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Court of Appeals
Division I
State of Washington

No. 72356-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TEREZ LEJUAN BARDWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Bardwell's Batson[1] challenge to the State's peremptory strike of African-American Juror No. 25, in violation of the Fourteenth Amendment's equal protection guarantee.

2. The trial court's use of notepads to conduct peremptory challenges violated the public's and Mr. Bardwell's rights to a public trial.

3. The State presented insufficient evidence to prove value, as required to sustain Mr. Bardwell's conviction for possession of stolen property in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The equal protection clause of the Fourteenth Amendment prohibits racial discrimination in jury selection. Under Batson v. Kentucky, once the defendant has made a prima facie showing that a challenge was based on race, the burden shifts to the prosecutor to advance a race-neutral reason for the strike. African-Americans are 6.4 times more likely to be incarcerated than whites, and this discrepancy is not explained by crime commission rates. Did the State fail to supply a race-neutral reason at Batson's second stage for its strike of an African-

[1] Batson v. Kentucky, 476 U.S. 79, 100 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

American juror where the primary basis was the fact that the juror's uncle was incarcerated, and two of the State's alternative, demeanor-based challenges were legally insufficient to support a strike? (Assignment of Error 1)

2. Did Mr. Bardwell prove purposeful discrimination at Batson's third stage where (1) the State's principal basis for striking Juror No. 25 was not race-neutral and (2) the State's demeanor-based challenges were not substantiated by the court or counsel? (Assignment of Error 1)

3. In the alternative, should this Court adopt a rule requiring a Batson objection be sustained where there is a reasonable probability that race was a factor in the exercise of the peremptory? Does application of the rule here mandate reversal? (Assignment of Error 1)

4. Did the use of a notepad to conduct peremptory challenges, where the identity of the party that had made the challenge was concealed from the jury and the public at the time of jury selection, violate the right to a public trial? (Assignment of Error 2)

5. Where the State prosecutes a person for a crime which requires it to prove property had a value exceeding a specific amount, the State must present evidence of the items' fair market value in the area at the time the crime was committed. "Market value" is an objective standard, and means "the price which a well-informed buyer would pay to a well-

informed seller, where neither is obliged to enter into the transaction." The State prosecuted Mr. Bardwell for possession of stolen property in the second degree. For some stolen items, the State presented no evidence of value. For others, the State relied on a child's estimate of the retail price paid for the items, without showing when the items were bought, or accounting for any depreciation in the value of the items. Did the State fail to present sufficient evidence that Mr. Bardwell possessed stolen property exceeding $750 in value? (Assignment of Error 3)

C. STATEMENT OF THE CASE

1. Substantive facts.

On the afternoon of October 14, 2013, a Seattle police officer attempted to effect a traffic stop of a Cadillac because the car did not have a front license plate. Instead of stopping, the Cadillac drove through a red light and collided with several cars. RP 303-07.[2] Appellant Terez Bardwell and a young woman jumped out of the driver's side of the car and Mr. Bardwell ran away. RP 311-12, 336. Mr. Bardwell was ultimately found hiding in the attic of a nearby business and arrested. RP 467-68.

[2] The verbatim report of proceedings is contained in multiple consecutively paginated volumes and is referenced as "RP" followed by page number. Jury selection was transcribed separately and is referenced as "RP (Voir Dire)" followed by page number.

Near where Mr. Bardwell was found was a red bag. RP 470. In the bag was cash, a purple wallet, a broken wooden drawer containing some jewelry, and some mail addressed to 9324 Sturtevant Ave. S., a few minutes' drive from the accident scene. RP 470, 554-55. The residence at 9324 Sturtevant Ave. S. had been burglarized earlier that day. RP 674-75, 702-03.

When Mr. Bardwell was searched, officers found $435.25 in cash in his front pants pocket. RP 564. A search of the Cadillac pursuant to a warrant revealed an iPad, a briefcase, additional cash, and a gun. RP 874-86. The gun was found on the driver's side front floorboard of the car. RP 903-04.

Mr. Bardwell was prosecuted by amended information for unlawful possession of a firearm in the first degree, residential burglary, attempting to elude a pursuing police vehicle, and possession of stolen property in the second degree. CP 21-23. A jury trial was held before the Honorable Andrea Darvas.

2. Jury selection.

Jury selection took nearly two days. The court utilized a method for the parties' peremptory challenges, without objection from either side, in which for each round of strikes, both the prosecutor and defense counsel indicated which juror they intended to strike on a notepad. RP

125; Supp. CP __, Sub No. 55. The judge then excused both jurors on the record, without stating which party had made the strike. RP (Voir Dire) 177-79, 186-87. The handwritten notes of the peremptory challenges were filed in the court file. Supp. CP __, Sub No. 55.

On the third round of strikes, the defense objected to the State's strike of Juror No. 25 under Batson.

The State's claimed basis for the strike was the juror's response to one of the general questions from the court, which preceded both rounds of voir dire conducted by the parties. The questions and answers were as follows:

> The Court: And then is there anyone here who has had the experience that you or someone close to you, a family member or close friend, has been accused of a crime? Juror No. 25? Yes ma'am?
>
> The Juror: I have an uncle that's in jail.
>
> The Court: And is he awaiting trial or was he convicted of something?
>
> The Juror: Convicted.
>
> The Court: What was he convicted of?
>
> The Juror: Assault.
>
> The Court: Okay, and was that recent?
>
> The Juror: Six years.

