No. 30815-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NATHEN BENNETT,

Appellant.

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

The Honorable Robert Lawrence-Berrey

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **Mr. Bennett's conviction must be reversed because the trial court incorrectly limited his peremptory juror challenges.**

The peremptory challenge has long played an important and unique role in our jury system. See Holland v. Illinois, 493 U.S. 474, 481, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990). Mr. Bennett argues his conviction must be reversed because the trial court denied two of his peremptory challenges to prospective jurors and ordered the jurors remain on the jury after finding the challenges were racially motivated. A review of the record does not reveal Mr. Bennett's attorney exercised his peremptory challenges in a discriminatory manner. Mr. Bennett's conviction must therefore be reversed and remanded for a new trial.

a. Mr. Bennett offered valid racially neutral explanations for his peremptory challenges, and the trial court erred in finding a discriminatory intent. When a party challenges the other party's use of peremptory challenges on the grounds they are racially discriminatory, the courts utilize a three-part test. Georgia v. McCollom, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 95-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The party challenging the peremptory challenges must first make out a prima facie case of racial

discrimination based upon the circumstances of the case. The responding party is then asked to articulate the reasons for the challenges. If the court determines the reasons provided are racially neutral, the court then decides if the challenging party has proved purposeful racial discrimination.[1] Id.; State v. Vreen, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001).

In this case, the State alleged that Mr. Bennett's attorney's use of peremptory challenges to excuse Hispanic jurors was racially discriminatory. 1RP 219-20. Before the court could determine if the State had established a prima facie case of purposeful discrimination, Mr. Bennett's attorney offered race-neutral reasons for the challenges. 1RP 220-22. In this situation, this Court simply addresses the court's conclusion that Mr. Bennett's exercise of his peremptory challenges was racially discriminatory. 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 "accepted the reasons offered" for Mr. Bennett's peremptory challenges to Jurors 10 and 31, but found purposeful discrimination as to Jurors 4 and 21. 2RP 225. The court gave no explanation as to why it found purposeful discrimination, and the

[1] State courts are free to formulate other procedures. Batson, 476 U.S. at 99; State v. Hicks, 163 Wn.2d 477, 181 P.3d 831, cert. denied, 555U.S. 919 (2008).

prosecutor does not offer one here. Id.; Response Brief at 5 (hereafter BOR). The prosecutor argues that the Evans factors support the court's determination, but Evans addresses only the first step in the Batson analysis – whether there was a prima facie case of discrimination. State v. Evans, 100 Wn. App. 757, 768-72, 998 P.2d 373 (2000). The issue before this Court, however, is the third step in the Batson analysis - whether the State proved the challenges constituted "purposeful discrimination." McCollom, 505 U.S. at 59; Batson, 476 U.S. at 98.

In reviewing the third step, the trial court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the persuasiveness of the party's explanation for his challenges. Batson, 476 U.S. 94 (internal quotation marks omitted); Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). The court must then evaluate the record and consider the explanations "within the context of the trial as a whole." Kesser v. Cambra, 465 F.3d 351, 359 (9th Cir. 2006). "[A]ll circumstances that bear upon the issue of racial animosity must be consulted." Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

The record as a whole includes the party's explanations for the challenges and the characteristics of people he did not challenge. Kesser, 465 F.3d. at 360. In Snyder, a prosecutor explained he had exercised a peremptory challenge against an African-American juror because the juror appeared nervous was concerned about fulfilling his student-teaching requirements for his college degree. Snyder, 552 U.S. at 478. There was no record that the trial court agreed with the prosecutor's comments about the juror's nervousness or that the prosecutor would have challenged the juror on that basis alone. Id. at 483. Moreover, the court's law clerk had confirmed with the college dean that jury service would not interfere with the juror's educational requirements, and the prosecutor had accepted white jurors with similar scheduling issues. Id. at 481-84. A review of the entire record thus proved the prosecutor's explanation was pretextual, giving rise to the inference of discriminatory intent. Id. at 484-85. Similarly, in Kesser, the Ninth Circuit reviewed the voire dire transcripts and jury questionnaires before concluding that the record refuted the prosecutor's stated grounds for challenging a Native American woman, "compelling the conclusion that his actual and only reason for striking [the juror] was her race. Kesser, 465 F.3d at 360.

