

68075-7

68075-7

NO. 68075-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT BENSON,

Appellant.

RECEIVED  
STATE OF WASHINGTON  
APPELLATE DIVISION  
2012 JUL 10 AM 9:12  


APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DONNA L. WISE  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	5
1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO EXERCISE A PEREMPTORY CHALLENGE TO JUROR 9.....	5
a. Relevant Facts .....	6
b. The Trial Court's Rejection Of The <u>Batson</u> Challenge Was Not Clearly Erroneous.....	14
2. THE DEFENDANT WAIVED ANY OBJECTION TO PROOF OF HIS OFFENDER SCORE BY EXPLICITLY AGREEING THAT IT WAS CORRECT.....	25
3. THE COMMUNITY CUSTODY TERM IMPOSED ON THE DUI CONVICTION MUST BE STRICKEN .....	26
4. THE FINDINGS HAVE BEEN FILED.....	28
D. <u>CONCLUSION</u> .....	29

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Batson v. Kentucky, 476 U.S. 79,  
106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 14, 15, 16, 21, 22, 24

Caldwell v. Maloney, 159 F.3d 639  
(1<sup>st</sup> Cir. 1998), cert. denied,  
526 U.S. 1009 (1999) ..... 21

Hernandez v. New York, 500 U.S. 352,  
111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) ..... 15, 17, 18

Lark v. Sec’y Pennsylvania Dept. of Corr.,  
645 F.3d 596 (3<sup>rd</sup> Cir. 2011) ..... 16

Miller-El v. Dretke, 545 U.S. 231,  
125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) ..... 21

Moody v. Quarterman, 476 F.3d 260  
(5<sup>th</sup> Cir.), cert. denied,  
552 U.S. 843 (2007) ..... 17

Purkett v. Elem, 514 U.S. 765,  
115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) ..... 16

Rice v. Collins, 546 U.S. 333,  
126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) ..... 14

Snyder v. Louisiana, 552 U.S. 472,  
128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) ..... 15, 20, 24

State v. Bishop, 959 F.2d 820  
(9<sup>th</sup> Cir. 1992) ..... 17, 18, 23

United States v. Fike, 82 F.3d 1315  
(5<sup>th</sup> Cir. 1996) ..... 19

Washington State:

Panag v. Farmers Ins. Co., 166 Wn.2d 27,  
204 P.3d 885 (2009)..... 22

State v. Boyd, 174 Wn.2d 470,  
275 P.3d 321 (2012)..... 27

State v. Byrd, 83 Wn. App. 509,  
922 P.2d 168 (1996), rev. denied,  
130 Wn.2d 1027 (1997)..... 28

State v. Hicks, 163 Wn.2d 477,  
181 P.3d 831, cert. denied,  
555 U.S. 919 (2008) ..... 15

State v. Luvene, 127 Wn.2d 690,  
903 P.2d 960 (1995)..... 15

State v. Morales, 168 Wn. App. 489,  
278 P.3d 668 (2012)..... 25

State v. Rhone, 168 Wn.2d 645,  
229 P.3d 752, cert. denied,  
131 S. Ct. 522 (2010) ..... 21, 22

State v. Ross, 152 Wn.2d 220,  
95 P.3d 1225 (2004)..... 25, 26

State v. Vreen, 143 Wn.2d 923,  
26 P.3d 236 (2001)..... 16

State v. Wright, 78 Wn. App. 93,  
896 P.2d 713, rev. denied,  
hv127 Wn.2d 1024 (1995)..... 22

Other Jurisdictions:

Turnbull v. State, 959 So.2d 275  
(Fla. App. 3 Dist. 2006), rev. denied,  
969 So. 2d 1015 (2007)..... 19

Constitutional Provisions

Federal:

U.S. Const. amend. 14 ..... 14

Statutes

Washington State:

RCW 46.20.342 ..... 2  
RCW 46.61.500 ..... 2  
RCW 46.61.5055 ..... 2  
RCW 9.94A.030 ..... 26  
RCW 9.94A.510 ..... 25  
RCW 9.94A.525 ..... 25, 26  
RCW 9.94A.701 ..... 27  
RCW 9A.20.021 ..... 27

Rules and Regulations

Washington State:

CrR 3.5 ..... 1, 28

**A. ISSUES PRESENTED**

1. Whether the trial court's denial of Benson's objection to the State's peremptory challenge to Juror 9 was not clearly erroneous where the juror described being harassed by a police officer and police officers were a critical part of the State's evidence, and the court found that the challenge was reasonable and in good faith.

