NO. 99698-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD BANGO,

Petitioner.

Petition for Review

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The jury was given a first aggressor instruction. The Defendant Bango argues that the decision conflicts with case law regarding aggressive acts that were "mere words." But this case was not about mere words. Throughout the night and in two locations, the Defendant engaged in a continuing course of conduct to rob his victim, eventually displaying a gun. He claimed that, after he displayed this weapon, the victim displayed his own. The Defendant then shot and killed Jeffrey Shaw. There is no conflict with any published case.

The Defendant challenged the State's exercise of a strike against Juror 26. The prosecutor explained the juror's sister had been murdered and that the juror's testimony (that divergent sensory perceptions were all valid) was problematic. The State intended to disprove the Defendant's self-defense claim with physical evidence demonstrating that he could not have seen what he claimed to have seen. Mr. Shaw's gun never left his waistband. The Defendant characterized Juror 26 as Black, although she had described herself as multiracial, and mainly Japanese. There were other Black and Asian jurors in the venire, and no party had exercised any peremptory strikes against any minority jurors. Applying the *Jefferson* standard, the court of appeals found that an objective observer would not have viewed race as a factor.

II. RESTATEMENT OF THE ISSUES

A. In a murder trial where the self-defense claim was contradicted by the physical evidence, would an objective juror view race as a factor where a peremptory strike was exercised against a juror whose sister had been murdered and who had expressed a belief that perceptions of objective reality were relative and where no strike had been exercised against any of the various Black and Asian jurors?

B. Did the giving of a first aggressor instruction conflict with case law related to "mere words" cases where the evidence in Bango's trial was that, if the victim raised a weapon, he did so because the Defendant provoked a need to defend against not mere words but a robbery accompanied by the display of a gun?

C. Should the Court enact a court rule addressing the recording of custodial interrogations via an opinion rather than the rule-making process (1) where the proposed rule has repeatedly and recently failed and (2) where the identical concerns have been addressed by the appropriate body in SHB 1223?

III. STATEMENT OF THE CASE

The Defendant Donald Bango killed Jeffrey Shaw during a drug transaction. CP 2-4. Shaw used and sold drugs, sometimes with the assistance of high school friend Curtis Wikstrom who acted as a middle man. RP[1] 992, 995; RP (6/1/17) 52-56. When the Defendant Bango asked Wikstrom to assist him in buying heroin from Shaw, the friends were cagey, because they knew that the Defendant's companion Daniel Lopez had been

[1] Where no date is indicated, reference is to the 26-volume verbatim report of proceedings transcribed by Official Court Reporter Emily J. Dirton.

robbing drug dealers. CP 172-75, 177, 179[2]; RP (6/1/17) 52, 59-60, 81-82, 89; RP 1278-79, 1286, 1427.

As Wikstrom waited with the Defendant for Shaw to arrive, he grew suspicious that the Defendant intended "to cause harm." RP (6/1/17) 82; RP 1173. The Defendant had backed into a parking spot where he waited with guns but no money. RP (6/1/17) 93-95, 108-09, 114-15; RP 1172. The Defendant cocked the 12-gauge shotgun on the floorboard by his feet and pointed to the backseat where he had a pistol and an AK-47. RP (6/1/17) 94-97, 100, 102, 106.

When Shaw arrived with his friend Jesse Neil, the Defendant told Wikstrom to tell Shaw to come directly to him. RP (6/1/17) 59, 89, 113-16; RP 990-91, 1043, 2246. Shaw declined, and as Wikstrom returned to Bango's car, he saw the Defendant pulling on his tactical black gloves used for shooting and he panicked. CP 166; RP 1625, 1637, 1642-44; RP (6/1/17) 117-18; RP 1173-74. Wikstrom ran back to Neil's car, jumped in, and the three men fled from the Defendant. RP (6/1/17) 118, 122; RP 1008. Wikstrom told Shaw and Neil that the Defendant had a lot of guns and no money and was "not doing what he was supposed to be doing." RP 1174.

[2] The Defendant's interview (Exhibit 370) is transcribed at CP 171-203.

