

1
2
3
4
5 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

6 THE STATE OF WASHINGTON,

7 Plaintiff,

8 v.

9 WILLIAM TOLIVER,

10 Defendant

Case No.: 20-1-00423-1 SEA

DEFENDANT'S REQUEST FOR AN
EVIDENTIARY HEARING

11
12 1. MOTION

13 Through counsel Cathy Gormley and Juanita Holmes, William Toliver moves this court
14 for an evidentiary hearing to decide any disputed issues of fact and determine whether the
15 prosecutor's media statements following his release hearing included implicit appeals to racial
16 bias. This motion is brought under the authority of *State v. Zamora*, 199 Wn.2d 698 (2022),
17 Wash. Const. art. 1, § 22, and the additional authorities cited below.
18

19 2. FACTS

20 As shown in the defendant's 8.3(b) Motion to Dismiss, the prosecutor repeatedly
21 referenced Mr. Tolbert's criminal history in its statements to the media following his February
22 23, 2023, release hearing. At the prompting of Senior DPA Petersen, the prosecutor's office
23 cited his "history of unlawful gun possession in violation of court orders," "history of domestic
24 violence," and "history of not following court orders." (Dk. No. 323 p. 5-6). The prosecutor
25 also released a statement to the Seattle Times referencing Mr. Toliver's alleged gang affiliation
26 and forwarded the charging documents containing the now inadmissible gang allegation to
27
28

1 multiple media outlets, including at least one outlet that did not request it. Numerous media
2 then repeated the alleged gang affiliation, with some featuring it in their headlines. Predictably,
3 outraged and often racist public comments ensued.

4
5 To date, the state has not responded to the Motion to Dismiss. However, we expect it
6 will raise factual disputes to the defense allegations that will require an evidentiary hearing to
7 resolve.

8 3. LAW AND ARGUMENT

9
10 a. *An objective observer could view race as a factor in the prosecutor's media blitz.*

11 Criminal history is a historical proxy for race and the first listed "presumably invalid"
12 criteria under GR 37 (H) (1) for that reason. Just this month, the 9th circuit upheld in relevant
13 part a Seattle housing ordinance that proscribed landlords' use of criminal history, calling it a
14 proxy for race. *Chong Yim v. City of Seattle* No. 21-35567 (9th Cir. 2023). In another recent
15 case, the court held that prior involvement with the child welfare system could serve as a proxy
16 for race, and thus cannot be used to deny child placement with an otherwise appropriate family
17 member. *Matter of Dependency of K.W.*, 199 Wn.2d 131, 143 (2022).

18
19 In Judge Young's order permitting limited gang evidence in both defendant's trials, before
20 later ruling it inadmissible in Mr. Toliver's, she implicitly referenced the *K.W.* case after Tolbert's
21 lawyers had briefed it in their pleadings, acknowledging:

22
23 [G]ang evidence is highly inflammatory and can be used to reinforce jurors' implicit and
24 explicit bias regarding young black [Black] men. **The defense is correct that gang
evidence can be a proxy for race.**

25
26 Dk 223 Ex. 7 (emphasis added).

27 Despite that ruling from Judge Young, in its recent media statements, the prosecutor
28 revived the gang issue in the public's minds and broadcasted Mr. Toliver's criminal history.

1 Because such references are appeals to bias and proxies for race, they provide the court an
2 additional basis to find prosecutorial misconduct for the CrR 8.3(b) motion to dismiss. *State v.*
3 *Zamora*, 199 Wn.2d 698, 702 (2022). They also provide *prima facie* evidence from which an
4 objective observer could view race as a factor in these proceedings, as the prosecutor
5 disseminated these appeals to racial bias to the jury pool and beyond.
6

7 *b. The objective observer standard applies to race-based prosecutorial misconduct.*