2. Whether Benson waived any factual error in calculation of his offender score when he agreed to that score in the trial court.

3. The State concedes that remand is required for the limited purpose of striking the term of community custody imposed, based on an intervening change in the law.

4. Whether the trial court's failure to enter CrR 3.5 findings already has been remedied because findings have been filed and no issue relating to the findings has been raised in this appeal.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Dwight Benson, was charged with felony driving under the influence of intoxicants (DUI) based on his having four prior DUI convictions within the previous ten years (RCW

46.61.5055(4)(a)), reckless driving (RCW 46.61.500), and driving while license revoked in the first degree (RCW 46.20.342(1)(a)). CP 1-7. The jury convicted Benson as charged. CP 23-25; RP 530.<sup>1</sup>

The court calculated Benson's offender score as 16, which would result in a presumptive sentence range of 72-96 months, but the five-year statutory maximum penalty for felony DUI established a presumptive sentence of 60 months for that crime. 12-9-11RP 2. The court rejected a defense request for an exceptional sentence downward. 12-9-11RP 23-25. The court imposed a 60-month sentence on the felony DUI, and a one-year consecutive term on the revoked license offense. CP 123-34; 12-9-11RP 25. On the reckless driving conviction, the court imposed a suspended sentence. CP 132-33; 12-9-11RP 25. The court ordered that all of these terms of confinement and supervision run consecutively to the sentences imposed in Seattle Municipal Court on the two prior convictions (DUI; DUI and Hit and Run) as to which Benson was free on appeal bond when he committed these offenses. CP 126, 132; 12-9-11RP 4-5, 8-9, 25, 28.

---

<sup>1</sup> The report of proceedings of the pretrial and trial proceedings is in consecutively paginated volumes and will be referred to as RP. The sentencing hearing will be referred to as 12-9-11RP.

## 2. SUBSTANTIVE FACTS

In the ten years prior to April 2, 2011, Benson was convicted three times of DUI and once of Physical Control while under the influence. Ex. 9-13; RP 428. On April 2, 2011, his driver's license was revoked in the first degree based on his having been convicted of three serious traffic offenses in a five-year period. RP 192-95. Benson knew his license was suspended that day. RP 428.

On April 2, 2011, Benson took between seven and thirteen pills, apparently prescription medication, drank alcohol and drove around town. RP 408, 418, 426-27. He is a military veteran who reported that he was injured in the service and in car and motorcycle accidents. RP 407-08. He described himself as 100 percent disabled. RP 408.

At about 6:30 p.m., Abdul Hared was driving on Martin Luther King Jr. Way South and stopped for a stop light, when Benson ran into the back of Hared's car, with a loud bang. RP 142-44, 213, 410. There was no damage to Benson's car, except possibly to his front license plate; the damage to Hared's rear bumper appeared minor. RP 150-51, 295-96.

Hared walked back to Benson's car, on the passenger (sidewalk) side, and repeatedly asked for Benson's identification



and insurance information. RP 145, 223-26. Benson, who was still sitting in the car, did not respond to those requests in any way.

RP 145. Finally, Hared said that he would call the police and Benson responded by making a hand signal and shaking his head, indicating nonverbally that he did not want that. RP 146. Hared smelled alcohol coming from inside Benson's car and concluded that he was under the influence of alcohol. RP 146. Benson contradicted Hared's description (and witness Long's description) of their contact after the collision. RP 410-11.

