72356-1

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Court of Appeals
Division I
State of Washington

72356-1

No. 72356-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TEREZ LEJUAN BARDWELL,

Appellant.

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. <u>ARGUMENT</u>

1. The State's removal of African American Juror 25 was unconstitutional.

As explained in the opening brief, a new trial is required because the State unconstitutionally excluded African American Juror number 25. The prosecutor claimed he removed the juror because her uncle was accused of a crime, her "body language and expression" demonstrated concern, and she was allegedly sleeping. But (a) African Americans are over-represented in the criminal justice system; (b) the prosecutor asked Juror 25 *no* questions about her uncle's situation and its effect on her; (c) the State did not remove a white juror with a family member accused of a crime; and (d) neither the judge nor defense counsel saw Juror 25 sleeping – and the prosecutor did not alert the court to this supposed issue until forced to produce a reason for excluding Juror 25. Thus, a basic *Batson* analysis demonstrates that the exclusion was impermissibly race-based, requiring reversal. *See* Br. of Appellant at 9-23; *Snyder v. Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 1317, 162 L.Ed.2d 196 (2005); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

a. The fact that the State "allowed" other African American jurors to serve is a red herring; the Constitution forbids discrimination against even a single prospective juror.

Instead of performing the required analysis under *Snyder* and *Miller-El*, the State repeatedly claims that there cannot possibly be an Equal Protection violation because the prosecutors were gracious enough to "allow" other black jurors to serve. Br. of Respondent at 4, 14, 15. The State doth protest too much. Indeed, its argument calls to mind the risible "Some of my best friends are black" defense to discrimination claims. *See, e.g.,* Noliwe M. Rooks, *Trayvon Martin: The Problem with the 'Some of My Best Friends Are Black' Defense*, Time, April 9, 2012.[1]

Not only is the argument offensive, it is legally erroneous. The Supreme Court has made clear that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

> A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions. For evidentiary

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[1] Available at: http://ideas.time.com/2012/04/09/theproblem-with-the-my-best-friend-is-black-defense/.

The article notes, inter alia, that "the scholarship on racial perception clearly proves that even the most diverse group of friends doesn't make one immune to race-based prejudice, whether it is conscious or unconscious." *Id.*

> requirements to dictate that several must suffer discrimination before one could object would be inconsistent with the promise of equal protection to all.

Batson, 476 U.S. at 95-96 (internal quotations omitted). The State simply ignores the controlling U.S. Supreme Court caselaw on this question.

The State's argument here is also strikingly similar to the claim rejected in *Sanchez v. Roden*, 753 F.3d 279 (1st Cir. 2014) (cited in Br. of Appellant at 23 n.10). There, the First Circuit held that the defendant made a prima facie showing of race discrimination in the prosecutor's dismissal of African American Juror number 261. *Id.* at 299-300. The court further held that the Massachusetts appellate court ("MAC") unreasonably applied *Batson* in concluding to the contrary. *Id.* at 299. Like the prosecution here, the state court in *Sanchez* "dismissed the racial challenge out-of-hand by its facile and misguided resort to the undisputed fact that the prosecutor had allowed some African Americans to be seated on the jury." *Id.*

> [B]y focusing exclusively on the presence of other African Americans on the jury at the time of Sanchez's *Batson* challenge, the MAC ignored Juror No. 261's right not to be discriminated against on account of his race. The MAC simply missed the core concern addressed in the Supreme Court's jurisprudence.

Id.; *see also Batson*, 476 U.S. at 87 (individual juror has Fourteenth Amendment right not to be excluded based on race).

The court continued, "Even more troubling, the MAC's application of *Batson* sent the unmistakable message that a prosecutor can get away with discriminating against *some* African Americans …," so long as he does not discriminate against all of them. *Sanchez*, 753 F.3d at 299-300. The court denounced this attitude, and emphasized that a *Batson* claim for a particular juror may not be rejected simply because the prosecutor has not discriminated against other minority panelists. Instead, at both steps one and three of the analysis, all of the circumstances that bear upon the question must be consulted. *Id.*; *Snyder*, 552 U.S. at 478; *see also People v. Collins*, 187 P.3d 1178, 1180-84 (Colo. Ct. App. 2008) (reversing for Equal Protection violation where prosecutor removed one of two black jurors).

b. The State failed to satisfy its burden of production at step two of the analysis.