> The Court: Okay. Anything about that experience that would influence your ability to be a fair or impartial juror in this case?
>
> The Juror: No.

RP (Voir Dire) 106.

Three other jurors, Jurors No. 4, 5, and 44 also answered the question affirmatively. RP (Voir Dire) 106-07. Juror No. 4 stated that his son had served time in prison as a minor for car theft. Id. Juror No. 5 said that a family member had been accused of "breaking a domestic violence order during a divorce" but that "[n]othing ever came of it." Id. at 107. And Juror No. 44 indicated that she had a family member who, seven or eight years earlier, had been prosecuted as an adult for a robbery he had committed as a juvenile, for which he had to pay a fine and serve time in jail. Id. at 107-08.

In its first round of questioning, the State did not follow up on the court's questions to Juror No. 25 regarding her uncle or question her at all regarding other topics. In its second round of questioning, the prosecutor asked, "Does anybody think that reasonable doubt is a good standard or we should have one perhaps that's lesser or one that's greater?" RP (Voir Dire) 163. Juror 25 responded, "I don't know how you really get it greater, you know, without somebody necessarily they've done it [sic]."

RP (Voir Dire) 164. She stated, "It's probably better – the best that we have right now." Id.

When the State exercised a peremptory strike against Juror No. 25, Mr. Bardwell's counsel pointed out the lack of a legitimate basis for the strike, stating, "I saw no reason that she gave any answers to any questions to make her less desirable to the prosecuting attorney." Id. at 180. He noted the absence of "follow-up to the initial question of her relative being in prison, if that impacted her view of the proceedings here," and argued, "[s]o I don't think there's been a showing from the paucity of questions to the prospective juror that the challenge is for anything other than her race." Id. at 181-82.

In response, the prosecutor advanced two ostensible reasons for the strike. First, he averred that he also intended to strike another African-American juror, No. 44. Id. at 182-83. He said that he intended to strike the jurors because they both responded affirmatively to the question whether they had relatives in prison. Id. He also claimed that "both of them, when they answered that question, based on their body language and expression, seemed to have a lot of concern about that." Id. at 183.

Then, although he had not raised this concern to the court or counsel at any time during the lengthy two-day voir dire process, he asserted,

> The other reason that the State is exercising the challenge is Juror No. 25, as the Court can see from the layout of the Court, sits more or less directly in my line of sight. There's been at least two occasions where I believe she's been sleeping, and I don't want her on the jury if she's been falling asleep in Court. That's the other reason for the peremptory challenge.

Id.

The court did not witness what the prosecutor asserted he saw and said, "I have to admit, I have to rely on [the prosecutor's] representations as to Juror No. 25 falling asleep." RP 183. Mr. Bardwell's defense counsel also did not see what the prosecutor claimed he observed. RP 184.

The court noted that because of the distance between the bench and the jurors, "I'm not sure I would have noticed it unless, you know, her head sagged or she started snoring or something like that[.]" Id. The court stated that it had "no reason to doubt" the prosecutor's representation. Id. The court further noted that "his statement about … her body language and her level of concern about a relative who's in prison, that is a legitimate concern the State would have … regardless of Juror No. 25's ethnicity or race or anything like that." Id. The court accordingly overruled Mr. Bardwell's Batson objection and permitted the peremptory strike. Id.

3. Jury verdict.

The jury convicted Mr. Bardwell of all counts as charged. CP 62-65. Mr. Bardwell appeals. CP 123.

D. ARGUMENT

1. **The State's racially discriminatory strike of African-American juror No. 25 violated the Fourteenth Amendment guarantee of equal protection as stated in *Batson v. Kentucky.***

Under Batson and its progeny, the exclusion of otherwise qualified and unbiased jurors from a venire solely because of their race violates federal constitutional guarantees of equal protection. Batson, 476 U.S. at 86-87; U.S. Const. Amend. XIV. An improper race-based challenge of a potential juror compromises the guarantee of trial by impartial jury, violates the juror's equal protection rights under the Fourteenth Amendment, and is harmful to the fundamental values of our judicial system and society as a whole. Miller-El v. Dretke, 545 U.S. 231, 237-38, 241, 125 S.Ct. 1317, 162 L.Ed.2d 196 (2005); State v. Saintcalle, 178 Wn.2d 34, 50, 309 P.3d 326 (2013).

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Batson, 476 U.S. at 87; see also Saintcalle, 178 Wn.2d at 50 ("If we

allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict.").

A claim of purposeful discrimination in jury selection requires the trial court to engage in three steps. First, the defendant must make a prima facie showing "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. Second, once the defendant has made a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strike. Id. at 94. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." Purkett v. Elem, 514 U.S. 765, 767, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995) (per curiam).

In Washington, a Batson challenge is reviewed for clear error. Saintcalle, 178 Wn.2d at 41. "Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed." Id.

a. The State failed to proffer race-neutral reasons for the strike at *Batson*'s second stage.

As noted, at Batson's second stage, once the defendant has made a prima facie showing of discrimination in jury selection, the State has the "burden of stating a racially neutral explanation for their own actions."

