72356-1

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Court of Appeals
Division I
State of Washington

NO. 72356-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TEREZ LEJUAN BARDWELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ANDREA DARVAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Whether the defendant can show that the State's exercise of a peremptory challenge to a single African-American juror, one of four African-Americans on the jury *venire*, was the result of purposeful discrimination.

2. Whether the defendant can show a public trial right violation where, in exercising peremptory challenges, the attorneys wrote down the number of the juror they were excusing, without simultaneously stating the number orally in open court?

3. As charged in count 4, the State concedes that there was insufficient evidence supporting the charge of second-degree possession of stolen property.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with first-degree unlawful possession of a firearm (count 1), residential burglary (count 2), attempting to elude (count 3) and second-degree possession of stolen property (count 4). CP 21-23. A jury found the defendant guilty as charged. CP 62-65. The defendant received a standard range sentence of 50 months confinement. CP 115-22.

2. SUBSTANTIVE FACTS

Seattle Police Officer Marcus Martin was stopped at the intersection of South Roxbury Street and 54th Avenue South when a Cadillac with tinted windows and no front license plate turned onto 54th Avenue right in front of him. RP[1] 297, 300, 302. Officer Martin decided that he was going to pull over the vehicle and conduct a traffic stop. RP 302-03. However, before Officer Martin could activate his emergency equipment, the Cadillac took off at a high rate of speed. RP 304. A pursuit then began with the Cadillac making an illegal turn and speeding at over 40 miles per hour toward a controlled intersection on Rainier Avenue. RP 305-07. The Cadillac entered the intersection against a red light, crashed into two vehicles, and came to rest approximately 500 feet down the roadway.[2] RP 306-07, 309, 396-97, 409.

Officer Martin's dash cam shows two individuals exiting the Cadillac after it came to a stop, a young woman, Marcuita Roach, who exited the car from the backseat, and the defendant, who exited from the driver's seat. RP 310-11, 334, 355-57; Trial

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[1] The verbatim report of proceedings is contained in multiple consecutively paginated volumes hereinafter cited as "RP" followed by the page number. Jury selection is separately cited as "RP (*voir dire*)."

[2] A passenger in one of the vehicles suffered a dislocated hip and partially dislocated spine. RP 401-02.

Exhibit 4. On the floor of the driver's seat, right below the steering wheel, was a .380 Smith & Wesson handgun. RP 340, 884. By stipulation, the jury was informed that the defendant had previously been convicted of "an unknown felony that constitutes a serious offense within the meaning of the law." RP 972.

When the defendant exited the Cadillac, he was carrying a red bag. RP 312. Although ordered to stop by Officer Martin, the defendant took off running. RP 313. When two civilians tried to intervene, the defendant fought them off and took off running again, still with the red bag. RP 259-64, 438-43. A short time later, officers located the defendant hiding in a nearby marijuana dispensary. RP 461-67. The red bag was found on the floor near where the defendant was hiding. RP 466.

Subsequent investigation revealed that certain property (primarily jewelry, mail, money, wallets, and an iPad) found variously on the defendant's person, in the red bag, and in the Cadillac, had just recently been taken in a burglary of a nearby house. RP 470-71, 473-74, 485-86, 553-55, 563-65, 569, 745-47, 876. The property belonged to the Huynh family, whose home had been ransacked and the front door kicked in. RP 566, 569-70, 676.

The defendant did not testify or call any witnesses. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT'S BATSON ARGUMENT IS NOT SUPPORTED BY THE FACTS

The defendant asks this Court to draw the conclusion that when the prosecutor exercised a peremptory challenge as to a single African-American prospective juror, the reasons given by the prosecutor were merely a ruse or pretext to hide the prosecutor's purposeful racial discrimination. Under the facts of this case, this argument defies logic. The prosecutor struck a single African-American prospective juror while allowing two other African-American prospective jurors to sit on the case. It defies logic to presume that the reasons given to strike the one juror were pretexts for purposeful racial discrimination where the prosecutor did not strike two other African-American jurors. Thus, the defendant cannot show that the trial court's rejection of his Batson claim was "clearly erroneous."

a. Relevant Facts

The trial court brought in a 50 juror *venire*, of which 18 were excused by the court for hardship or cause. RP (*voir dire*) 113-15,

156-58; RP 223-24, 228. The court intended to seat 14 jurors. After closing arguments, two jurors would be randomly chosen as alternates. RP 125-29. Thus, the court gave each party eight peremptory challenges. Id.