The trial court did not discuss Mr. Bennett's reasons for his peremptory challenges or explain why the reasons were racially biased or pretextual. 2RP 225. The State does not refer to any part of the record to support the trial court's conclusion, except to assert without citation to the record that the defendant's four challenges would have removed all of the apparent Hispanic members of the jury pool. BOR at 5; compare CP 126-28 (listing venire, approximately 20% appear to have Hispanic surnames); CP 120 (alternate juror has Hispanic surname). The review of the record provided in the Brief of Appellant demonstrates that the State did not meet its burden of proving purposeful discrimination. Brief of Appellant at 12-21 (hereafter BOA). The trial court's decision must be reversed.

b. Controlling Washington authority requires automatic reversal of Mr. Bennett's conviction. In Vreen, the Washington Supreme Court held that that the "erroneous denial of a litigant's preemptory challenge cannot be harmless when the objectionable juror actually deliberates."[2] Vreen, 143 Wn.2d at 932. The State argues this Court need not follow Vreen because it was decided before Rivera v. Illinois, 556 U.S. 148,

[2] The Vreen Court affirmed this Court's opinion in the same case as well as Division One's use of automatic reversal in Evans. Vreen, 99 Wn.2d at 931-2; see State v. Vreen, 99 Wn. App. 662, 667-71, 994 P.2d 905 (2000); Evans, 100 Wn. App. at 774.

158, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (applying harmless error to Batson violation because preemptory challenges are a matter of state law, not violation of federal right to due process). BOR at 6-7. Rivera, however, left each state free to determine whether the erroneous denial of a defendant's preemptory challenges requires automatic reversal. Rivera, 556 U.S. at 161-62.

Vreen is the controlling authority on the standard of review to be applied in Washington. This Court is thus bound to follow Vreen. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.2d 423 (2006); Matia Contractors, Inc. v. City of Bellingham, 144 Wn. App. 445, 452-53, 183 P.3d 1082 (2008).

Even if this Court could overrule a controlling Washington Supreme Court case, the State provides no reason to do so. The Washington Supreme Court overrules its own controlling authority only upon a clear showing that the rule is both incorrect and hurtful. State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011). The State makes no showing that the Vreen rule meets this exacting standard.

The prosecutor argues that Vreen is based in part upon a Ninth Circuit case. Annigoni, which was "undercut" by Rivera. BOR at 6-7 (citing United States v. Lindsey, 634 F.3d 541 (9th Cir.), cert. denied

131 S. Ct. 2475 (2011) and United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996)). In Lindsey, the Ninth Circuit declined to follow Annigoni, because as a federal appellate court it was required to apply the Rivera reasoning.[3] See Lindsey, 634 F.3d at 550 ("We are not a separate sovereign that may freely prescribe remedies to our own laws absent a federal constitutional violation . . . we are an intermediate court within the federal system and, as such, we must take our cue form the Supreme Court."). This court, however, must follow Vreen, which is supported by other Washington cases presuming prejudice and requiring automatic reversal when there is a "material departure" from the rules or statutes governing jury selection. City of Bothell v. Barnhart, 172 Wn.2d 223, 257 P.3d 648 (2011); State v. Tingdale, 117 Wn. 595, 817 P.2d 850 (1991).

2. **Mr. Bennett's conviction must be reversed because the trial court refused to instruct the jury on self-defense.**

Mr. Bennett testified that he assaulted Mr. Cantu to stop Mr. Cantu from raping him, and he defended on the ground that he acted in self-defense. The absence of self-defense is an essential element of

[3] In Lindsey the district court mistakenly gave the defense one fewer preemptory challenge than he was entitled to under the federal rules of criminal procedure. The case does not address a Batson challenge. Lindsey, 634 F.3d at 545-46.

felony murder based upon assault that the State must prove beyond a reasonable doubt. The court's refused to instruct the jury on self-defense requires reversal of Mr. Bennett's conviction.

Acting in self-defense negates the necessary mental element of the crimes of murder and assault. State v. Acosta, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984) (second degree assault); State v. McCullum, 98 Wn.2d 484, 491-97, 656 P.2d 1064 (1983) (first degree murder). The State must therefore prove the absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16; McCullum, 98 Wn.2d at 493-94. The trial court is thus required to instruct the jury on self-defense if there is some evidence from any source to support the instruction. State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997); McCullum, 98 Wn.2d at 488; State v. George, 161 Wn. App. 86, 100, 249 P.3d 202, rev. denied, 172 Wn.2d 1007 (2011).