Miller-El, 545 U.S. at 252. When race is at issue, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." Miller-El, 545 U.S. at 252.

The first reason for the strike given by the prosecutor—the juror's affirmative response to the question whether someone close to her had been accused of a crime—is not race-neutral on its face. The prosecutor's second claimed basis—the prosecutor's alleged observations of the jury's "body language" and "concern" when she answered the question—is legally insufficient to support a strike. This Court should conclude that the State failed to meet its burden at Batson's second stage.

i. *The juror's affirmative answer to the question whether someone close to her had been accused of a crime was not race-neutral on its face.*

Minority racial and ethnic groups are disproportionately represented in Washington State's court, jail, and prison populations. Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System (March 2011) at 1 (hereafter "Preliminary Report on Race").[3] Studies have shown that, even after controlling for pertinent factors, Blacks are more likely than Whites

[3] Available at http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf, last visited April 21, 2015.

to be charged with crimes, denied bail, and imprisoned. Id. at 7. In the United States in 2005, Blacks were incarcerated at 5.6 times the rate of Whites. Id. at 9.

In Washington, however, the incarceration rate exceeds the national average. Id. at 10. In 2005 in Washington, Blacks were incarcerated at 6.4 times the rate of Whites. Id. According to statistics compiled in 2009, 36% of Black imprisonment in Washington could not be accounted for by arrest rates. Id. at 8.[4]

This is not a new problem. In 1980, Washington "led the nation in its disproportionate imprisonment of blacks." Id. at 6. The historic data support the conclusion that racial inequity and bias are ingrained in Washington's criminal justice system.

In evaluating the race neutrality of an attorney's explanation, "a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). "A facially race-neutral reason is one that is not based on race at all." Turnbull v. State, 959 So.2d 275,

[4] The Task Force concludes that arrest rates are a "poor proxy" for crime commission, and that "'[s]tudies that treat arrests as a measure of crime commission will likely overstate the rate of crime commission by Blacks and therefore underestimate racial disparity in criminal justice processing." Preliminary Report on Race at 12.

277 (Fla. Dist. Ct. App. 2006), as modified on denial of reh'g (July 18, 2007). Where "a discriminatory intent is inherent in the prosecutor's explanation", then the explanation is not race-neutral. United States v. Bishop, 959 F.2d 820, 827 (9th Cir. 1992) overruled on other grounds, United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010).

The prosecutor's primary reason for the peremptory strike was Juror No. 25's response to "that question of having a relative or friend who's in prison serving time[.]" RP (Voir Dire) 183. As noted, Blacks are disproportionately likely to be incarcerated in Washington as compared to Whites. And Washington incarcerates Blacks at a higher and more disproportionate rate than the rest of the country as a whole. As a matter of pure statistical likelihood, therefore, a black juror in Washington is more likely than a white juror in Washington to know someone who has been charged with or convicted of a crime. The stated reason for the strike was inherently discriminatory. Compare Bishop, 959 F.2d at 825-26 (holding prosecutor's assertion that juror lived in low-income, predominantly black neighborhood, and therefore was likely to believe that police "pick at black people" was not race neutral; and noting, "where residence is utilized as a surrogate for racial stereotypes-as, for instance, a short hand for insensitivity to violence-its invocation runs afoul of the guarantees of equal protection"); Buck v. Com., 432 S.E.2d 180, 186 (Va.

App. 1993) ("The reason given by the prosecutor, that an African-American who lived near (not in, but near) a city with a "drug problem" would be sympathetic to narcotic use, is both irrational and a convenient means by which to mask racial bias"), aff'd, 247 Va. 449, 443 S.E.2d 414 (1994); see also Ridley v. State, 510 S.E.2d 113, 116 (Ga. App. 1998) (prosecutor's strike not race neutral where based on fact that black jurors had the same last names as persons prosecuted by that office).

ii. *The prosecutor's demeanor-based reasons for the strike were legally insufficient.*

The prosecutor attempted to supplement his facially-invalid basis for the strike with two demeanor-based reasons. The prosecutor claimed that Juror No. 25's "body language and expression" when she answered the question about whether someone close to her or a family member had been charged or convicted of a crime suggested that she "[had] a lot of concern about that." RP (Voir Dire) 183. The prosecutor also claimed that he observed the juror sleeping during voir dire. Id.

The prosecutor's assertion regarding the jurors' "body language and expression" is legally insufficient. The prosecutor did not describe specific aspects of Juror No. 25's body language. The prosecutor did not state what it was about Juror No. 25's "expression" that led him to believe the juror had "a lot of concern" about her uncle's incarceration. And the

prosecutor did not connect the juror's alleged "concern" to Mr. Bardwell's trial, or even to jury service generally.

The prosecutor "must articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. The explanation must be "clear and reasonably specific." Id. at 98 n. 20. Explanations based on "conduct and demeanor" should be given "close scrutiny" because "such perceptions may easily be used as a pretext for discrimination." Mack v. Anderson, 861 N.E.2d 280, 297 (Ill. App. 2006). "[M]erely stating that a juror nonverbally "reacted" is insufficient. Davis v. Fisk Elec. Co., 268 S.W.3d 508, 519 (Tex. 2008); compare McClain v Prunty, 217 F.3d 1209, 1223 (9th Cir. 2000) (finding a demeanor-based challenge pretextual where "the prosecutor did not explain the significance of [the juror's body language] or otherwise indicate how that gesture evidenced bias"); Bishop, 959 F.2d at 925 (prosecutor's observations about juror were not race-neutral where prosecutor did not link the characteristic to the juror's possible approach to the specific trial).