Officer Caron arrived at the scene and observed that Benson's speech was slow and slurred and smelled of alcohol, Benson walked unsteadily. RP 263, 270. Benson did not seem to realize he had been in a collision. RP 263. Benson admitted that he had been drinking but did not say how much. RP 263. Benson refused to cooperate with the limited field sobriety tests that Caron tried to conduct. RP 270-77. Benson tried to recite the alphabet but failed miserably. RP 273-74. Benson contradicted Caron's description of Benson's behavior at the scene. RP 413-17.

Officer Caron also testified that Benson was advised of his implied-consent warnings and refused to sign the form or provide a breath sample. RP 278-84. Caron admitted that he could have

obtained a search warrant for Benson's blood but chose not to because he did not realize this would be a felony DUI. RP 303.

Officer Shopay was the second officer at the scene. He testified that he tried to talk to Benson but Benson had trouble focusing on any subject that Shopay brought up. RP 314. Shopay observed that Benson appeared impaired: in addition to difficulty with conversation, Benson could not walk and staggered, his eyes were bloodshot, and Shopay could smell alcohol on him. RP 314-15. Benson denied that Shopay talked to him. RP 417.

Officer Easton was the third officer at the scene. RP 328. He had limited contact with Benson but noticed that Benson had trouble standing, had alcohol on his breath, and that Benson's responses seemed delayed. RP 329-31.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO EXERCISE A PEREMPTORY CHALLENGE TO JUROR 9.**

Benson argues that the State's peremptory challenge of Juror 9, an African-American, violated the Equal Protection Clause. To prove his claim, Benson asserts that the State's race-neutral reason was a proxy for race discrimination, and compares Juror 9's

answers during voir dire to other jurors in the venire, arguing that similarity in their answers reveals that the State's race-neutral reason for striking Juror 9 was purposeful discrimination. A review of the record makes plain that the State challenged Juror 9 based on the juror's negative experience with a police officer. No other juror in the box described such a negative experience with police. Given that the only witnesses who could describe Benson's intoxication at the scene were police, and the anticipated defense that the police investigation was inadequate, the trial court's finding that the challenge was made "in good faith" and was reasonable, and that Benson failed to prove purposeful racial discrimination, is not clearly erroneous.

**a. Relevant Facts.**

During preliminary general questioning in voir dire, the court asked the venire whether any of them had had an "extremely unpleasant experience with a police officer." RP 550. Seven potential jurors answered in the affirmative: Jurors 9, 16, 23, 28, 36, 37, and 41. RP 550. Jurors 23 and 41 were excused at the request of the defense: Juror 23 as a peremptory challenge, Juror 41 as a challenge for cause. RP 581-82, 591-92, 618.

The State addressed a number of topics related to the crimes charged during voir dire. In its first round, it explored jurors' experiences with drinking and driving, jurors' knowledge of individuals arrested or convicted of DUI, and how those persons (including the jurors themselves) were treated by the criminal justice system. RP 558-64. In its second round, it explored at length whether individual jurors would be able to convict of DUI without a number that quantifies whether the defendant was under the influence. RP 595-605.

In total, the trial court excused seven jurors for cause at the request of the defense. RP 581-94. At the conclusion of all of the peremptory challenges, the highest number juror in the jury panel was Juror 25. RP 618. The parties were not permitted to exercise peremptory challenges as to jurors who were not yet seated in the jury box. RP 113.

The State exercised three of its peremptory challenges to jurors who were reluctant to convict without a blood alcohol numerical result: Jurors 4, 13, and 19. RP 620. Juror 4 had said that the juror would have to acquit if there was no blood alcohol

result.<sup>2</sup> RP 583-84, 616. Juror 13 also was reluctant to convict without a quantitative measure. RP 602-03, 617. Juror 13 said that he could not walk a straight line when sober and so that would not be enough either. RP 603. Juror 13 said that he would want more than a refusal to take a breath test. RP 603. Juror 13 was an African-American juror, but Benson did not object to that peremptory challenge. RP 617. Juror 19 also did not like the idea of not having a blood alcohol result. RP 597, 620.