The State argues the trial court's decision not to instruct the jury on self-defense was justified because the defense theory was "completely unsupported" by the evidence." BOR at 9 (quoting George, 161 Wn. App. at 100). Because the defendant need only produce "some evidence" to support a self-defense instruction, the trial court must look at the evidence in the light most favorable to the

defendant and cannot substitute its judgment for that of the jury in determining whether to instruct on self-defense. George, 161 Wn. App. at 95-96. Mr. Bennett testified that he assaulted Mr. Cantu because he was raping him and would not stop when Mr. Bennett told him to. 4RP 708, 710, 720. He thus produced the evidence necessary to warrant a self-defense instruction. Walden, 131 Wn.2d at 473-74; RCW 9A.16.020(2).

Mr. Bennett proposed a number of self-defense instructions including instructions modeled after WPIC 15.01, 16.02, and 16.03, and 17.02. CP 25-26, 54, 56-57; see Washington Supreme Court Committee on Jury Instructions, 11 Wash. Prac., Washington Pattern Jury Instructions Criminal (2008) (WPIC). Mr. Bennett's argument on appeal focused on the court's failure to give WPIC 16.02 or 16.03, both justifiable homicide instructions based upon RCW 9A.16.050, although he also addressed the court's failure to give an instruction based upon WPIC 17.02. BOA at 26-37; WPIC 16.02, 16.03.

In response, the State refers this Court to State v. Ferguson, 113 Wn. App. 855, 129 P.3d 856, rev. denied, 158 Wn.2d 1016 (2006). BOR at 9-10. The Ferguson Court held that WPIC 17.02, the self-defense instruction used for charges other than homicide, can never be

given in a felony murder prosecution based upon assault, and a later case limited its holding to felony murder based upon assault with a deadly weapon. State v. McCreven, 170 Wn. App. 444, 467, 284 P.3d 793 (2012), rev. denied, 176 Wn.2d 1015 (2013); Ferguson, 113 Wn. App. at 862. In his opening brief, Mr. Bennett argued the holding and reasoning of these cases should not be adopted by this Court in addressing WPIC 17.02. BOA at 35-36. While Mr. Bennett adheres to this argument, he also argues these cases support his argument that the trial court should have given his proposed justifiable homicide instructions based upon WPIC 16.02 and 16.03.

Both Ferguson and McCreven uphold the giving of WPIC 16.02 in prosecutions for felony murder based upon assault with a deadly weapon. In McCreven, the trial court gave a number of self-defense instructions, including one patterned after WPIC 16.02. The Court of Appeals held the combined instructions impermissibly lowered the State's burden of proof in the prosecution for felony murder based upon means of second degree assault other than use of a deadly weapon, but were proper for felony murder based upon second degree assault with a deadly weapon. McCreven, 170 Wn. App. at 467. The Ferguson Court similarly held the trial court did not err in giving WPIC 16.02 instead

of WPIC 17.02 in prosecution for felony murder based upon first degree assault with knife. Ferguson, 113 Wn. App. at 862. These cases thus support Mr. Bennett's argument that the trial court erred by not giving his proposed justifiable homicide instructions.

Mr. Bennett testified that Mr. Cantu was raping him. He was therefore entitled to use self-defense in protecting himself against this serious offense, which can cause emotional if not physical damage. Mr. Bennett's conviction must be reversed because the trial court incorrectly refused to instruct the jury with any of Mr. Bennett's proposed self-defense instructions.

B. CONCLUSION

The record does not support the trial court's conclusion that two of defense counsel's peremptory jury challenges were exercised in a discriminatory manner, and the trial court incorrectly refused to instruct the jury on justifiable homicide. For the reasons stated above and in the Brief of Appellant, Nathen Bennett asks this Court to reverse his conviction for second degree felony and remand the case for a new trial

Respectfully submitted this 25th day of June 2013.

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DIVISION THREE

STATE OF WASHINGTON, Respondent, v. NATHEN BENNETT, Appellant.	)	NO. 30815-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ANN JOYCE, STATE THAT ON THE 25TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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