But the Defendant persisted. He succeeded in convincing Shaw to meet that same night, albeit subject to Shaw's conditions, i.e. in a public place and with the understanding that Shaw would be bringing his own protection, a handgun which was at his waistband. RP (6/1/17) 118-22; RP 1175-84, 1190.

When they met at the 7-Eleven, the Defendant made repeated attempts to enter Shaw's vehicle. He asked to enter to sample the product. RP 1195, 1200. When Shaw did not agree, the Defendant asked to enter the vehicle to see the product weighed. RP 1012-13, 1019-20, 1200, 1204. Again Shaw refused, inviting the Defendant to observe through the window only. RP 1019-20. At this point, the Defendant said, "Here's how we're going to do this," unzipping his coat, pulling out a badge, and telling the three men to exit the vehicle. RP 1191, 1205, 1208. He "told us there was cops all around us and get the fuck out of the car." RP 1021.

Shaw never drew his gun. RP 1021, 1027, 1179, 1203-04. Instead he screamed for Neil to go. RP 1022, 1206. Initially Neil froze, believing the Defendant to be a police officer. *Id.* Neil finally backed up when Wikstrom yelled that the Defendant was pulling his handgun from his coat pocket. RP 1206-07. After Neil backed up, the Defendant started shooting. RP 1022-23, 1207. The 7-Eleven video shows the Defendant chasing the

car as it backs up right, and then there is the muzzle flash. Exh. 118. He shot twice. RP 1444, 1447, 1533-34, 2678.

Wikstrom called 911, and Neil ran traffic lights driving directly to the hospital. RP 1024, 12. But a bullet had gone through Shaw's ribs, lungs, and heart, severing both major arteries at the top of the heart, killing him. RP (6/8/17) 44, 49-50. Shaw expired at 2:34 in the morning shortly after his arrival at the hospital. RP 1074.

The Defendant's interview: The Defendant was arrested at his hotel room at 7:46 pm. RP 66. At 8:39 pm, the Defendant signed a Miranda advisement agreeing to be interviewed. RP 112-13. But he did not consent to be recorded until the detective refused to proceed. RP 114-15, 177.

The Defendant alleges that there is no explanation or record for what took place prior to the commencement of the recording. Petition for Review at 5, 15. In fact, the CrR 3.5 hearing produced a detailed record. For ten minutes, Detective Brian Vold collected background information, offered the Defendant the use of the restroom and some refreshment, and focused on developing rapport. RP 115-16, 138. After ten minutes, Bango requested an attorney. RP 114. A minute later, he rescinded that request, asking to reengage. RP 114, 116, 140. Det. Vold advised that he would only agree to reengage if the Defendant would consent to be recorded "for his sake and for my sake." RP 114-15, 177. The detective reviewed the

recording device over several minutes to make sure he did not overwrite another recording and then started the recording at 8:54. RP 117, 143-44. The recording begins with another Miranda advisement, a summary of what had just taken place in the preceding few minutes, and the Defendant's expressed willingness to talk without an attorney. CP 171-72; RP 117-20; Exh. 370. The interview concluded at 10:37 pm. RP 120-21.

The Defendant's constantly changing statements were inconsistent with the evidence as to every detail. Brief of Respondent at 7-9. Confronted with his lies, the Defendant acknowledged that he was "trying to cover up" and "playing chess." CP 190-91. When he made no headway, he said "that's why I asked for a lawyer." CP 200. The detective pointed out that the Defendant had rescinded that request, been readvised of his rights, and waived them – both in writing and in the recording. CP 201.

At the CrR 3.5 hearing for the first time, the Defendant alleged coercion. RP 190-92.

> Here, the court found that the detectives scrupulously honored Bango's invocation of his rights and no further interrogation took place after that point, that the detectives did not coerce Bango's waiver, and that the subsequent signed waiver of his rights was knowing and voluntary. These findings support the conclusion that the State was permitted to introduce Bango's statements made during the interrogation.

Unpub. Op. at 12.

The judge found that the detective was credible, and the Defendant was not. RP 417-19.

