No. 308154

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

NATHEN BENNETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE ROBERT LAWRENCE-BERRY, JUDGE

RESPONSE BRIEF

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Federal Cases

TABLE OF AUTHORITIES (continued)

PAGE

Rules and Instructions

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the court erred in limiting the defendant's peremptory challenges pursuant to *Batson v. Kentucky*?

2. Whether the court erred in denying Mr. Bennett's proposed self-defense or justifiable homicide instructions?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court properly in denying the peremptory challenges, pursuant to the procedure set forth in *Batson.* In any event, any error on the part of the trial court does not require automatic reversal.

2. The court did not err in denying the proposed instructions, as the facts did not support them, and justifiable homicide instructions are not appropriate in felony murder cases.

III. STATEMENT OF THE CASE

The State is satisfied with Mr. Bennett's Statement of the Case. RAP 10.3(b).

IV. ARGUMENT.

1. **The court did not err in limiting the defendant's peremptory challenges pursuant to *Batson v. Kentucky.***

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Six years later in Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same in all cases, the juror is subjected to open and public racial discrimination." Id., at 49.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

In deciding whether step one has been met, the court in Batson "held that a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives

'rise to an inference of discriminatory purpose.'" Johnson v. California, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005), *quoting* Batson, 476 U.S. at 94. *See also,* State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752, *cert denied* 131 S. Ct. 522 (2010). To satisfy his burden, a defendant may rely solely on the facts concerning the selection of the venire in his case. Batson, 476 U.S. at 95. The Supreme Court has declined to require proof of a pattern or practice because a single invidiously discriminatory governmental act is not rendered less harmful by the fact that it is not one in a series of discriminatory acts. Johnson, 545 U.S. at 169; Batson, 476 U.S. at 95.

If the court finds a prima facie showing, then it will ask the party exercising the preemptory challenge for an explanation. Should the party volunteer a race-neutral explanation, the trial court rules on whether a prima facie case has been made out, and the trial court then rules on the ultimate question of racial motivation, the preliminary prima face case evaluation is unnecessary. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Going to the second step marks a shift in the burden of production but not of the burden of persuasion. The burden of persuasion "rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at

768. In assessing the second step, the trial court is guided by the following cautionary instruction: "The step of this process does not demand an explanation that is persuasive, or even plausible. Purkett, 514 U.S. at 767-68; *see also,* State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). While the proponent must have legitimate reasons for exercising the strike, this is not the same as stating that the proffered reason must make sense; the constitution requires only that it be a reason that does not deny equal protection. Purkett, 514 U.S. at 768-69.

The court has described the process as the "first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." Johnson, 545 U.S. at 171. In the third step, the court weighs the persuasiveness of the justification and "determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." Purkett, 514 U.S. 768.

One division of the Court of Appeals has established circumstances for the court to consider in making its determination: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor (or

proponent of the strike); (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. State v. Evans, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000).

A trial court's determination is accorded great deference on appeal, Hernandez, 500 U.S. at 364; Luvene, 127 Wn.2d at 699 will be upheld unless clearly erroneous.

Here, the trial court's decision should be accorded great deference, and it should be affirmed, as there was a clear prima facie case made out that four of the defense's peremptory challenges would have removed all of the apparent Hispanic members of the jury pool. The court properly weighed the reasons given by the defense, and allowed the strikes to stand as to two prospective jurors. The court determined that the State had met its burden of demonstrating purposeful discrimination, however, as to Jurors 4 and 10. The factors outline in Evans support this determination, as the strikes were disproportionately directed at members of one group, and again, allowing the strikes to stand would have removed all members of that group from the seated jury.

2. Even if the court erred in responding to the Batson challenge, automatic reversal is not dictated.

Mr. Bennett acknowledges in a footnote in his brief that the United States Supreme Court has rejected automatic reversal in cases where the trial court has erred in its denial of a defendant's peremptory challenge under Batson. Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed.2d 320 (2009). The court's holding relied on precedent that peremptory challenges are not constitutionally mandated and are not necessary for a fair trial. The court concluded that when "a defendant tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." Id., 129 S. Ct. at 1453.