8 Prosecutors are quasi-judicial officers with a special duty to ensure that a defendant's
9 rights to a fair trial are not violated. *State v. Monday*, 171 Wn.2d 667, 676 (2011). A
10 prosecutor "gravely violates a defendant's Washington State Constitution article I, section 22
11 right to an impartial jury when the prosecutor resorts to racist arguments and appeals to racial
12 stereotypes or racial bias to achieve convictions." *Id* at 667. When a prosecutor taints the jury
13 by "race-based...misconduct at the early stages of a case, the jury becomes infected in
14 untraceable ways." *Zamora, supra*, at 714. Once a proponent makes a *prima facie* case
15 showing that an objective observer could view race as a factor at any stage of a proceeding, the
16 court cannot ignore the evidence or claim and must grant an evidentiary hearing. *State v.*
17 *Quijas*, 12 Wn. App. 2d 363, 3 (2020); *Henderson v. Thompson*, 200 Wn.2 417, 435 (2022)
18 citing *State v. Berhe*, 193 Wn.2d 647, 665 (2019).
19
20
21

22 In *Zamora*, the court held for the first time that the objective observer standard applies
23 to claims of race-based prosecutorial misconduct. *Id* at 723. Under this standard, the court must
24 determine whether an objective observer could view the prosecutor's comments as an appeal to
25 the jury panel's prejudice, bias, or stereotypes. An objective observer is one who,

26 "[I]s aware of the history of race and ethnic discrimination in the United States and
27 aware of implicit, institutional, and unconscious biases, in addition to purposeful
28 discrimination."

1 *Id* at 723.

2 If an objective observer could view the prosecutor's comments as race-based appeals,
3 the prosecutor has committed flagrant or apparently intentional misconduct. *Id*. The court does
4 not consider the prosecutor's subjective intent to determine whether the prosecutor has
5 committed such misconduct. *Zamora* at 716 (*quoting State v. Loughbom*, 196 Wn.2 64, 70
6 (2020)).

7
8 In *Zamora*, the court reviewed whether the prosecutor made flagrant, apparently
9 intentional appeals to racial bias when he invoked the specter of unlawful immigration and
10 border security during *voir dire* in the trial of a Latino defendant. It noted that ten times during
11 a one-hour *voir dire*, the prosecutor asked about crime at the border, border security, and
12 undocumented immigrants committing crimes. The court also noted the nation's remote and
13 recent discrimination against Latinxs based on ethnicity. *Id* at 726-727. Applying the objective
14 standard, the court found that the prosecutor committed race-based misconduct, held that the
15 resulting prejudice is incurable in such cases, and reversed the conviction. *Id* at 729.

16
17 In contrast to *Zamora*, where the prosecutor confined his racial appeals to the jury, the
18 prosecutor here made its racial appeals to the entire jury pool via the media, which,
19 predictably, linked those appeals with inflammatory images of Mr. Toliver. By deploying the
20 media in this way, the prosecutor multiplied the reach of those racial appeals exponentially,
21 though the exact numbers are unknown.¹ Also, as in *Zamora*, the prosecutor here made the
22 racial appeals--this time against a Black man, in a nation whose recent and remote history is
23 replete with gross discrimination and violence against its Black citizens. Under these facts and
24
25

26
27
28

¹Until the defense gains access to TVEyes and Meltwater data, it cannot provide exact numbers.

1 the holdings of *Zamora*, *Quijas*, and *Henderson*, an evidentiary hearing is required, and the
2 objective observer test is easily met.

3
4 4. CONCLUSION

5 The *Zamora* court lowered the standard for finding race-based prosecutorial misconduct
6 because the old standards "proved insufficient to deter such conduct." *Id* at 712 *citing Monday*,
7 *supra*, at 171. The opinion was one in a series in which the Washington Supreme Court has
8 signaled it will do what is needed to deter a prosecutor from making appeals to racial bias that
9 undermine the presumption of innocence. *State v. Bagby*, slip op. (Wash. Supreme Ct. 1/19/23)
10 *citing Zamora, supra*, at 722. We respectfully ask the court to grant the evidentiary hearing as
11 required under *Zamora*, *Quijas* and *Henderson*. We will then ask this court to rule consistently
12 with the recent mandates cited above.
13

14
15 Respectfully submitted March 28, 2023

16
17
18 s/Cathy Gormley
19 Cathy Gormley, WSBA #26169
20
21
22
23
24
25
26
27
28