After the court excused the 18 jurors for hardship or for cause, of the remaining 32 jurors, there were at least four jurors identified as African-American.[3] RP (*voir dire*) 182-83.[4] Of the four, the State used a peremptory challenge to a single African-American juror, juror number 25. RP (*voir dire*) 179-86. She was the subject of a Batson challenge, with the trial court rejecting the defendant's claim of purposeful racial discrimination. RP (*voir dire*) 183-84.

The State used only six of its allotted eight peremptory challenges. CP 129-30. Two African-American jurors, jurors 30 and 35, actually sat on the jury and deliberated to a verdict.

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[3] The record does not reflect the racial makeup of the remaining jury *venire*.

[4] The original verbatim report of proceedings mistakenly listed two of the jurors (jurors 30 and 35) with the same juror number (juror 30) (see RP (*voir dire*) 182), thus making it appear there were only three African-American prospective jurors on the *venire*. The parties listened to the CD of the proceedings, confirmed that there was a scrivener's error in the original report of proceedings, and entered into a stipulation to correct the mistake. Although filed with the trial court, the stipulation is not yet on ECR, thus, a copy of the stipulation is attached. CP ___, sub # ___.

RP (*voir dire*) 189.[5] A fourth African-American juror, juror 44, was so far down the line in the *venire* that he did not have the opportunity to sit on the jury. RP (*voir dire*) 189.

During the initial stages of *voir dire*, when the judge was asking general questions of the *venire*, the defendant requested that the judge ask two additional questions. RP (*voir dire*) 68-69. First, the judge asked if anyone personally, or a close friend or family member, had been a witness to a crime. RP (*voir dire*) 104. Second, the judge asked if anyone personally, or a close friend or family member, had been accused of a crime. RP (*voir dire*) 106. Juror 25 responded that her uncle was in jail after having been convicted of assault six years prior. Id. Asked if this would influence her ability to be fair, she said that it would not. Id.

Later, when asked if she thought that the beyond a reasonable doubt standard was good, or if there should be a lesser or greater standard, juror 25 responded, "I don't know how you really get it greater, you know, without somebody necessarily they've done it...It's probably better -- the best that we have right

[5] Two of the 14 jurors selected did not participate in deliberations. During the course of trial, the court excused juror number 6 for cause. RP 988. Juror 34, seated in the jury box as juror number 10, was chosen as the alternate. RP (*voir dire*) 186; RP 1064.

now." Id. at 164-65. Juror 25 did not volunteer an answer to any other questions during *voir dire*.

At the end of *voir dire*, when the State indicated that it was exercising a peremptory challenge as to juror 25, defense counsel said he was raising a Batson challenge. Id. at 179. The court asked defense counsel the basis for its challenge, noting that caselaw required that the party raising a Batson challenge first make a *prima facie* showing of purposeful discrimination. Id. at 180. Defense counsel did not point to any evidence showing purposeful racial discrimination, and he did not raise any of the arguments that he now raises on appeal. Id. at 180-82. Instead, defense counsel pointed out that the juror was African-American and so was his client, and thus, according to defense counsel, the burden was on the State to show that the two State prosecutors trying the case did not act with purposeful racial discrimination. Id. at 180.

The court responded that "you have to do a little more than simply point out that she's an African-American woman." Id. Defense counsel then opined that he saw no reason why juror 25 would not be just as good a juror as any other juror, and therefore,

counsel surmised, the State's peremptory challenge must have been based on racial discrimination. Id. at 181-82.

The prosecutor provided a threefold response. First, the prosecutor correctly stated that in exercising a peremptory challenge a party does not need to state a reason for the challenge,[6] and thus, whether the opposing party thinks the particular juror would be a good or bad juror is of no relevance.[7] Id. at 182. Second, the prosecutor correctly noted that the first step of a Batson challenge requires the showing of a *prima facie* case of purposeful racial discrimination, a requirement that the defendant failed to meet. Id. And third, the prosecutor stated that regardless of the fact that no *prima facie* showing had been made, he would put his reasons for excusing juror 25 on the record. Id.

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[6] In Washington, the right to exercise a peremptory challenge free from judicial control is codified by statute. A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror." RCW 4.44.140; see also RCW 4.44.210.