As noted in the opening brief, the State did not meet its burden of production at step two of the analysis. Br. of Appellant at 10-16. The prosecutor's claim that Juror 25's "body language and expression" demonstrated concern was insufficient, because the explanation must be "clear and reasonably specific" and "related to the particular case to be tried." *Batson,* 476 U.S. at 98 n.20; *see also Ali v. Hickman,* 584 F.3d 1174, 1195 (9th Cir. 2009). This requirement must be enforced to prevent

the use of demeanor-based claims as a mask for discrimination. *See* Br. of Appellant at 14-15 (citing cases reversing for insufficient demeanor-based claims); *see also* Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* (August 2010) at 18 (describing demeanor-based justifications as "thinly-veiled excuses for removing qualified African Americans from juries" and noting their use shows "that many prosecutors have failed to take seriously the Constitution's requirement that every citizen has an equal right to sit on a jury."). The State understandably does not defend its vague demeanor-based justification on appeal. Br. of Respondent at 12-18.

The justification that Juror 25's uncle was accused of a crime is not race-neutral, because African Americans are charged and convicted at a significantly higher rate than Caucasians – and this difference cannot be explained by a difference in crime commission rates. Br. of Appellant at 11-14 (citing studies and cases). Thus, the use of this justification to exclude African Americans from jury service is doubly discriminatory.

The response brief wrongly claims that it was defense counsel who asked the judge to question jurors about whether they had family members accused of a crime. Br. of Respondent at 6. It was the prosecutor, Patrick Hinds, who requested the inquiry, and he was presumably aware that African Americans are far more likely to answer the question

affirmatively. RP (Voir Dire) 67-68; *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* at 10, 11, 21 (March, 2011).[2] The justification was not race-neutral, and the State failed to meet its burden at step two.

c. <u>The State's justifications for exclusion do not hold up at step three of the analysis</u>.

Even assuming the State satisfied its burden at step two, its reasons for removing Juror 25 do not hold up at step three of the analysis. The State removed the only available black juror with a family member accused of a crime – while retaining a white juror with an accused family member. Br. of Appellant at 17; RP (Voir Dire) 107. This is strong evidence of discriminatory intent. *See Sanchez*, 753 F.3d at 306 (the use of a constitutionally neutral characteristic in a racially discriminatory manner constitutes race-based discrimination); *see also Snyder*, 552 U.S. at 483-84 (performing comparative juror analysis)*; Miller-El v. Dretke*, 545 U.S. at 241-45 (same); *Ali,* 584 F.3d at 1184 ("a comparative juror analysis reveals that the prosecutor did not 'consistently' strike jurors who had experience with the criminal justice system.").[3]

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[2] Defense counsel said only that he preferred to have the judge pose these initial questions rather than the attorneys. RP (Voir Dire) 68.

[3] The State intimates that defense counsel was required to present a comparative juror analysis in the trial court to preserve the issue for

The white juror in question, Number 5, not only had a family member who was accused of a crime, but also espoused very defense-friendly views during voir dire. Juror 5 was appalled by the prospective jurors who did not understand the presumption of innocence, and said, "if I commit a crime, remind me not to do it in King County because there's too many people that I wouldn't want on my jury because they couldn't be impartial." RP (voir dire) 138. The fact that the State did not excuse Juror 5 but did excuse Juror 25 demonstrates that the proffered justification was pretext for race discrimination. *See Snyder*, 552 U.S. at 483-84*; Miller-El*, 545 U.S. at 241-45. The State's response brief does not address this problem.