The prosecutor's assertion that he believed Juror No. 25 was sleeping should be discounted given the failure of the prosecutor's other two stated reasons to supply a basis for the strike. At stage two of the analysis, however, the justification does not even need to be "minimally persuasive," so long as it is neutral. See Purkett v. Elem, 514 U.S. at 768

(prosecutor's justifications, even if "implausible or fantastic", "silly or superstitious", survive step two if they are facially neutral). Even if the Court concludes this justification survives step two, as argued below, it fails at step three.

b. Mr. Bardwell proved purposeful discrimination at *Batson*'s third stage.

If the court determines that the prosecutor has supplied an adequate race-neutral reason for a peremptory strike at Batson's second stage, the court must evaluate whether, despite the prosecutor's proffered justification, the defendant has nonetheless met his burden of showing "purposeful discrimination." Batson, 476 U.S. at 98. At Batson's third stage, a judge must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93. The court evaluates the "totality of the relevant facts" to decide "whether counsel's race-neutral explanation for a peremptory challenge should be believed." Ali v. Hickman, 584 F.3d 1174, 1180 (9th Cir. 2009).

i. *A comparative juror analysis shows the strike was a pretext for racial discrimination.*

Discriminatory intent may be found where a comparative juror analysis shows that the prosecutor treated similarly-situated white jurors

differently from the struck juror.[5] Miller-El, 545 U.S. at 241. Here, a comparative juror analysis establishes that the prosecutor's reasons were a pretext for race discrimination.

The prosecutor chose not to strike Juror No. 5, who also responded affirmatively to the question whether a family member or friend had been accused of a crime. RP (Voir Dire) 107.[6] The State did not strike Jurors No. 2 or No. 3, both of whom said they were disappointed by the police as a result of recent negative media coverage of the Seattle Police Department. Id. at 159-60. The State did not strike Juror No. 2 or Juror No. 19, both of whom voiced frustration with other potential jurors' inability to presume Mr. Bardwell innocent of the charges. Id. at 137-38. The State did not strike Juror No. 16, even though the juror expressed disagreement with other jurors who would have been likely to believe Mr. Bardwell was guilty because he was arrested. Id. at 142. The State did not strike Juror No. 33, even though she graphically described feeling

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[5] A court should engage in a comparative juror analysis even where, as here, there is no identically-situated white juror. "A *per se* rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters." Miller-El, 545 U.S. at 247 n. 6.

[6] Juror No. 5 also said, in response to a question from defense counsel, "if I commit a crime, remind me not to do it in King County because there's too many people that I wouldn't want on my jury because they couldn't be impartial." RP 138.

"disconcert[ed]" and "overwhelm[ed]" by her experience testifying as a witness. Id. at 149-50. The State did not strike her even though she said she was "frustrated" because the "person representing the State … promised protection and then it was, like, open fire." Id. at 150.

ii. *The prosecutor's failure to question Juror No. 25 about his claimed concerns supports an inference of discriminatory intent.*

The court's question about friends or family members accused of crimes came before the parties began voir dire. But the State did not ask Juror No. 25 about her answer in either of the two complete rounds of voir dire it conducted. The prosecutor did not follow up with the juror to determine the source of the "concern" he professed he observed. The prosecutor did not try to find out whether the juror's "body language and expression" were because she felt sympathy towards Mr. Bardwell, sympathy towards the State, or, as is most likely, embarrassment about having to talk about her uncle's criminality in a public setting. He did not try to find out if she believed her uncle had been treated fairly by the criminal justice system.

Where a prosecutor has failed to question a minority juror about a topic that is later proffered in support of a peremptory strike, this may also support an inference that a stated reason is pretextual. Snyder v. Louisiana, 552 U.S. 472, 481, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)

(finding prosecutor's reliance on black juror's student-teaching obligation was pretext for racial discrimination where obligation did not pose problem for juror, and "the prosecution did not choose to question him more deeply about the matter"); Miller-El, 545 U.S. at 246 ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination" (citation omitted)); Haynes v. Union Pac. R. Co., 395 S.W.3d 192, 198 (Tex. App. 2012) ("The failure to ask questions about the reason given for a strike suggests pretext"). Here, the prosecutor's failure to question the juror shows the unspecific demeanor-based challenge was a pretext for racial discrimination.

iii. *The prosecutor's tacked-on claim that he saw the juror sleeping, which neither the judge nor defense counsel saw, was a pretext for racial discrimination.*

Finally, the prosecutor's claim that he saw the juror sleeping on "at least two occasions", RP (Voir Dire) 183, is also a patent blind for race-based discrimination. No one else in the courtroom saw what the prosecutor claimed he saw. The judge initially said, "I have to admit, I have to rely on [the prosecutor's] representations as to Juror No. 25 falling asleep." RP 183. The judge then stated, "well, she's far back enough from me that I'm not sure I would have noticed it unless, you know, her

head sagged or she started snoring or something like that, so – but I don't have any reason to doubt his representation." RP 184.

