers at 116.

[4] "Prosecutorial misconduct" is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). It is, instead, a term of art that refers to "prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial." *Id.*

reasonable inferences in the record, and the frequency of the remarks. *Zamora*, 199 Wn.2d at 718-19. If race-based prosecutorial misconduct occurred, we no longer inquire whether the misconduct was prejudicial; rather, the remedy is reversal. *Id.* at 722.

Here, had the deputy prosecutor ended her discussion about jury composition sooner, the fact of the jury's likely composition might have been communicated without an improper sting. But she did not. She improperly emphasized race when she told Mr. Horntvedt that he would not receive a jury of his peers, but "a jury of our peers, . . . a lot of white folks." Clerk's Papers at 116. This remark, although true, carried with it a problematic sting: an objective observer could believe the deputy prosecutor emphasized the specter of race in the context of plea negotiations to cause Mr. Horntvedt to fear he could not receive a fair trial so he would plead guilty. Once that sting was delivered, the deputy prosecutor's explanation that her remark was simply factual was an insufficient balm. Although the remark was not repeated and the deputy prosecutor attempted to diffuse it, the implication that Mr. Horntvedt could not receive a fair trial because he is African American was sufficiently strong and problematic to constitute an injustice sufficient to allow him to be given the option to withdraw his guilty plea. On this basis, I would grant the relief ordered by the majority.

Lawrence-Berrey, A.C.J.
Lawrence-Berrey, J.