The response brief also ignores another critical component of the analysis: the prosecutors' failure to question Juror 25 about the alleged concern. Juror 25 told the court that her uncle's experience with the justice system would not affect her at all. RP (Voir Dire) 106.[4] If the

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appeal. Br. of Respondent at 7. This is incorrect. Defense counsel preserves the issue by lodging a *Batson* objection. Then, so long as the record of voir dire is before the appellate court, the reviewing court evaluates all relevant circumstances – including questions asked of the jurors and differential treatment of jurors. *Miller-El,* 545 U.S. at 241 n.2; *Ali*, 584 F.3d at 1179 & n.3; *Reed v. Quarterman*, 555 F.3d 364, 370-74 (5th Cir. 2009).

[4] Furthermore, Juror 25 was not one of the jurors who said they had "strong feelings" one way or the other about law enforcement officers or the criminal justice system generally. RP (Voir Dire) 41, 46.

prosecutors were skeptical of this claim, they would have asked follow-up questions. Instead, they asked *no* questions about this supposed concern, demonstrating that it was pretext for impermissible discrimination. Mr. Bardwell pointed this out in the trial court, and the prosecutor wrongly claimed that the failure to question was irrelevant to the analysis. RP (Voir Dire) 181-82.

Caselaw is clear that the lack of follow-up questions regarding an alleged concern is significant evidence that the stated justification is pretext for race discrimination. *Miller-El*, 545 U.S. at 246 ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"). For example, in *Miller-El,* the prosecutor claimed that a reason for excusing a black juror was that the juror's brother-in-law had been convicted of a crime. *Miller-El*, 545 U.S. at 250 n.8. But the prosecutor "never questioned [the juror] about his errant relative at all…." *Id.* The Supreme Court concluded, "the failure to ask undermines the persuasiveness of the claimed concern." *Id.* Unlike the State here, other courts have properly applied *Miller El. See, e.g., Ali,* 584 F.3d at 1188 (prosecutor's alleged concern about juror's "objectivity" belied by "his failure to clear up any lingering doubts about [the juror's] objectivity by asking follow-up questions"); *Reed*, 555 F.3d at

377 (State claimed to have struck juror because she was a health care professional, but "[t]he State's failure to question her about her job suggests that this asserted reason for striking [the juror] was pretextual").

Finally, it is not surprising that the State fails to defend the prosecutor's allegation that Juror 25 was sleeping. The allegation was contrary to the record, which showed that (a) the judge did not see the juror sleeping; (b) defense counsel did not see the juror sleeping; (c) the juror's head did not sag; (d) the juror did not snore; and (e) during voir dire, the prosecutor never alerted the court that a juror was sleeping – even though such conduct would have constituted a basis for removing the juror for unfitness. *See* Br. of Appellant at 19-20; RP (Voir Dire) 183-84; RCW 2.36.110 (Judge must excuse unfit person); *State v. Jorden*, 103 Wn. App. 221, 230, 11 P.3d 866, 871 (2000) (State alerted court that juror was sleeping, then judge and bailiff corroborated the observations and court properly removed juror under RCW 2.36.110). This, too, is significant evidence of improper race-based exclusion. *See Snyder*, 552 U.S. at 485 (noting the "pretextual significance" of a "stated reason [that] does not hold up"); *Miller-El*, 545 U.S. at 241 (explanation unworthy of credence is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive").

In addition to *Snyder, Miller-El, Ali,* and *Reed,* the Colorado case of *People v. Collins* is instructive. There, the prosecution excluded an African American juror, claiming she "didn't respond to anything," crossed her arms, worked as a nurse, did not bring up that her husband was a defendant in a domestic violence case during voir dire even though she so stated on her questionnaire, and "she slept through part of defense counsel's voir dire." *Collins*, 187 P.3d at 1180. As in Mr. Bardwell's case, the trial judge in *Collins* did not see the juror sleeping. *Id.* at 1181. The court found there was not a "clear and reasonable, specific explanation" for excluding the juror, and provisionally granted the *Batson* challenge. *Id.* But as in this case, the State protested that it did not plan to remove *all* African Americans, and, after the prosecutor accepted the only other African American on the panel, the trial court reconsidered the issue and rejected the defendant's *Batson* challenge. *Id.*

The Court of Appeals reversed. *Collins*, 187 P.3d at 1180. The court pointed out that "[t]he striking of a single potential juror for a discriminatory reason violates the Equal Protection Clause even where jurors of the same race as the stricken juror are seated." *Id.* at 1184. Thus, the court was "not persuaded by the People's argument that the prosecutor's reason for excusing Ms. S. was race-neutral because he later accepted another African-American, Mr. B., on the jury." *Id.* at 1183.