[7] Courts recognize that:

> peremptory challenges are granted to parties so that they may remove jurors that parties believe should not serve. Our jury selection process recognizes that bias and partiality may not be so evident that these qualities can readily be demonstrated. For that reason, a party seeking to exercise a peremptory challenge is not required to give a reason for its use and may exercise the challenge without court approval.

State v. Vreen, 99 Wn. App. 662, 994 P.2d 905 (2000) (citing 14 Orland & Tegland, Washington Practice § 202 at 417 (4th ed. 1986)), aff'd, 143 Wn.2d 923 (2001).

The prosecutor stated that he had two primary reasons for exercising a peremptory challenge as to juror 25. First, juror 25 had a relative who was currently serving time in prison and, based on her body language and expressions, when responding to this subject, she seemed to possess a great deal of concern about this. Id. at 183. Second, the prosecutor noted that with the configuration of the courtroom, juror 25 sat directly in his line of sight, and that there had been at least two occasions where he noticed that juror 25 appeared to be sleeping. Id. at 183.

Although the judge stated that because she was so far away from juror 25 that she would not have noticed if juror 25 was sleeping unless she started snoring or her head sagged down, she accepted the prosecutor's representations as true. Id. at 184. The court then held that the prosecutor's reasons were legitimate concerns and that the defendant had failed to prove that the prosecutor was acting in a purposeful racially discriminatory manner. Id.

b. The Batson Standard

In Batson v. Kentucky, the Supreme Court addressed the ability and limitations of the trial court in interjecting itself into the jury selection process where there is an allegation of purposeful

racial discrimination. The Court recognized that the peremptory challenge system is a necessary and important part of trial by jury, and that peremptory challenges were historically exercised by the parties free from any judicial control and interference. Batson v. Kentucky, 476 U.S. 79, 91 n.15, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (citing Swain v. Arizona, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). However, where there is evidence of purposeful discrimination in the jury selection process, the Court recognized that under the Equal Protection Clause, a trial court must intervene. Id. The Court announced a three-part test that sought to balance the "historical privilege of peremptory challenge free of judicial control," with the Equal Protection Clause that forbids either party from "challeng[ing] potential jurors solely on account of their race." Batson, at 89, 91. The Court started with the acknowledgement that "[a]s in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the *venire* to prove the existence of purposeful discrimination."[8] Batson, at 93.

[8] Batson also applies to civil cases and to a criminal defendant's use of peremptory challenges. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

First, a party raising such a challenge must make a *prima facie* showing of purposeful discrimination. Id. at 96. To make such a showing, a party must provide evidence that raises an "inference" that a peremptory challenge was used to exclude a *venire* member on account of the member's race. Id. An inference, the Court would later note, "is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them." Johnson v. California, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (citing Black's Law Dictionary 781 (7th ed. 1999)). An inference is not simply an allegation or a guess. Id.

Second, if and only if a party raises an inference of purposeful discrimination, then the burden shifts to the opposing party to provide a race-neutral explanation for challenging the *venire* member. Batson, at 97. The reasons given need not rise to the level justifying the exercise of a challenge for cause. Id.

Third, the trial court must then determine whether the challenging party has established purposeful racial discrimination, that the exercise of the peremptory challenge was based on the juror's race. Id. at 98.

c. The Defendant Bears The Burden Of Proving That The Trial Court's Ruling Was Clearly Erroneous

In this case, while the trial court never found that the defendant met his burden of making a *prima facie* showing of purposeful discrimination, the prosecutor offered race-neutral reasons on his own accord, thus, the only issue necessary for this Court to decide pertains to step number three, the trial court's finding that the defendant failed to prove purposeful racial discrimination. See State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (if the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary *prima facie* case is unnecessary) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

A trial court's decision is a factual determination based in part on the answers provided by the juror and on the assessment of the demeanor and credibility of the jurors and of the attorney. Batson, at 98 n.21; Hernandez, 500 U.S. at 365. The defendant carries the burden of proving the existence of purposeful discrimination. Batson, at 93. The determination of the trial judge

is "accorded great deference on appeal," and will be upheld unless proven "clearly erroneous." Hernandez, at 364.

d. The Defendant's Argument

The defendant asks this Court to draw a conclusive presumption that because other jurors may have had similar backgrounds as juror 25, and those jurors were not challenged, all the reasons provided by the prosecutor in exercising a peremptory challenge to juror 25 must be discounted because the unavoidable conclusive presumption is that the prosecutor was merely providing a ruse or pretext for what he was really engaging in -- purposeful racial discrimination. However, this conclusive presumption simply does not logically follow from the facts of this case.