The peremptory strike: In jury selection, the Defendant challenged the State's exercise of a peremptory strike against Juror 26, arguing that she was the only African American juror who could be seated on the jury. CP 801; RP 810-11. This surprised the prosecutor because the juror had described herself as mainly Asian American. RP 577-81, 813-14 (describing a Japanese family culture, a mother who was Okinawan and Japanese, and a multiracial father representing "three American races" including English and German, but "listed as mulatto in the genealogy"). The prosecutor pointed out that Juror 26 was not the only Asian juror who could be seated. RP 814. "I would hazard a guess [there] are two Pacific Islanders still in the first 12 that are in the box that have been passed by the State repeatedly." RP 814.

The prosecutor explained various reasons for exercising a peremptory strike in this case. This was a murder case, and the juror's own sister had been murdered. RP 815. The juror had expressed a belief in a sensory relativism (RP 581), making her a poor match for a jury which would be evaluating the Defendant's self-defense claim which was contradicted by the physical evidence. RP 815.

No other peremptory strikes had been exercised against jurors of any racially cognizable minority group so as to suggest a pattern of discriminatory intent. RP 817-19. Nor was the judge aware of past discriminatory behavior by the prosecutor. RP 818.

The court denied the challenge, finding no pattern of purposeful elimination of minorities and a credible, nondiscriminatory basis to exercise the strike. RP 820.

When the challenge was renewed after the verdict, the law had changed.[3] CP 551. In an abundance of caution, the court found Juror 26 to be African American. *Id*. But under the *Erickson* rule, there was no prima facie case of racial discrimination where Juror 26 was not "the only black juror" remaining in the venire or even who could be included in the 14 jurors which would be selected. CP 551; RP 810-11, 814. But again in an abundance of caution, the court continued on to the next step as if that standard had been met. CP 551. The court found that the prosecutor "articulate[d] sufficient race-neutral reasons for excusing Juror No. 26." CP 553. The court found that the peremptory strike was not based on a racial motivation or even an unconscious bias. CP 552.

[3] *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) issued ten days after the verdict in this case. CP 487. GR 37 was adopted a year after the verdict.

First Aggressor Instruction: The court granted the State's request for a first aggressor instruction where even in the Defendant's version of events, he was the first person to pull a gun.

The Defendant claimed he saw a gun on the center console. CP 186. He took out his badge. CP 186; RP 1021, 1191, 1205, 1208. Shaw screamed for Neil to drive. RP 1022, 1206. The Defendant pulled a handgun from his coat. RP 1206-07. Wikstrom yelled, "he's pulling his gun." *Id*. Neil backed up. RP 1022-23, 1207. The Defendant chased after them. Exh. 118. According to the Defendant, Mr. Shaw drew a gun, pointed, and pulled the trigger twice but the weapon did not fire. CP 180-81. "*As soon as* he did that then I, I pointed towards him and I, you know, I, I shot." CP 181 (emphasis added). The Defendant shot Mr. Shaw through the heart as the three men were fleeing him for the second time that night. Exh. 118; RP (6/8/17) 44, 49-50.

The court permitted the instruction. RP 2601.

The Defendant is convicted of intentional murder in the second degree with a firearm enhancement, criminal impersonation, and tampering with a witness. CP 419-25, 521; Unpub. Op. at 36.

IV. ARGUMENT

A. The Defendant's misrepresentation of the prosecutor's reasons for exercising a peremptory strike does not reveal a conflict with any published opinions.

The Defendant argues that the court of appeals did not apply the law correctly in analyzing the *Batson* challenge.

A *Batson* challenge involves three steps. First, the challenger must establish a prima facie case that "gives rise to an inference of discriminatory purpose." *State v. Jefferson*, 192 Wn.2d 225, 231–32, 429 P.3d 467, 471 (2018). When a party strikes the last member of a racially cognizable group, the trial court *must* recognize a prima facie case of discriminatory purpose. *City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124, 1131 (2017).