The court performed the required analysis at step three of the *Batson* framework, and found that the prosecutor's proffered reasons for striking the juror did not hold up. *Collins*, 187 P.3d at 1182 ("At step three," the court "must review all the evidence to decide … whether counsel's race-neutral explanation for a peremptory challenge should be believed."). Just as the prosecutor here did not ask Juror 25 any questions about her uncle's case, in *Collins* "the prosecutor did not ask Ms. S. any questions concerning the details of her husband's domestic violence case, a fact which suggests pretext as it 'undermines the persuasiveness of the claimed concern.'" *Id.* at 1183 (quoting *Miller-El*, 545 U.S. at 246). And just as the prosecutor here retained a white juror whose relative was accused of a crime (after claiming this reason for excluding a black juror), the prosecutor in *Collins* retained white health-care workers after claiming this profession was one reason for excluding the black juror. *Collins*, 187 P.3d at 1183. After performing the careful analysis mandated by *Snyder* and *Miller-El*, the Court of Appeals reversed for improper exclusion of African American juror Ms. S., and remanded for a new trial. *Id.* at 1184. This Court should do the same here.

In sum, the State's asserted justifications for removing African American juror 25 were inherently biased, vague, unsupported by the record, and belied by the prosecutors' failure to question the juror and

failure to strike a similar white juror. The response brief neglects to perform the required analysis under *Snyder* and *Miller-El,* ignores the abundant evidence demonstrating an Equal Protection violation, and instead urges this Court to defy governing caselaw and to impose a quota-based rule that is both offensive and constitutionally incorrect. The State's dismissive attitude only underscores the Equal Protection problem. A new trial is required.

d. The State does not address Mr. Bardwell's proposed alternative rule, even though the Supreme Court has made clear that a more-protective rule should be adopted.

Although the State's exclusion of Juror 25 requires reversal under *Batson*, this Court should take the opportunity to adopt a standard that better safeguards the right to be free from race discrimination in jury selection. In the opening brief, Mr. Bardwell proposed that the Court adopt a rule suggested in *Saintcalle*: the removal of a juror should be disallowed if there is a reasonable probability that race was a factor, conscious or unconscious, in the exercise of the peremptory challenge. Br. of Appellant at 25-26; *State v. Saintcalle*, 178 Wn.2d 34, 54, 309 P.3d 326 (2013).

Just as the response brief did not include the analysis mandated by U.S. Supreme Court caselaw, it also did not address Mr. Bardwell's

proposed Washington standard. Instead, the State dropped a footnote urging the Court not to reach the issue. Br. of Respondent at 18 n.11. In the footnote, the State first claims that "it is unclear what new rule of law the defendant seeks" – even though Mr. Bardwell *directly quoted* the rule proposed by the lead opinion in *Saintcalle.* Second, the State complains that a new rule is not "constitutionally mandated," but this is beside the point. Our Supreme Court recognized that current procedures are not "robust enough to effectively combat race discrimination in the selection of juries" and that "we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *Saintcalle*, 178 Wn.2d at 35-36, 49. Our state appellate courts not only have the responsibility to rise to the challenge and adopt a new standard, but have the authority to do so under both the federal and state constitutions. *Saintcalle* at 50-51; U.S. Const. amend. XIV; Const. art. I, § 21.