The defendant relies on statistics that show that African-Americans are disproportionately incarcerated in Washington State to then argue that to use a peremptory challenge on the basis that an African-American juror knows someone who is incarcerated is "inherently discriminatory."[9] This argument fails for a number of reasons. To begin, the prosecutor did not rely solely on the fact

[9] Under the defendant's logic, the reliance upon this factor for White jurors or jurors of a race that are not disproportionately incarcerated would be a proper factor to rely. It is difficult to rationalize how a factor that could show bias or prejudice in an individual juror can be used when one race is involved but not another, when in both cases the possibility of bias and prejudice in a particular juror appears to be equal.

that juror 25 knew someone who had been incarcerated, it was her uncle who was in prison and it was her concerning expression and body language when addressing the issue that raised concerns for the prosecutor.

Still, this is not to say that under different circumstances, reliance upon such a factor could not be an indicator of a pretext for purposeful discrimination. See, e.g., United States v. Bishop, 959 F.2d 820 (9th Cir. 1992) (holding that the prosecutor's use of residency in a low-income area that happened to be a predominantly African-American neighborhood was a proxy for purposeful racial discrimination), overruled on other grounds by United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010). But unlike the many cases cited by the defendant, the record here shows the opposite.

The prosecutor here exercised a peremptory challenge to a single African-American juror while, with two peremptory challenges still left at his disposal, the prosecutor allowed two other African-American jurors to sit on the jury and deliberate to a verdict. While the issue of whether or not a jury is drawn from a "fair cross-section" of the community is an issue that falls under the Sixth

Amendment,[10] not the Equal Protection Clause and Batson, the racial makeup of the jury and the *venire* in this case helps to illustrate the failure of the presumption the defendant asks this court to make.

According to the 2010 U.S. census, African-Americans make up 6.2% of the population of King County. See http://www.census.gov/2010census/popmap/ipmtext.php?fl=53. However, African-Americans made up 12.5% of the *venire* and 14.2% of the actual jury. If the prosecutor were engaging in purposeful racial discrimination, he would have exercised his other peremptory challenges on the other African-American jurors, or he would have asked them further questions to find a clear reason to strike them.

Instead of addressing this issue directly – the fact that the prosecutor challenged only a single African-American juror and left others on the panel, the defendant merely drops a footnote, cites to three cases, and says that "such claims have been resoundingly rejected." Def. br. at 23. Such is not the case. In the cases cited by the defendant, the trial courts misapplied the law, the records

[10] See Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (The Sixth Amendment contemplates that a jury be drawn from a fair cross-section of the community).

show a pattern of discrimination, and the cases were dealing with the first step of Batson, the showing of a *prima facie* case of purposeful discrimination, not the third step of the test as is the issue here.

In United States v. Battle, 836 F.2d 1084 (8th Cir. 1987), "[t]he government exercised five of its six (83%) allowable peremptory challenges to strike five of the seven (71%) blacks from the jury panel." The trial court mistakenly believed Batson was merely permissible and thus the court did not require that the government put its reasons for its challenges on the record. On review, the Circuit Court held that the trial court had erred, that a *prima facie* case of discrimination had been shown and that remand was necessary so that an evidentiary hearing could be held and the government could put its reasons for the challenges – if they existed – on the record. Appropriately, the Court noted that the trial court should consider all "relevant circumstances." Battle, at 1085 (citing Batson).

In Paulino v. Harrison, 542 F.3d 692 (Cal. 2008), the prosecutor used five of her six challenges to strike five of the six African-American *venire* members (it is unclear if the prosecutor had the ability to strike the remaining African-American juror). The

trial court did not require the prosecutor to put her reasons for striking the jurors on the record; instead, the judge opined himself that the prosecutor had good reasons for doing so. Subsequently the case was remanded for an evidentiary hearing with the prosecutor professing to have absolutely no memory of why she struck any of the jurors. On review, the court found that the "stark" disparities in the prosecutor's exercise of peremptory challenges, the clear pattern of striking African-American jurors, and the complete lack of any race-neutral reasons given by the prosecutor, showed purposeful discrimination.