The court only moves to the next *Batson* steps "if a prima facie case is made." *Erickson*, 188 Wn.2d at 727. In the instant case, the court did not find a prima facie case of discrimination had been established. CP 551. The prosecutor did not have a history in this case or any other which would suggest a pattern of discriminatory intent. RP 817-19. No peremptory strikes had been exercised against minorities. And Juror 26 was not the only Black juror remaining in the venire. CP 551; RP 810-11, 814.

The Defendant argues that Juror 26 was the only Black juror who could make it into the first 12.[4] Petition at 10-11. This is immaterial. The presumption established in *Erickson* is a "bright-line" rule. *Erickson*, 188 Wn.2d at 734. That line is not drawn at the first 12 jurors. "We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." *Id*.

In the Defendant's issue statement, he characterizes Juror 26 as "the only African-American Asian American Pacific Islander juror from the venire." Petition at 1. This allegation is not supported by any record. The record is that there were several Black jurors and several Asian jurors. There was no inquiry into the number of jurors of mixed heritage.

Under the second step, the burden would shift to the party exercising the peremptory strike to come forward with a race-neutral explanation for strike. *Jefferson*, 192 Wn.2d at 231–32. And in the third step, the trial court would consider whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." *Jefferson*, 192 Wn.2d at 249.

[4] N.B. She was not the only Black juror who could make it into the first 14, however, and 14 jurors would be chosen to allow for alternates. RP 810.

The Defendant misrepresents the prosecutor's reasons. The prosecutor explained that he struck Juror 26, because her sister had been murdered and this was a murder trial. And he explained that the juror's expression of sensory relativism made her less than ideal in a self-defense case where the Defendant's statement was inconsistent with the physical evidence. Bango claimed that Shaw had pointed a gun and pulled the trigger twice. Of course, this did not happen. No other witness had observed Shaw remove his gun from his waistband, which is where it was recovered. RP 1027. Bango described Shaw's weapon as an unloaded or misfiring 1911 style Para Ordnance, stainless and black with visible hammer and dovetail. CP 179-80. But in fact Shaw's gun was a fully operable .40 caliber Smith & Wesson Kahr pistol with no visible hammer and with an unspent cartridge in the chamber. RP 2121, 2680. The Kahr does not have the dovetail design. It showed no signs of any misfire. RP 1905, 1949-52, 2131-34, 2685. This juror might excuse the Defendant's lie as just one of "many ways to look at something." RP 581, ll. 20-21.

Based on these proferred reasons, an objective observer could not view race or ethnicity as a factor in the exercise of the peremptory challenge. Unpub. Op. at 18-19.

> … defense counsel used a peremptory strike against Juror 12, whose relative had been convicted of felony murder, even though Juror 12 stated that he believed he

> could separate that incident from the current situation. Despite the different roles occupied by the prospective jurors' relatives, both the prosecutor and defense counsel could reasonably have concluded that a family member's prior involvement in a murder could consciously or unconsciously affect a juror's ability to be objective in a murder trial.
>
> Although the questioning regarding the nature of Juror 26's work was unique among the potential jurors, this discrepancy is unsurprising given that she created her own field of study. The State argued that her scholarship suggested that she might be more forgiving of alternate perceptions than the average person. This was an especially important consideration because Bango claimed he acted in self-defense, which made his perception of the incident pivotal. The singular nature of her field set her apart regardless of race, and the State's justifications carried none of the historical hallmarks of improper discrimination. See, e.g., GR 37(h), (i).10 An objective observer would not view race as a factor in the strike.

Unpub. Op. at 18-19.

The Defendant argues that the prosecutor must have been insinuating that the juror had a distrust of law enforcement and would not follow the law. Petition at 11. These are not the prosecutor's reasons, and they are not fair inferences from those reasons.

The Defendant alleges that the prosecutor "expressed concern" that the juror had not grown up in Bellevue and had a unique world view. Petition at 11. The allegation is shockingly lacking in candor. This was information which the juror volunteered and which the prosecutor simply paraphrased back to her during her voir dire. RP 580-81. The trial court's

perspective was that the juror had a strong, volunteered point of view which commanded respect and that the attorneys had been very deferential to her.