It is possible that the court felt uncomfortable about calling the prosecutor a liar.[7] But the court's statement, "I'm not sure I would have noticed it unless … her head sagged or she started snoring" means that Juror No. 25's head *did not* sag. She *did not* start snoring. Defense counsel, who presumably was seated at the same distance from the jurors as the prosecutor, also did not see the juror sleeping. RP 184.

In Snyder, the Supreme Court concluded a prosecutor's claim that a juror appeared nervous was not worthy of deference on review where the explanation had not been credited by the trial court. Snyder, 128 S.Ct. at 479. The Court explained,

> [D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus,

[7] As the court in Saintcalle observed, "Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism." Saintcalle, 178 Wn.2d at 53.

> the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike.

Id.[8]

In addition to the fact that no one else in the courtroom saw Juror No. 25 "sleeping", there are other reasons to doubt the veracity of the sleeping allegation. Even though voir dire lasted two days, the prosecutor never raised any concern about the juror sleeping. The prosecutor also did not challenge the juror for cause on this basis. Given these circumstances, the "sleeping" claim "reeks of afterthought." Miller-El, 535 U.S. at 246.

In sum, the State's demeanor-based reasons—untethered as they were to the circumstances of Mr. Bardwell's case—support an inference of discriminatory intent. As part of Batson's third stage examination, the court is not limited to "the four corners of a given case." Miller-El, 545 U.S. at 240. "Sometimes stated reasons are false, and … sometimes a court may not be sure unless it looks beyond the case at hand." Id.

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[8] A court is not obligated to reject a demeanor-based challenge if the judge did not personally observe what the prosecutor says he saw. Thaler v. Haynes, 559 U.S. 43, 49, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010) (holding there is no clearly established "categorical rule" under AEDPA requiring demeanor-based reasons be corroborated by judge's own observations). However "where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the *voir dire*." Id. at 48.

In a report published in 2010, the Equal Justice Initiative noted the pervasive use by prosecutors of demeanor-based challenges to mask racial discrimination. See e.g. Equal Justice Initiative, Illegal Race Discrimination in Jury Selection: A Continuing Legacy (August 2010) (hereafter ""EJI Report")[9] at 23 (prosecutor described juror as "tentative and timid"); at 24 (prosecutor struck juror because she was "inattentive"). The reason prosecutors deploy these tactics is because they work. See EJI Report at 22 ("state courts tend to accept at face value prosecutors' explanations for striking jurors of color – even reasons that are implausible and not supported by the record").

Here, however, this Court should not accept the prosecutor's explanations at face value. In support of the peremptory strike of Juror No. 25, the prosecutor supplied a facially-invalid reason, a legally-insufficient demeanor-based reason, and a third, tacked-on demeanor-based reason that the prosecutor never brought to the court's attention during voir dire, and that was not corroborated by the observations of the

[9] Available at http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf, last visited April 23, 2015.

other judicial participants. This Court should conclude that Mr. Bardwell has proven purposeful racial discrimination.[10]

c. In the alternative, this Court should adopt a rule requiring a *Batson* challenge be sustained where, as here, there is a reasonable probability that race was a factor in the exercise of the peremptory challenge.

As the Supreme Court recognized in Saintcalle, Batson's procedures are neither meaningful nor effective at rooting out racial discrimination from our courtrooms. Saintcalle, 178 Wn.2d at 46 ("Batson, like Swain [v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)] before it, appears to have created a 'crippling burden' making it very difficult for defendants to prove discrimination even where it almost certainly exists"). The "main problem" is that "Batson's third step requires a finding of 'purposeful discrimination'", where discrimination is often unconscious. Id. at 53. The Court found that "a new, more robust

[10] To the extent that the State may attempt to argue that a finding of purposeful discrimination is rebutted by the fact that it did not strike other black jurors on the jury, see RP (Voir Dire 182), such claims have been resoundingly rejected by the courts. See e.g. Sanchez v. Roden, 753 F.3d 279, 299 (1st Cir. 2014) (terming such reasoning "facile and misguided"); Paulino v. Harrison, 542 F.3d 692, 703 (9th Cir. 2008) (finding the fact that other black jurors had been seated irrelevant to analysis); United States v. Battle, 836 F.2d 1084, 1084 (8th Cir. 1987) ("under Batson, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors").

framework" should be adopted that seeks to "eliminate [unconscious] bias altogether or at least move us closer to that goal." Id. at 54; see also id. at 51 ("we should strengthen our Batson protections, relying both on the Fourteenth Amendment and our state jury trial right"). Despite the "urgent need," however, the Court did not adopt a new framework.[11] Id. at 55. This Court should do so in this case.

It is plain that Batson's three-step analysis is not prescriptive. See id. at 51 (discussing states' "flexibility" to formulate procedures to ensure jury selection practices do not violate equal protection); see also id at 72 (noting Court's "inherent power to govern court procedures" as a "necessary adjunct of the judicial function") (González, J., concurring; citation omitted). Other jurisdictions have adapted their procedures in an effort to prevent racial discrimination from tainting jury selection. See EJI Report at 23 (discussing changes in Florida law to protect against racial discrimination in jury selection[12]).