In Sanchez v. Roden, 753 F.3d 279 (Mass. 2014), it was the Massachusetts Appeals Court that misapplied the Batson test. The Court believed that if a prosecutor left a single racial minority on the jury while striking others, it was impossible for the defendant to make a *prima facie* showing of discrimination because the prosecutor necessarily must have had a race neutral reason for striking the other jurors and the prosecutor did not need to put race neutral reasons on the record. Roden, at 299-300. The Federal Court recognized that this was incorrect, that Batson requires that "all of the circumstances that bear upon the issue of racial

animosity must be consulted," and that "out-of-hand" resorting to a single undisputed fact was insufficient. Id.

The case here does not involve a misapplication of the Batson test. Additionally, as each of these courts recognized, a reviewing court must consider the circumstances that exist in each case, and may not simply rely on "out-of-hand" claims. The defendant cannot ignore the facts here, that the conclusive presumption he asks this Court to find simply does not follow from the facts and circumstances of the case. The defendant cannot show that the trial court's decision to allow the State to exercise a peremptory challenge was "clearly erroneous" as he is required to prove.[11]

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[11] The State will not directly address the defendant's request for this Court to enact some new rule of law. First, it is unclear what new rule of law the defendant seeks – no request was made to apply a new rule before the trial court. Second, the defendant does not argue that a new rule is constitutionally mandated. Third, any new rule would be dicta because the defendant fails to articulate how a new rule of law could apply retroactively to the trial court here. See, e.g., State v. Rhone, 168 Wn.2d 645, 658, 229 P.3d 752 (2010) (any new rule would apply to future cases) (Chief Justice Madsen concurring). Fourth, because a new rule is not constitutionally mandated, it is appropriately addressed by legislation or the Supreme Court's rulemaking authority. See State v. Templeton, 148 Wn.2d 193, 212-13, 59 P.3d 632 (2002) (the Supreme Court possesses certain rule-making authority granted to it by the Legislature and inherent in its power to prescribe rules of procedure and practice). With the multiple considerations that would be prevalent in creating any new rule to address this situation, it would be paramount that it be created by the rule-making process as it is ill-suited for case-by-case adjudication. See In re Carlstad, 150 Wn.2d 583, 592 n.4, 80 P.3d 587 (2003) (The rule making process "enables all interested and affected parties to participate in creating the rule. Foisting the rule upon courts and parties by judicial fiat could lead to unforeseen consequences.").

2. THE METHOD OF WRITING DOWN PEREMPTORY CHALLENGES DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL

The defendant argues that his right to a public trial was violated when the trial court took peremptory challenges in writing, rather than orally. Specifically, in exercising peremptory challenges, the attorneys wrote down on a piece of paper the number of the juror they were challenging and which party was challenging which juror. There was no discussion, argument or oral communication of any kind that was not on the record in open court. The trial court then excused the challenged jurors in open court and then filed the piece of paper in the record for any member of the public to view. The defendant's argument that this procedure violates the right to public trial fails for at least two reasons. First, he fails to show that the exercise of peremptory challenges is even subject to the open court's doctrine. Second, he fails to show that what occurred here constitutes a court closure.

a. The Relevant Facts

At the conclusion of *voir dire* examination that was done in open court, the judge asked the parties if they had any "for cause" challenges. RP 176-77. With neither party having any "for cause"

challenges, the judge proceeded to the peremptory challenge stage.

The procedure used for the peremptory challenge stage was discussed with the parties prior to *voir dire*. The judge explained that instead of having the peremptory challenges announced orally in front of the jurors, the State would write the number of its first peremptory challenge on a piece of paper, the piece of paper would be handed to defense counsel to write down his first peremptory challenge, then the paper would be handed to the judge who would announce and excuse the challenged jurors. RP 126-26. This procedure would continue until each party had used all of their peremptory challenges or accepted the panel. Id. The piece of paper listing the challenges and the party challenging each juror would then be made part of the record. Id. The defendant agreed to this procedure and this was the exact procedure that was used.[12] Id.