The State also exercised a peremptory challenge as to Juror 9 and the defense objected to that challenge, noting that this Juror was the last remaining African-American juror in the venire, and contending that the State did not have “a nonracial reason” for its challenge. RP 617, 620. Juror 9 had affirmatively responded to the question as to whether she had had an “extremely unpleasant experience with a police officer.” RP 550. 109.

In his second round of voir dire, defense counsel asked Juror 9 about her interaction with a police officer. The juror’s answers are as follows:

---

<sup>2</sup> The defense earlier had moved to excuse Juror 4 for cause because of the juror’s other statements that she could not be fair, but that motion had been denied. RP 576, 581-82, 595.

JUROR No. 9: My tabs were - - I had bought them, but I didn't put them on at the time. And I had four children with me. And when he stopped me, I had asked what I had did wrong. And he said well, if I noticed your tabs are expired. And I had said, "oh." And at that time I thought I had bought the tabs. So, I thought okay. But, then, he started to kind of looking in my car like there were other things going on. And I thought that am I going to get a ticket or, you know, I was willing to give my information. But, I felt like when I got stopped, okay, I didn't have my tabs on, but I also felt like when he stopped me, like he was looking for something else. And I had my children with me. I felt like, okay, what else did I do wrong.

DEFENSE COUNSEL: Okay. Did the officer treat you fairly?

JUROR No. 9: I felt I was treated fair in what was asked of me. He stopped me. Did you know that your tabs expired. Yes, I did, but I did not put them on. But, then I felt like there was - - he was looking for something else besides that. So, I felt a little - - I didn't feel easy about that. So, I guess there was kind of a mixed feeling, but I felt like he stopped me, okay. I needed to make sure that I had tabs. And then also, you know, he was looking kind of pat me into my car, like maybe something else was going on.

RP 609-10. Defense counsel at this point simply thanked the juror, and did not ask how this experience would affect the juror's evaluation of the testimony of police officers. Because the State already had completed its voir dire sessions, it did not have the opportunity to ask that question. RP 621.

something else. And I got the impression from what she was saying, that she believed she was being harassed or interrogated further because she is a minority. Ant that is not at issue in this case. In fact, the victim in this case is a minority as well.

My concern is that the defense is going to make that an issue in this case, because of those questions. I was surprised how far it went frankly with Juror Number 9.

It's my concern that she will have some bad view of officers because they focused their investigation on the defendant, who is an African-American male. The other gentleman is an African, African male. That was my concern.

That's why I struck Juror Number 9. It has nothing to do with her race. It had everything to do with her answers. Defense counsel questioned her, but I didn't get a second opportunity to figure out if I could rehabilitate her. That's why I struck her.

RP 621.

Defense counsel challenged that explanation, arguing that if the strike was based on Juror 9's experience with police, the State would have challenged Juror 6. RP 622. Defense counsel argued that he did not believe that Juror 9's answers indicated that her experience "really prejudiced her." RP 622.

The State added that it did intend to challenge Juror 28 if he had been seated based on his similar experience to Juror 9's: they

both “felt like they were the ones that were singled out and being picked on.” RP 622-23.

The trial court observed that this case did not present a situation where the defendant could claim that he was stopped unfairly by the police. RP 623. It continued:

There may be, however, an allegation that the investigation was inadequate by the police, especially in a case where we don't have a BAC result.

So, I see why the State would care about having jurors who have not had negative interactions with the police. On the other hand, one of the things that is so troubling about excusing African Americans from a jury trial is that they have had the experience, but not necessarily all our other jurors have had. I am very mindful of that.

RP 623-24.

The court recognized that “Juror Number 9 was, I think, uncomfortable about the way she was treated by the police.”

RP 624. The prosecutor responded that her impression was that “what Juror 9 was saying, without saying it, was that she was being frankly harassed, and that they were investigating more because she was African-American.” RP 624. The court agreed: “That is exactly what I thought she was saying.” RP 624.