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[11] The Court asserted it did not do so because the issue had not been briefed by the parties. Saintcalle, 178 W.2d at 55. As concurring Justice González pointed out, the court has "frequently recognized it is not constrained by the issues as framed by the parties" and will "decide crucial issues which the parties themselves fail to present", id. at 71-72 (González, J., concurring), so it is not clear why the Court chose not to invoke this authority.

[12] As summarized in the EJI report,

Some courts employ the "mixed motives" test. Under this standard,

> where both race-based and race-neutral reasons have motivated a challenged decision, a supplementary analysis applies. In these situations, the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of racially discriminatory motivation, if they can show that the challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a "but for" cause of the challenged decision.

Kesser v. Cambra, 465 F.3d 351, 372 (9th Cir. 2006) (Wardlaw, J., concurring) (citing cases).

However a "but-for" analysis is too onerous a standard, and will not achieve the goal of "eliminat[ing] [unconscious] bias altogether." Saintcalle, 178 Wn.2d at 54. A better rule was proposed in Saintcalle. The rule "would require a Batson challenge to be sustained if there is a

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> Florida judges must assess whether the reason is "genuine" by considering factors such as whether (1) the prosecutor actually questioned the excluded juror; (2) the juror was singled out during voir dire or manipulated into providing answers that would tend to disqualify him from jury service; (3) the prosecutor's reason for the strike was related to the facts of the case, and (4) other jurors gave similar answers but were not struck. Under Florida law, the prosecutor's reason for the strike must be supported by the record, which makes it much harder for the prosecutor to manufacture explanations after the fact.

EJI Report at 23.

reasonable probability that race was a factor in the exercise of the peremptory." Saintcalle, 178 Wn.2d at 54.

Washington's constitutional right to trial by jury is more protective than the federal constitutional right. Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982); State v. Pierce, 134 Wn. App. 763, 770, 142 P.3d 610 (2006); Const. art. I, §§ 21, 22. This Court has the duty to "ensure that trial procedures in this state promote justice and comply with the federal and state constitutions." Saintcalle, 178 Wn.2d at 71 (González, J., concurring).

Criminal defendants are not the only persons harmed by racially discriminatory jury selection practices. Batson, 476 U.S. at 87. Minority jurors who have been unjustifiably refused the right to participate in our justice system suffer shame, humiliation, and stigma from the exclusion. See EJI Report at 28. And society as a whole is harmed. "Racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 1371, 113 L. Ed. 2d 411 (1991) (internal citation omitted).

Unconscious bias proliferates in our criminal justice system, and it affects outcomes. Preliminary Report on Race at 19-21. "[G]ood people often discriminate, and they often discriminate without being aware of it."

Saintcalle, 178 Wn.2d at 48. The Supreme Court rightly found that the judiciary's focus should be on "recogniz[ing] the challenge presented by unconscious stereotyping in jury selection and ris[ing] to meet it." Id. at 49.

The proposed rule would ease the courts' "crippling burden" of divining purposeful discrimination where a race-based strike may have been driven by unconscious motives. It would also relieve judges from having to "accuse attorneys of deceit and racism in order to sustain a Batson challenge." Id. at 53. This Court should conclude that the time is past due to remedy our state procedures towards the goal of eliminating racism from our courtrooms. The Court should adopt a rule that obligates courts, at Batson's third step, to sustain a challenge to a peremptory strike if there is a reasonable probability that race was a factor in the strike.

d. Mr. Bardwell's convictions must be reversed.

In this case, the record demonstrates a reasonable probability that race was a factor in the prosecutor's peremptory strike of Juror No. 25. Under either Batson's existing framework or under the proposed rule advocated above, Mr. Bardwell's convictions must be reversed because racial discrimination in jury selection violated his and Juror No. 25's right to equal protection. Batson, 476 U.S. at 100.

2. **The use of a notepad to conduct peremptory challenges violated the right to a public trial.**

This Court should also hold that the court's practice of conducting peremptory challenges on a notepad, instead of requiring the parties to state them on the record in open court, violated Mr. Bardwell's and the public's right to a public trial.[13]

Open public trials provide a check on the judicial process. U.S. Const. Amends. I; VI; Const. art. I, §§ 10, 22. They deter misconduct and perjury; they temper biases and undue partiality. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness…enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to

[13] The Supreme Court recently decided several public trial cases, but none resolve the question presented here. See State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (lead opinion finds that in-chambers pre-voir dire discussion on jurors' answer to questionnaires does not implicate the public trial right); State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014) (addressing whether in-chambers questioning of jurors during voir dire constituted closure of the court); State v. Koss, 181 Wn.2d 493, 334 P.3d 1042 (2014) (public trial right did not attach to preliminary in-chambers conference about jury instructions); State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014) (addressing whether a trial court can exclude: observers during hardship excusals, members of the press during voir dire, and a family member of the victim who was also a witness); State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014) (discussing whether on-the-record sidebar conference implicates the public trial right); State v. Shearer, 181 Wn.2d 1064, 334 P.3d 1078 (2014) (addressing whether an in-chambers discussion to determine whether a juror had a felony conviction was a courtroom closure and required a Bone-Club analysis). The Court has not addressed whether peremptory challenges must be made in the public's view.

public confidence in the system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

It is true that all three divisions of this Court disagree that written peremptory challenges violate the public-trial right. See State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014); State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), rev. granted in part, 181 Wn.2d 1029 (2015);[14] State v. Marks, 184 Wn. App. 782, 786-87, 339 P.3d 196 (2014). Most recently, in State v. Filitaula, 184 Wn. App. 819, 339 P.3d 221 (2014), this Court rejected a challenge nearly identical to that brought here.