[12] Besides his public trial right claim, the defendant does not assert that this procedure violated any other provision of law. In point of fact, the practice is widespread and has been identified as a "best practice" by the American Bar Association and the Washington State Jury Commission. See State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) (recognizing that the use of written peremptory challenges is a practice used in multiple counties of this state); Georgia v. McCollum, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) ("it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors"); Washington State Jury Commission, Report to the Board for Judicial Administration, at 41 (July 2000) ("Best practices

In open court, each attorney wrote on a piece of paper the first juror they intended to challenge. RP (*voir dire*) 178. There was no sidebar, argument or in-chambers discussion. Id. The piece of paper was then handed to the judge who excused two jurors – each party's first peremptory challenge. Id. This procedure continued until the panel was accepted by both parties. Id. at 178-88. The same day, the piece of paper was then made part of the public record. CP 129-30. The paper listed the number of each juror challenged and which party challenged which juror. Id.

b. There Was No Violation Of The Right To A Public Trial

The right to a public trial is guaranteed by article I, sections 10 and 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution. State v. Slert, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014). This right extends in general to *voir dire*. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

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should include...taking peremptory challenges out of the hearing of jurors, with the court announcing the final selections to the panel") (available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf); ABA Standards for Criminal Justice Discovery and Trial by Jury Standards 15-2.7 (peremptory challenges "should be addressed to the court outside of the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge") (available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html).

Alleged violations of the public trial right may be raised for the first time on appeal. Slert, 181 Wn.2d at 603. Whether the right to a public trial has been violated is a question of law that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Washington courts have established a three-step framework for determining whether the public trial right has been violated. State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014). The reviewing court will first determine whether the proceeding at issue implicates the public trial right. Id. at 514. This determination is made by applying the "experience and logic" test. Id. (citing Sublett, 176 Wn.2d at 73). Under the experience prong, the court asks whether the place and the process have historically been open to the press and the public. Id. Under the logic prong, the court asks whether public access plays a significant positive role in the functioning of the particular process at issue. Id. Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. Sublett, 176 Wn.2d at 71.

If the court determines that experience and logic do not support a conclusion that the public trial right is implicated, it need

not reach the second step – whether a closure occurred. Smith, 181 Wn.2d at 520. A closure occurs when the courtroom is completely and purposefully closed to the public so that no one may enter or leave.[13] State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). A defendant asserting a violation of the right to a public trial bears the burden of showing that a closure actually occurred. State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). Where no closure is demonstrated, a defendant's public trial right has not been violated. Njonge, 181 Wn.2d at 558.

If the court reaches the third step, it must determine whether the closure was justified. A closure that is unaccompanied by a Bone-Club[14] analysis on the record will almost never be found to be justified. Smith, 181 Wn.2d at 520.

All three divisions of the Court of Appeals have held that identical or analogous procedures for peremptory challenges do not implicate the public trial right. State v. Filitaula, 184 Wn. App. 819, 823, 339 P.3d 221 (2014) (Div. I) (exercise of peremptory challenges in writing, rather than orally, does not implicate the public trial right where a record is kept showing which jurors were

[13] The court noted that this definition was likely underinclusive and might be expanded in later cases with different facts. Lormor, 172 Wn.2d at 93.

[14] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

challenged and by whom); State v. Marks, 184 Wn. App. 782, 786-89, 339 P.3d 196 (2014) (Div. II) (exercise of peremptory challenges in writing at sidebar conference does not implicate the public trial right under the "experience and logic" test and that the exercise of peremptory challenges is *not* a part of *voir dire*)[15]; State v. Webb, 183 Wn. App. 242, 246-47, 333 P.3d 470 (2014) (Div. II) (exercise of peremptory challenges on paper did not violate public trial right), rev. denied, 182 Wn.2d 1005 (2015); State v. Dunn, 180 Wn. App. 570, 574-75, 321 P.3d 1283 (2014) (Div. II) (exercise of peremptory challenges at clerk's station does not implicate the public trial right under the "experience and logic" test), rev. denied, 181 Wn.2d 1030 (2015); State v. Love, 176 Wn. App. 911, 917-20, 309 P.3d 1209 (2013) (Div. III) (exercise of for-cause and peremptory challenges at sidebar does not implicate the public trial right under the "experience and logic" test), review granted in part, 181 Wn.2d 1029 (2015)[16].

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[15] See also State v. Anderson, 2015 WL 2394961, 8 n.7 (2015) (Div. II) (noting the difference between the exercise of challenges for cause that implicate the public trial right, and peremptory juror challenges which do not implicate the public trial right).

[16] Oral argument in Love occurred on March 10, 2015. The court's website lists the issue as follows: "When the trial court heard for-cause juror challenges at a sidebar, did this violate the defendant's right to a public trial?"