> … we got into an extensive dialogue by both defense and the State in regards to her unique job and her unique perspective and outlook on the world. And I think all of us found it very intriguing. She presented herself as a very intelligent, thoughtful woman, and one of not just African-American descent but so many different cultures she had running through her blood that it was an inspiration for her to make a life's work out of the different cultural influences that people have and how it is perceived by society.
>
> And as indicated by both sides, she came up with her own definition of that word and has really developed a philosophy regarding that that she teaches to other individuals in the education system, et cetera.
>
> And both sides were very deferential to her. She wasn't targeted by any side because of her beliefs other than to just find out more about them since they were somewhat -- not somewhat -- they were unique and not what you typically hear in a voir dire situation.

RP 816-17. But the prosecutor ***did not*** offer the juror's broad cultural background as a reason for the exercise of the peremptory strike, and he ***did not*** express "concern" about it. This is pure invention.

The Defendant does not demonstrate a conflict with any case by misrepresenting the prosecutor's reasons.

B. The record does not support the Defendant's claim that the act supporting the first aggressor instruction was merely the display of a badge.

The Defendant misleads the court, claiming that his first aggressive act was mere speech. Petition at 13. This is not the record. The aggressive act which precipitated the alleged display of Shaw's weapon was a

continuing course of conduct to rob culminating in the Defendant's display *of a gun*, not a badge. Because the Defendant misrepresents the record, he also misrepresents a conflict of laws. Petition at 14 (referencing *State v. Riley,*137 Wn.2d 904, 909-10, 976 P.2d 644 (1999) and *State v. Kee,* 6 Wn. App. 2d 874, 882, 431 P.3d 1080 (2018)).

A first aggressor instruction is appropriate where there is some credible evidence that the defendant provoked the need to act in self-defense. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); *State v. Sullivan,* 196 Wn. App. 277, 289, 383 P.3d 574 (2016), *rev. denied* 187 Wn.2d 1023 (2017). The evidence is reviewed in the light most favorable to the party requesting the instruction – in this case, the prosecution. *Sullivan,* 196 Wn. App. at 289.

The evidence was that the Defendant was associated with Lopez, who had just robbed Shaw of heroin and cash. The Defendant was desperate, suffering from withdrawal. CP 177 ("didn't want to be hurting and sick"). He had shown up with guns and no money, pulled on tactical gloves, parked as if primed to make a sudden escape. He demanded to bypass the middle man, which would expose Shaw while he was holding both product and cash. Shaw demanded they meet in a public place and warned the Defendant not to try to rob him.

When they met a second time that night, despite how poorly this meeting was going, the Defendant made more demands – intent on entering Neil's vehicle. Shaw did not allow it. Having lost his opportunity to rob Shaw in a dark neighborhood, denied his opportunity to rob Shaw in the cover of Neil's vehicle, the Defendant had one more ploy: to strong-arm Shaw with a pretense of authority.

When the Defendant drew his badge, Shaw screamed for Neil to drive. RP 1022, 1206. Neil hesitated. The Defendant pulled a handgun from his coat. RP 1206-07. Wikstrom yelled, "he's pulling his gun." *Id*. It was this information which caused Neil to back up. RP 1022-23, 1207. In other words, Neil did not begin to back up until after the Defendant displayed his own weapon.

The Defendant claimed that he shot Shaw immediately after or "as soon as" he saw Shaw pulling the trigger of his own weapon twice. CP 181. We know from the video that the Defendant chased after the fleeing vehicle and shot Shaw well *after* the vehicle had backed up. Exh. 118. Therefore, his claim is that Shaw drew a gun *only after* the Defendant first displayed his gun. ***The Defendant was the first person to draw a gun.*** The Defendant shot Mr. Shaw through the heart as the three men were fleeing him for the second time that night. Exh. 118; RP (6/8/17) 44, 49-50.