The prosecutor explained the basis of her strike again:

My concern in impugning that onto the police in this case, that they focused their efforts on Mr. Benson, an African-American; and frankly I think that came out in pretrial motions. Defense counsel kind of pushed that fact of the officer not really investigating or doing the test with the other driver or anything like that.

So I do think that becomes a significant issue. I want to be very clear. That's why, that's the reason for my striking Juror Number 9.

RP 624.

Defense counsel responded that it is very common for African-American people to feel that they have an "extra duty regarding contact with police" and what Juror 9 said was so innocuous that it was not an appropriate basis for a peremptory challenge. RP 625.

The trial court concluded that the reason articulated by the prosecutor may be a reason that others disagree with but that the prosecutor made the strike "in good faith." RP 626. The court concluded that the reason articulated "was reasonable," rejecting the claim that the challenge was improperly motivated. RP 626.

**b. The Trial Court's Rejection Of The Batson Challenge Was Not Clearly Erroneous.**

The Equal Protection Clause guarantees a defendant the right to be tried by a jury selected free from racial discrimination. U.S. Const. amend. 14; Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When reviewing a Batson challenge, the trial court undertakes a three-part inquiry to determine whether the challenged juror is being stricken based on purposeful discrimination.

First, a defendant opposing the State's peremptory challenge of a juror must establish a prima facie case of purposeful discrimination. Batson, 476 U.S. at 93-96. Second, if the defendant establishes a prima facie case, then the burden shifts to the State to articulate a race-neutral explanation for challenging the juror. Id. at 97-98. Third, the trial court considers the State's explanation and determines whether the defendant has demonstrated purposeful discrimination. Id. at 98. Although the final step involves evaluating the persuasiveness of the State's explanation, the ultimate burden of persuasion that there has been purposeful discrimination rests with the defendant. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

The trial court's Batson determination as to the existence of purposeful discrimination is accorded "great deference" by the appellate courts and "upheld unless clearly erroneous." State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831, cert. denied, 555 U.S. 919 (2008). The trial court "must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). Determinations of credibility and demeanor are "peculiarly within a trial judge's province" and must be deferred to on appeal absent exceptional circumstances. Id. (citations omitted).

Here, the trial court did not address the first Batson step, requiring the defendant to prove a prima facie case of racial discrimination. Nonetheless, once a prosecutor has offered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

The trial court found that the State's race-neutral reason for challenging Juror 9 was reasonable and made in good faith. RP 625-26. The court's comment about the importance of the experience of African-American jurors reveal the court's commitment to ensuring that the jury be impaneled free from racial discrimination. See RP 623. That comment indicates that the court took its obligation to evaluate the State's reason seriously, and that its rejection of the claim of purposeful discrimination deserves great deference.

The reasons provided by the State for excusing Juror 9 were race neutral: the juror's bad experience with a police officer, when police officers were important witnesses in the case and the nature of their investigation could be at issue. A neutral explanation is one based on something other than the race of the juror, and need not rise to the level of justifying a challenge for cause. Batson, 476 U.S. at 98. The reason need not be persuasive or related to the case. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); Lark v. Sec'y Pennsylvania Dept. of Corr., 645 F.3d 596, 621 (3<sup>rd</sup> Cir. 2011); State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). Because this explanation was not based on race, it was race-neutral.

Benson's argument that the reason given was a proxy for a race-based challenge is without merit. Unless discriminatory intent is inherent in the explanation, the reason offered is deemed race neutral. Hernandez, 500 U.S. at 360; Moody v. Quarterman, 476 F.3d 260, 267 (5<sup>th</sup> Cir.), cert. denied, 552 U.S. 843 (2007).

It is unclear on what basis Benson claims that the prosecutor mischaracterized Juror 9's statements as extreme distrust of police conduct. App. Br. at 16. The prosecutor did not use the word "extreme" or the word "distrust" at the cited page. RP 621. At that page, the prosecutor said, "It's my concern that she will have some bad view of officers" because of her experience. RP 621. Later, when the prosecutor said she believed that the juror was saying that the juror was "being frankly harassed, and that they were investigating more because she was African-American," the trial judge said, "That is exactly what I thought she was saying." RP 624.