Bennett maintains that Washington is one of several states which have maintained an independent basis for automatic reversal, relying on Vreen, supra, 143 Wn.2d at 932: "[w]e agree erroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates . . ."

However, it must noted that the Supreme Court relied heavily upon the Ninth Circuit decision in United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996), "[t]he error in this case – the erroneous denial of a right of peremptory challenge-is simply not amenable to harmless-error analysis." Id., at 1144.

After the decision in Rivera, Annigoni is no longer good law, and indeed the Ninth Circuit has recognized that it has been undercut by Rivera in its rejection of the automatic reveral rule. United States v. Lindsey, 634 F.3d 541 (9th Cir. 2011). In Lindsey, the Court of Appeals affirmed even though the trial court mistakenly disallowed the defendant's last peremptory challenge, finding that the error was not per se reversible error.

Likewise, here, there is nothing evident from the record that Jurors 4 and 10 would have been challengeable. In light of Rivera, even if this Court should determine that the trial court erred in denying Bennette two of his peremptory challenges, it should also determine that any violation was in good faith, and decline to remand this matter for a new trial.

3. The court did not err in declining to give the self defense instructions.

Mr. Bennett assigns error to the court's failure to give his proposed instructions on self defense, arguing that the court employed the wrong standard, determining that he did not have a reasonable fear of death or great bodily injury, instead of the correct one, that he had the right to use force to repel a serious felony, and that logically, self-defense must be viewed in light of the predicate felony in a charge of felony murder. The State submits that the facts did not support the proposed instructions.

Further, the State would ask this Court to so hold consistent with the decisions in Division Two, State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006), and State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012), which limit the use of the justifiable homicide instruction, WPIC 17.02.

An appellate court normally reviews jury instructions de novo. State v. Knutz, 161 Wn. App. 395, 403, 253 P.3d 437 (2011), *cited* in McCreven, 170 Wn. App. at 461-62. "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." Id. However, when a trial court has refused to give a justifiable homicide or self-defense instruction, the standard of review depends on why the trial court did so. State v. Walker, 136 Wn.2d 767 , 771,-72, 966 P.2d 883 (1998). If the trial court's refusal is based on a factual dispute, then the decision is reviewed for abuse of discretion. Id.

"To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997).

"The degree of force used in self-defense is limited to what a reasonable prudent person would find necessary under the conditions as they appeared to the defendant. " Id.

A trial court should deny a requested self-defense instruction only where a defense theory is "completely unsupported" by the evidence." State v. George, 161 Wn. App. 86, 100, 249 P.3d 202, *review denied* 172 Wn.2d 1007 (2011).

Mr. Bennett submits that his proposed self-defense instruction, WPIC 16.02 should have been given, since it was supported by RCW 9A.16.020, which provides that an individual may act in self defense to defend himself or others against a "felony". Bennett presumes that the sexual contact, initiated by the victim Mr. Cantu, constituted rape. However, as Mr. Bennett described the encounter at trial, there was no forcible compulsion or other means employed to overcome his resistance or lack of consent, or prevent him from simply walking away. **(4 RP 705-720)** The self defense instruction was thus not supported by the facts, and the court did not abuse its discretion in so finding.

Mr. Bennett's request to instruct the jury as to justifiable homicide WPIC 17.02, was also properly rejected, since, as Division Two has stated: "[w]e hold that WPIC 17.02 can never be given in a felony murder case where assault is the predicate felony because it can never be

reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." Ferguson, 131 Wn. App. at 862.

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction.

Respectfully submitted this 25th day of April, 2013.

/s/ Kevin G. Eilmes
WSBA 18364
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney
128 N. 2nd St., Room 211
Yakima, WA 98901
Telephone: (509) 574-1200
FAX: (509) 574-1201
kevin.eilmes@co.yakima.wa.us

Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant and the defendant via U.S. Mail.

Ms. Elaine L. Winters
1511 Third Avenue, Suite 701
Seattle, WA 98101

Nathan Bennett
DOC # 357326
Monroe Correction Complex
P.O. Box 777
Monroe, WA 98272

Dated at Yakima WA this 25th day of April, 2013

/s/ Kevin G. Eilmes