Both *Kee* and *Riley* hold that words are not enough to justify a first aggressor instruction. *Riley,*137 Wn.2d at 911-12; *Kee,* 6 Wn. App. 2d at 880-81. *Kee* additionally holds that where a reasonable juror might have believed that the first aggressive act was mere words, the jury should be instructed that words are not enough. *Kee,* 6 Wn. App. 2d at 882. The court of appeals' opinion does not disagree with either holding. Rather, this case does not present evidence of words alone, and the State never suggested it did. Unpub. Op. at 23. The State presented evidence of a continuing course of conduct of robbery throughout the night, followed by the Defendant's display of his gun. There is no RAP 13.4(b) consideration which would permit review.

C. Recently passed SHB 1223 addresses the recording of custodial interrogations; the bill, rather than a court case, is the proper path for addressing this topic.

The Defendant argues that the lack of a recording for the few minutes of his interview, an absence that resulted from his own refusal to be recorded, is "troublesome." Petition at 17. The Defendant invites this Court to adopt a court rule which would automatically exclude all evidence from an interrogation which was not fully electronically recorded. Petition at 16. This Court must decline the invitation.

This Court has repeatedly denied the request for such a rule. *State v. Turner,* 118 Wn.2d 1024, 827 P.2d 1393 (1992); *State v. Spurgeon,* 165

Wn.2d 1016, 199 P.3d 411 (2009). First of all, a case is not the proper place for such rule making.

> [T]he proper path to change the Rules of Appellate Procedure is through the normal rule making process, not through overruling precedent to accommodate the change. "Foisting the rule upon courts and parties by judicial fiat could lead to unforeseen consequences." *In re Pers. Restraint of Carlstad*, 150 Wash.2d 583, 592 n.4, 80 P.3d 587 (2003).

Matter of Det. of McHatton, No. 98904-4, 2021 WL 1681323, at *4 (Wash. Apr. 29, 2021). Drafting quality rules requires a body of objective and qualified rule-making experts.

Secondly, when the Court reviewed proposed rule CrR 3.7 quite recently, it met with wide rebuke. In 2018, WACDL circumvented the Criminal Law Section and the Rules Committee to propose a rule which would have required audiovisual recording of all "custodial and non-custodial interrogations of persons under investigation for any crime." The Washington Supreme Court received 176 comments (some with multiple signators). A minority (68 individuals) favored the rule. The WAPA Executive Director observed that the extension of protections beyond those in constitutions "are policy questions best left to the legislature" which "possesses mechanisms for gathering public input such as hearings and committees that this court lacks." The trial judges who commented agreed and criticized the attack on their discretion. The proposed rule would have

conflicted with SSB 5714 which admits testimony subject to a cautioning instruction, properly leaving the question to the factfinder. Laws of 2019, ch. 359 (SSB 5714) (enacting Chapter 10.56 RCW). The proposed rule also conflicts with Chapter 9.73 RCW which respects a person's right not to be recorded. In this case, the recording did not begin until the Defendant consented, consistent with our privacy laws. RCW 9.73.080 (criminalizing recording without consent). Many commenters noted that a court rule would come with no funding to purchase, store, and maintain equipment and data. In the instant case, the detective made an audio recording rather than a video recording, because the Tacoma Police Department's audiovisual system, Case Cracker, is undependable. RP 127-28, 175.

After reviewing the comments, this Court ultimately rejected WACDL's proposed rule in 2018. The question was picked up and decided by the appropriate branch.

A few days ago, on May 18, the Governor signed SHB 1223. The law will take effect January 1, 2022. Section 3 of the bill will require interrogations of juveniles or related to felonies to be recorded in their entirety. The bill allows for various exceptions including the defendant's refusal to be recorded, and it amends the Privacy Act.

There is no substantial public interest in addressing by opinion what can be addressed by rule making and has been addressed by law making.

V. CONCLUSION

The Petition must be denied where it presents no RAP 13.4(b) consideration.

RESPECTFULLY SUBMITTED this 21st day of May, 2021.

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The undersigned certifies that on this day she delivered by efile to the attorney of record true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

5/21/2021 *s/Jeanne Peter*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 21, 2021 - 10:36 AM

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