Benson's reliance on State v. Bishop, 959 F.2d 820 (9<sup>th</sup> Cir. 1992), is misplaced. In that case, the court concluded that a prosecutor's reason was not race neutral, where the prosecutor excused a juror because she lived in a predominantly black, violent neighborhood and he believed she would be likely to be

anesthetized to violence and more likely to believe police are unfair. Id. at 825. However, the juror had not stated that she had witnessed violence or police behavior. Id. The Court concluded that the reasons were generic reasons that amounted to little more than an “assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant.” Id. In contrast, the prosecutor in the case at bar excused the juror based on answers given by Juror 9 relating to her own experience with a police officer, which the juror had characterized as extremely unpleasant in responding to the court’s general questions.

The court in Bishop distinguished its holding from the Supreme Court’s decision in Hernandez, supra, and observed that a criterion for excusing jurors that has a disparate racial impact does not violate the Constitution, although a criterion that acts as a racial proxy does. Bishop, 959 F.2d at 826. The criterion found to be race neutral in Hernandez was that the prosecutor believed that two Spanish-speaking jurors by their body language indicated that they were uncertain that they could listen only to the interpreter’s version of Spanish spoken in the courtroom. 500 U.S. at 356-57. Just as in this case, the reason was race neutral because it related

to specific responses given by the juror, not assumptions based on stereotypes. See also United States v. Fike, 82 F.3d 1315, 1319-20 (5<sup>th</sup> Cir. 1996) (upholding strike of African-American juror who expressed his concern about racial issues in the criminal justice system).

The other case Benson cites as rejecting a reason for a challenge because it was a proxy for race also is distinguishable. In that case, Turnbull v. State, 959 So.2d 275 (Fla. App. 3 Dist. 2006), rev. denied, 969 So. 2d 1015 (2007), the prosecutor asked the members of the venire if they thought that police racially profile people. Five black venire members answered yes and the State exercised peremptory strikes against four of them and a challenge for cause as to the fifth. Id. at 276. The court concluded that the question was a subterfuge and noted that the racial profiling was not an issue in the case and the question was not used to elicit the jurors' feelings about law enforcement. Id. at 276-77. In contrast, in this case Juror 9's statements that were the basis of the State's challenge were elicited by defense counsel and specifically addressed the juror's negative opinion about law enforcement.

The remaining question is whether Benson has established that the trial court's conclusion that the State's challenge was in

good faith and reasonable, not the result of purposeful discrimination, was clearly erroneous. Snyder, 552 U.S. at 477. Benson has not identified any indication that the challenge was the result of purposeful discrimination.

While Benson describes Juror 9's experience as innocuous, that claim is refuted by the court's agreement with the prosecutor's conclusion that Juror 9 believed that she was harassed by the police because of her race, and that she was investigated more thoroughly because of it. RP 624. Juror 9 characterized it as extremely unpleasant. RP 550.

The trial court observed that there may be an allegation that the investigation by the police in this case was inadequate, especially because there was no blood-alcohol analysis. RP 623. The court continued: "I can see why the State would care about having jurors who had not had negative interactions with the police." RP 623. Benson's claim that he did not make inadequate investigation an issue in pretrial hearings is irrelevant, as certainly it is permissible (and expected) that the prosecutor will anticipate likely defenses at trial in jury selection. As the State anticipated, at trial Benson did challenge the adequacy of the investigation, particularly the failure of the police to take pictures at the scene and



to obtain a search warrant for Benson's blood, developing these arguments on cross-examination and in closing argument.

RP 254-56, 303, 502, 506-07.

Benson's reliance on a comparative juror analysis also is meritless. Comparative juror analysis can be probative of whether a challenge was racially motivated, although it is more probative if the reason for the challenge is an objective characteristic, like age or profession. Caldwell v. Maloney, 159 F.3d 639, 653 (1<sup>st</sup> Cir. 1998), cert. denied, 526 U.S. 1009 (1999). Comparative juror analysis requires "side-by-side comparisons" of "black venire panelists who were struck and white panelists allowed to serve." Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); see also State v. Rhone, 168 Wn.2d 645, 657, 229 P.3d 752, cert. denied, 131 S. Ct. 522 (2010) (comparing the similarity between an African-American juror who was struck and a non-African-American juror who served on the jury).