The Court in Marks held that peremptory challenges are not a part of voir dire. Marks, 184 Wn. App. at 787. In Filitaula, this Court concluded that the writing of peremptory challenges on a notepad did not constitute a closure. Filitaula, 184 Wn. App. at 823. Both holdings should be revisited and reversed.

It is well-settled that the public trial right applies to jury selection. Wise, 176 Wn.2d at 11. "'[T]he process of juror selection … is itself a matter of importance, not simply to the adversaries but to the criminal justice system." In re Personal Restraint of Orange, 152 Wn.2d 795, 804,

[14] It is not clear from the statement of the issue on review on the Court's website that the Court will review the public trial question presented here with regard to the exercise of peremptory challenges.

100 P.3d 291 (2004) (quoting Press-Enterprise Co., 464 U.S. at 505. There are vital constitutional interests at stake in the exercise of peremptory challenges. See e.g. Georgia v. McCollum, 505 U.S. 42, 47-50, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); Saintcalle, 178 Wn.2d at 41-42.

The holding that peremptory challenges are not part of voir dire divorces the *selection* of jurors from the *questioning* of jurors. But the process of excusing prospective jurors is itself a critical part of voir dire. E.g., Batson, 476 U.S. at 98; State v. Beskurt, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) (noting that cause challenges and reasons therefor were done in open court, where public had an opportunity to observe dialogue, thus "everything that was required to be done in open court was done"). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In short, it strains logic to conclude that the process of *selecting* jurors is not part of voir dire. The holding in Marks is incorrect.

The determination that written peremptories is not a closure is also flawed. In Filitaula, Court held that "peremptory challenges need not be conducted orally to fulfill the public trial right." Filitaula, 134 Wn. App.

at 824. Part of the justification for the holding was the fact that in Filitaula, as here, a written record of which party had excused which juror was generated and filed in the court file. But the Supreme Court has found a public-trial violation even where in-chambers questioning was recorded and transcribed. State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012); see also Njonge, 181 Wn.2d at 556 (intimating that closure during hardship excusals would have violated public trial right, but finding no closure occurred). The Court has also rejected a rule that would excuse public-trial violations that are *de minimis*. Shearer, 181 Wn.2d at 572; State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009). Both experience and logic dictate that voir dire must be open to the public, and neither condone the closed proceedings that were held here.

A violation of the public trial right is a structural error. Wise, 176 Wn.2d at 18. Mr. Bardwell is therefore entitled to reversal of his convictions for a new trial.

3. **The State presented insufficient evidence of value, as required to convict Mr. Bardwell of Possession of Stolen Property in the Second Degree.**

a. The State did not present any competent evidence of the value of the items that were stolen during the burglary.

A number of small items were stolen during the burglary. But the State only called two witnesses, both children, to testify about the crime.

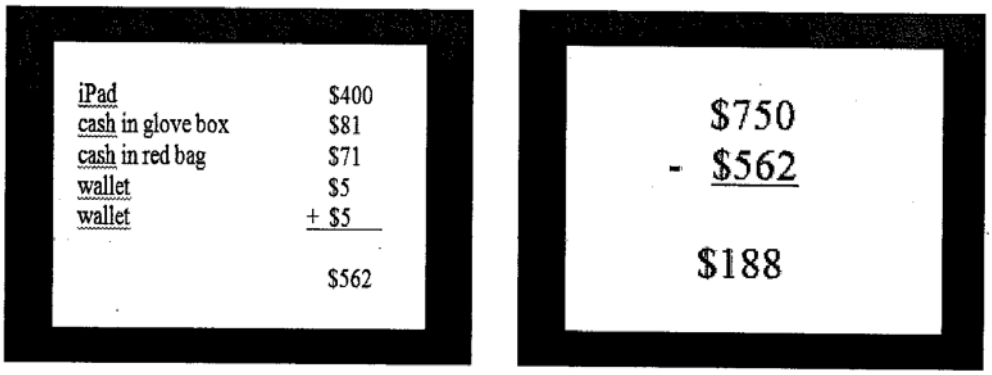
Can Huynh said that money, jewelry, an iPad, some mail, a jacket, and a hat were taken. RP 676. Jennifer Huynh testified that the iPad cost "around $400" when it was purchased. RP 707. The State did not ask her, and she did not testify, about when the iPad had been purchased. Jennifer[15] did not remember how much the wallets had cost, but guessed they may have cost $10 to $20. Id.

The State did not call any other witnesses to testify about the value of the iPad. The State also did not call any witnesses to testify about the value of the other items.

In closing argument, the prosecutor urged the jurors to conclude that the stolen items were worth more than $750 by using their "common sense." RP 1039. The prosecutor pointed to Jennifer's testimony that the iPad "when they bought it was worth about $400." RP 1038. The prosecutor noted that $81 in cash had been found in the glove compartment and $71 in cash was found in the red bag. Id. The prosecutor estimated that two wallets found in the red bag and in Mr. Bardwell's pocket were each worth $5. Id. The prosecutor told the jurors they could add up these amounts and then subtract the total from $750. Id.