The procedure used here leads to the conclusion that, even if the excusal of jurors is considered a part of *voir dire* (in contrast to the findings in Marks), no closure occurred where the trial court properly exercised its discretion by directing the procedure to be used in the peremptory challenge stage, while at the same time ensuring that the public had full and near contemporaneous access to the information. The judge announced in open court which prospective jurors had been excused by the attorneys. The written document listing the numbers of the excused jurors, and which party had excused which jurors, was filed for the record on the same day that the challenges were made. This fulfills the public trial right. See, e.g., Filitaula, 184 Wn. App. at 823 (no violation where written form listing prospective jurors removed by peremptory challenge and identifying party who made the challenge was filed in the court record at the end of the case), accord; Love, 176 Wn. App. at 919-20.

3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGE OF SECOND-DEGREE POSSESSION OF STOLEN PROPERTY

The State concedes that there was insufficient evidence to support the charge of second-degree possession of stolen property. Thus, judgment on the lesser charge of third-degree possession of

stolen property, an option that was provided to the jury, should be entered.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, "[m]ere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence." State v. Taplin, 9 Wn. App. 545, 557, 513 P.2d 549 (1973).

Here, to prove second-degree possession of stolen property, as charged in count 4, the State was required to prove that the defendant possessed stolen property that had a value exceeding $750.00. RCW 9A.56.160(1)(a); CP 22. Value "means the market value of the property at the time and in the approximate area of the act." RCW 9A.56.010(21). Market value is based on an objective standard and is the price that a well-informed buyer would pay to a

well-informed seller. State v. Kleist, 126 Wn.2d 432, 438, 895 P.2d 398 (1995); State v. Ehrhardt, 167 Wn. App. 934, 944, 276 P.3d 332 (2012).

Various types of evidence may be admitted that allow a jury the ability to determine market value. State v. Hermann, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). To begin, the State may prove a property's market value by direct or circumstantial evidence. Id. The original purchase price paid to obtain an item may be useful in determining the current market value, if the price paid is not too remote in time. See State v. Melrose, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). In conjunction with the original purchase price, evidence would usually be introduced that would allow the jury to factor in the current condition of the property (depreciation). Id. (evidence of the price paid for a camera five years before its theft, combined with consideration of the camera itself, was sufficient to establish market value). Presenting the actual item to the jury is useful in determining its current condition and market value. See State v. McPhee, 156 Wn. App. 44, 65-66, 230 P.3d 284, rev. denied, 169 Wn.2d 1028 (2010).

The trade value of property is another factor that can be used to determine market value. McPhee, 156 Wn. App. 65-66. In

Washington, the owner of property may testify as to its market value without being qualified as an expert in this regard. State v. Hammond, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972). Replaced cost is another recognized factor, and of course, expert witness testimony may be admitted on the issue. Hammond, at 463; Melrose, at 832.

Here, insufficient evidence was admitted as to the market value of the stolen property, and thus the jury was left to speculate as to whether the total market value exceeded $750.00. The relevant stolen items the defendant possessed included an iPad, cash, a few wallets, and miscellaneous pieces of jewelry. RP 676. None of the items were retained by the police, and thus, none of the items were presented to the jury for its examination. RP 581-82, 950. Instead, photographs of the property were admitted into evidence for the jurors' review. See, e.g., Trial Exhibit 17 and 19; RP 678.

Ten-year-old Jennifer Huynh testified that she believed her iPad originally cost around $400. RP 707. However, no evidence was introduced regarding the age of the iPad, its current condition, working abilities or whether it would be considered outdated. Thus,

a realistic basis did not exist for the jury to determine the actual market value of the item.[17]

Valuing the jewelry was equally problematic. First, not all of the jewelry in the defendant's possession was identified as having been stolen from the Huynh family residence. Jennifer Huynh recognized some of the jewelry as belonging to herself, some to her aunt, but other items she could not identify. RP 722, 724-26. She was not specific as to which items belonged to her family. Id. Second, no evidence was presented as to the value, the condition or what the jewelry was made of. In the photographs, much of the jewelry appears to be what would be characterized as costume jewelry with little value. See Trial Exhibit 17 and 19. The photographs do not show pieces of jewelry that are clearly of significant value or of a value that can readily be determined to be within a certain range.

Finally, there is the cash that was found on the defendant's person ($435, RP 564-65), in the glove box ($81, RP 951), and in the red bag possessed by the defendant ($71, RP 553, 555).