Benson's claim that comparative juror analysis is required to analyze a Batson challenge is not supported by United States Supreme Court or Washington authority. Lower federal courts' decisions are not binding on Washington courts, and no Washington court has held that the trial court must conduct

comparative juror analysis when confronted with a Batson challenge. Panag v. Farmers Ins. Co., 166 Wn.2d 27, 47, 204 P.3d 885 (2009) ("Federal court decisions are guiding, but not binding, authority."); see also Rhone, 168 Wn.2d at 657 (applying comparative juror analysis but not requiring it); State v. Wright, 78 Wn. App. 93, 97, 896 P.2d 713, rev. denied, 127 Wn.2d 1024 (1995) (same).

In any event, such comparative analysis does not suggest purposeful discrimination in this case. In the trial court, the defense identified only Juror 6 as a comparable juror, indicating that the juror described an incident in which he received a citation. RP 622. Juror 6, however, described an incident where he lost control of his car on the freeway and crashed, police responded and he said, "treated me well." RP 614. That was not a negative experience with the police, and in fact Juror 6 did not respond when the judge asked whether jurors had had an extremely unpleasant experience with the police. RP 550.

On appeal, Benson cites the list of jurors who did answer the question that they had an unpleasant experience with the police as comparisons with Juror 9. However, the only juror from that list who served was Juror 16, who was never asked about what that

experience was and never discussed it. The additional juror who did describe a negative experience, Juror 28, was not seated and so could not be challenged, although the prosecutor stated that she was saving a peremptory challenge so she could challenge Juror 28 if the juror came into the jury box. RP 622-23.

Benson's claim that the State cannot strike a juror who has had a negative experience with the police and believes that it was racially motivated is without support in the law. App. Br. at 23. No authority is cited for that proposition and it directly contradicts the holding of Bishop, supra, quoted by Benson himself two paragraphs earlier: a criterion having a discriminatory racial impact is permitted by the Constitution, although one acting as a proxy does not. Bishop, 959 F.2d at 826.

The State's challenge to a juror who had a negative experience with the police makes sense given that the primary witnesses to Benson's intoxication were officers, and that Benson strongly disputed the officers' view of events and challenged the adequacy of their investigation. Unlike the reviewing court, the trial court had the opportunity to observe both the prosecutor and juror's demeanor, and concluded that the challenge was reasonable and in good faith. The best evidence relating to discriminatory intent

often is the demeanor of the attorney exercising the challenge, which is peculiarly within the province of the trial judge who observes it. Snyder, 552 U.S. at 477.

That the State did not inquire about Juror 9's unpleasant experience with police confirms that the State was not using unpleasant experiences with police as a proxy for race. Once Juror 9's extremely negative experience with police was revealed during questioning by defense counsel, however, and especially because the State could not question Juror 9 about the effect of that experience on her evaluation of the testimony of police officers, the State's challenge to that juror was race neutral.

The State did not harbor discriminatory intent, but rather the intent to empanel a jury that would treat the officers' testimony with the same fairness and impartiality as any other witness. Based on this record, the deferential standard of review, and the trial court's distinct advantage in assessing demeanor and credibility, Benson cannot show that the trial court clearly erred in denying the Batson challenge.

**2. THE DEFENDANT WAIVED ANY OBJECTION TO PROOF OF HIS OFFENDER SCORE BY EXPLICITLY AGREEING THAT IT WAS CORRECT.**

In a Supplemental Assignment of Error and Brief in Support, Benson contends that this case must be remanded for resentencing because the trial court disregarded the scoring provisions of RCW 9.94A.525, as interpreted by this Court in State v. Morales, 168 Wn. App. 489, 278 P.3d 668 (2012). That claim is without merit.