[15] Jennifer is referenced by her first name to differentiate her from her brother. No disrespect is intended.

The prosecutor used a PowerPoint presentation to support his argument. The PowerPoint contained a schematic (reproduced below) that correlated the prosecutor's dollar amounts to the prosecutor's argument.



Supp. CP __ (Exh. 30 at 14).

The prosecutor noted that there were other items in the car – "the contents of the briefcase, that stuff from the passenger seat, … the other property in the red bag besides the cash … the rings." RP 1038. He pointed out that when Mr. Bardwell was arrested, he had $435.25 in cash in his pocket, and argued "Some portion of that money … beyond a reasonable doubt would have been stolen." RP 1039. The prosecutor concluded,

> Common sense tells you that when you add together all of these, **while they can't be valued, there is no specific number that anyone has put on them**, they likely add up to more than $188, particularly when you add in that $435 in cash. And if it's more than $188, then the total is more than $750.

Id. (emphasis added).

b. The State's evidence was insufficient to prove that the value of the items stolen exceeded $750.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. Amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

A person is guilty of possession of stolen property in the second degree where "[h]e or she possesses stolen property … which exceeds seven hundred fifty dollars in value." RCW 9A.56.160(a). Where the State seeks to convict a defendant of an offense relating to property having a value greater than a specific amount, the State must present evidence of the property's value. State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975).

The statutory definition of "value" is "the market value of the property or services at the time and in the approximate area of the criminal

act." RCW 9A.56.010(21). Washington courts use the same definition of market value in criminal and civil cases. State v. Kleist, 126 Wn.2d 432, 434, 895 P.2d 398 (1995). "Market value" means "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." Id. at 435; Clark, 13 Wn. App. at 787. Market value is an "objective standard." Kleist, 126 Wn.2d at 438.

Here, the State did not present *any* evidence of market value. The State did not show that a well-informed buyer would pay $400 for the iPad, or that a well-informed seller would sell it for that amount. Where the State seeks to place a value on a used item, "the jury must consider any *depreciation* of the property in the hands of the owner, including any change in its condition." State v. Morley, 119 Wn. App. 939, 943, 83 P.3d 1093 (2004) (citation omitted, emphasis in original). The iPad presumably had been used and depreciated in value, but the State relied solely on an estimation of the item's *replacement* value—provided by a ten-year-old child—to meet its burden of proof.

Jennifer also estimated how much the wallets had cost. RP 707. The prosecutor reduced this amount to $5 per wallet, claiming he was being "conservative." The State did not show that the fair market value of either wallet was $5. And, as noted, the State did not offer any evidence of the value of the jewelry, briefcase or other miscellaneous items on

which it based its prosecution. The jurors had no basis to conclude whether these items were worth $5 or $500.

Jennifer Huynh's testimony about how much she believed her family had paid for the iPad when they bought it was relevant, but it is not dispositive, let alone sufficient, to prove its "fair market value." To hold otherwise would render this portion of RCW 9A.56.010's language superfluous. State v. Sweany, 174 Wn.2d 909, 915-16, 281 P.3d 305 (2012). Kleist, 126 Wn.2d at 438 ("[d]espite the tempting simplicity of the theory that a thief should be bound by the victim's retail price, we cannot rewrite the statute").

Without any evidence of the stolen items' value, the prosecutor's arithmetic does not add up. The remaining items consist of the cash that was recovered from the red bag, the car, and Mr. Bardwell's pocket. Even assuming all of this money was stolen, it totals $587.25. The State did not prove Mr. Bardwell possessed stolen property exceeding $750 in value.

c. On remand, the State is barred from retrying Mr. Bardwell for possession of stolen property in the second degree.

If an appellate court has held that evidence is insufficient to support the conviction, then retrial for that offense is prohibited. Burks v. United States, 437 U.S 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); State v. Hescock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999); U.S. Const.

Amend. V. However, when an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged if the lesser degree was necessarily proven at trial, and the jury was instructed on that offense. cf. In re Heidari D., 174 Wn.2d 288, 292-93, 274 P.3d 366 (2012). Here, the jury was instructed on the inferior-degree offense of possession of stolen property in the third degree. CP 56-59; "A person is guilty of possessing stolen property in the third degree if he or she possesses … stolen property which does not exceed seven hundred fifty dollars in value." RCW 9A.56.170(1).

If this Court reverses Mr. Bardwell's convictions and remands for a new trial, then the State may only prosecute him for possession of stolen property in the third degree. In the alternative, Mr. Bardwell is entitled to have that conviction reversed and to be resentenced on the lesser offense.

E. CONCLUSION

Mr. Bardwell's convictions should be reversed and remanded for a new trial based on the State's Batson violation or the public trial violation. In the alternative, Mr. Bardwell's conviction for possession of stolen property in the second degree should be reversed and the case remanded for a new sentencing hearing at which judgment would be entered for the crime of possession of stolen property in the third degree, and Mr. Bardwell would be resentenced.

DATED this 24th day of April, 2015.

Respectfully submitted:

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

STATE OF WASHINGTON, Respondent, v. TEREZ BARDWELL, Appellant.	)))))))))	NO. 72356-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] TEREZ BARDWELL 357335 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF APRIL, 2015.

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