[17] In closing argument, the prosecutor used the estimated purchase price of $400.00 as the market value of the iPad. RP 1038. This was likely based on either an assumption that the iPad was virtually brand new or a mistaken belief that the purchase price, and not the current market value, is the price used to determine value under the possession of stolen property statute.

Mr. Can Huynh testified that cash was taken from his home in the burglary, although he provided no estimate as to how much money was taken. However, even if one assumes that all of the money the defendant possessed belonged to the Huynh family ($587),[18] there still needed to be some reasonable basis for the jury to determine the market value of the other property for there to be sufficient evidence to find the total market value of all the property combined exceeded $750. While it may be that the market value did exceed $750, beyond speculation, the evidence to support such a finding simply does not exist in the record here.

When a reviewing court finds that there is insufficient evidence to support a conviction of a charged offense, the reviewing court will direct that the trial court enter judgment on a lesser degree offense if the lesser degree offense was provided to the jury as an option in the jury instructions and the evidence supports the fact that the lesser offense was committed. State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980). In this case, the lesser degree charge of third-degree possession of stolen property was provided to the jury. CP 56-58. The lesser charge applies

[18] In closing, the prosecutor admitted that it was unknown how much of the money belonged to the Huynh family, just that "some portion" of the money was likely money stolen from the Huynh home. RP 1039.

where the stolen property possessed does not exceed $750.00. RCW 9A.56.170(1). Thus, this Court should remand for entry of judgment on the lesser charge.

D. CONCLUSION

For the reasons cited above, with the exception of the possession of stolen property charge, count 4, this Court should affirm the defendant's convictions. The case should be remanded for entry of the lesser offense of possession of stolen property in the third degree.

DATED this 14 day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. TEREZ BARDWELL, Defendant.	No. 13-1-14142-2 KNT STIPULATION AND ORDER RE: CORRECTION OF THE VERBATIM REPORT OF PROCEEDINGS COA NO. 72356-1-I

STIPULATION

The State, represented by Senior Deputy Prosecutor Dennis McCurdy, and the defendant/appellant, represented by Appellate Counsel Susan Wilk, hereby stipulate to the following:

(1) That the above listed counsel have reviewed the Verbatim Report of Proceedings previously filed with the Court of Appeal.

(2) That the parties noted an error on page 182 in the volume listed as "Supplemental Verbatim Transcript of Proceedings Trial – Jury Voir Dire," for the dates May 28 and May 29, 2014.

(3) That the parties listened to the CD of the court proceedings and confirmed that the prosecutor, Mr. Patrick Hinds, refers to three jurors by number, jurors 30, 35 and 44.

(4) That the parties agree that the attached substitute page accurately indicates what was said on the record by Mr. Hinds, and that this page should substitute for page 182 of the above listed volume.

ORDER

The court accepts the above stipulation. Pursuant to this stipulation, the attached substitute page shall replace page 182 of the Verbatim Report of Proceedings previous filed, the volume listed as "Supplemental Verbatim Transcript of Proceedings Trial – Jury Voir Dire," for the dates May 28 and May 29, 2014.

DONE THIS DAY, the 8th of July, 2015.

Judge

Dennis J. McCurdy WSBA #21973
Senior Deputy Prosecutor

Susan Wilk WSBA #28250
Attorney for Appellant/Defendant

that would make her more inclined to find for the defense than the State, if she couldn't be fair to the defense?

So I don't think there's been a showing from the paucity of questions to the perspective juror that the challenge is for anything other than her race. I think the burden switches to the prosecutor.

THE COURT: All right.

Mr. Hinds?

MR. HINDS: With all due respect I completely disagree with that. I mean, that may have been a reason why the State could bring a for cause against her, but it's a peremptory challenge. The – and the reasons why defense might or this court or someone else watching might think, Oh, I think she'd be a good juror, that's not the issue. It's a peremptory. We don't have to give any reason unless there is a prima facie showing that our reason is her membership in that racial category. There's been nothing here.

I will go beyond that, though, and say there's another African-American woman in the panel who's Juror No. 30.

THE COURT: Um-hmm.

MR. HINDS: The State has no intention of striking her.

The African-American gentleman, Juror No. 35. The State would be fine on.

There's another African-American woman, Juror No. 44, that the State would exercise a peremptory on.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Lila Silverstein, containing a copy of the State's Brief of Respondent, in STATE V.BARDWELL, Cause No. 72356-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

7/14/15
Date

Done in Seattle, Washington