Legal errors in scoring may be raised for the first time on appeal. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). However, Benson identifies no legal error that occurred at the sentencing hearing.<sup>3</sup> The trial court did not explain its interpretation of RCW 9.94A.525 because the issue was not presented to it – Benson agreed that his offender score should be calculated with the score of 9-plus. CP 59; 12-9-11RP 2, 9-10, 13.

Nine-plus is the maximum offender score class. RCW 9.94A.510. Serious traffic offenses are to be included in the offender score for felony DUI. RCW 9.94A.525(2)(e)(ii). Serious traffic offenses include nonfelony DUI, nonfelony physical control

---

<sup>3</sup> It is difficult to determine exactly what prior convictions may be the subject of this challenge, as this portion of the brief appears to refer to the facts of another case and cite that record. Appellant's Supplemental Brief at 6.

under the influence, and reckless driving. RCW 9.94A.030(44). Fourteen prior convictions for serious traffic offenses are listed on the judgment and sentence, not including the current reckless driving. CP 129.

A scoring challenge that is raised for the first time on appeal must show error of fact or law within the four corners of the judgment and sentence. State v. Ross, 152 Wn.2d at 231.

Benson's claim apparently is that the State did not prove the facts (the dates of release from incarceration, arrest, conviction and sentencing) necessary to establish that none of Benson's prior DUI, physical control, or other serious traffic convictions would wash out of his score because of a five-year crime-free period after the last release from any confinement pursuant to RCW 9.94A.525(e)(ii). This is a claim based on facts not included in the judgment and sentence, so it has been waived by Benson's agreement to his offender score in the trial court.

### **3. THE COMMUNITY CUSTODY TERM IMPOSED ON THE DUI CONVICTION MUST BE STRICKEN.**

The State concedes error in the community custody term that was imposed on the felony DUI conviction.

The length of the term of community custody is governed by statute:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9). After the sentencing in this case, in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), the Washington Supreme Court determined that, based on this statute, the language used at Benson's sentencing to limit the term of community custody "no longer complies with statutory requirements." 174 Wn.2d at 472. The trial court is required to reduce the term of community custody to avoid a sentence that exceeds the statutory maximum. Id. at 473.

Jones was sentenced to 60 months of confinement on the felony DUI. His term of community custody on that count must be stricken because the statutory maximum for that crime is 60 months. CP 124. This case should be remanded to the trial court solely to strike the term of community custody as to Count 1, the felony DUI.

#### 4. THE FINDINGS HAVE BEEN FILED.

Benson contends that the trial court erred in failing to enter findings relating to the court's CrR 3.5 rulings. He does not request any remedy or contend that any prejudice resulted. Findings now have been entered. CP 137-41. No issue was raised on appeal based on the court's CrR 3.5 rulings, so there can be no prejudice from the delay. Remand is unnecessary.

The trial court must enter written findings of fact and conclusions of law at the conclusion of a hearing on the admissibility of a defendant's statements. CrR 3.5(c). Ordinarily, the proper remedy for a failure to enter findings is a remand for the entry of findings, unless the defendant can establish that he was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in his appellate brief. State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), rev. denied, 130 Wn.2d 1027 (1997). Here, the findings of fact were entered while the appeal was pending. Because Benson has not challenged the court's findings as to admissibility of his statements, the findings cannot have been tailored for the appeal and he cannot show that he was prejudiced by the late entry. Remand is not required.




D. CONCLUSION

The State respectfully asks this Court to affirm Benson's conviction and sentence, with the exception of remanding to strike the community custody term on the felony DUI.

DATED this 10 day of September, 2012.

Respectfully submitted,


DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DONNA L. WISE, WSBA #13224  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

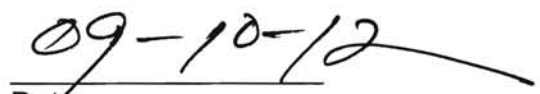
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DWIGHT BENSON, Cause No. 68075-7-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.



Name  
Done in Seattle, Washington



Date