The State then claims that any new standard should be created by court rule, not appellate decision, and that even if this Court adopts a new standard, it would not apply "retroactively" to Mr. Bardwell. Br. of Respondent at 18 n.11. Here, too, the State is wrong. *See State v. E.J.J.*, 183 Wn.2d 497, ___ P.3d ___ , *6 -*8 (2015) (Madsen, C.J., concurring). In *E.J.J.*, the majority reversed a young man's conviction for obstruction of justice because the conviction was improperly based on speech

protected by the First Amendment. *Id.* at *1 - *6 (majority). The concurring opinion disagreed with the majority's First Amendment analysis, but would have adopted a new standard to address the problem of racially disparate enforcement of the obstruction statute. The concurring justices also would have applied the new standard *in the existing case*:

> I believe this court must take this opportunity to add a common law requirement to the obstructing statute to ensure its constitutional application as follows: where the officer's conduct substantially contributed to the escalation of the circumstances that resulted in the arrest for obstruction, the state has failed to meet its burden to show that the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his or her official powers or duties. Under this common law requirement the State would be required to prove that the defendant's obstructing conduct was not substantially produced by the officer's escalating conduct. *This additional requirement is necessary because our system of justice cannot condone disparate treatment of the people we serve, based on race*, through the use of obstruction statutes. *Applying this requirement here, E.J.J.'s conviction must be reversed*.

E.J.J., at *6 (Madsen, C.J., concurring) (emphases added). Similarly here, a more robust *Batson* standard is necessary because our system of justice cannot condone disparate treatment of the people we serve, based on race, through the use of peremptory challenges. Applying the new standard here, Mr. Bardwell's convictions must be reversed.

2. Under the recent Supreme Court decision in *State v. Love*, the peremptory-challenge procedure used here did not violate the right to a public trial.

In his opening brief, Mr. Bardwell argued that the use of a notepad to conduct peremptory challenges violated the right to a public trial under article I, sections 10 and 22 of the Washington Constitution. Br. of Appellant at 28-31. After the filing of the opening and response briefs, the Supreme Court decided *State v. Love*, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 4366419 (filed 7/16/15) . There, as here, the parties exercised peremptory challenges silently in writing. *Love* at ¶¶ 1, 4. As here, the courtroom remained open during this process. *Id.* And, as in this case, the written list of struck jurors was filed in the public court record. *Id.*

Contrary to Division Two's opinion in *Marks,*[5] the Court held that the constitutional right to a public trial "attaches to jury selection, including for cause and peremptory challenges." *Id.* at ¶ 3. But the Court held that the procedure described above does not constitute a courtroom closure because:

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The … struck juror sheet [is] publically available. The public was present for and could scrutinize the selection of [the defendant's] jury from start to finish, affording him the

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[5] *State v. Marks*, 184 Wn. App. 782, 787, 339 P.3d 196 (2014).

> safeguards of the public trial right missing in cases where we found closures of jury selection.

Love at ¶ 4. Thus, under the Supreme Court's decision in *Love*, the peremptory-challenge procedure that occurred here did not violate the constitutional right to a public trial. *See id.*

3. The State properly concedes that it presented insufficient evidence to convict Mr. Bardwell of Possession of Stolen Property in the Second Degree.

This Court should accept the State's concession that it failed to prove the value element of second-degree possession of stolen property. *See* Br. of Respondent at 25-31; Br. of Appellant at 31-38. If this Court reverses all counts and remands for a new trial based on the improper removal of juror 25, the State may retry Mr. Bardwell for possession of stolen property in the third degree, but not possession of stolen property in the second degree. If this Court does not grant a new trial, the appropriate remedy for the error on count four is entry of a conviction on the lesser offense of possession of stolen property in the third degree, and resentencing. *See* Br. of Appellant at 36-38; Br. of Respondent at 30-31.

B. CONCLUSION

Mr. Bardwell asks this Court to reverse his convictions and remand for a new trial because the removal of juror 25 violated his right to equal protection. On count four, Mr. Bardwell may be retried only for third-degree possession of stolen property, not second-degree possession of stolen property.

DATED this 17th day of September, 2015.

Respectfully submitted,

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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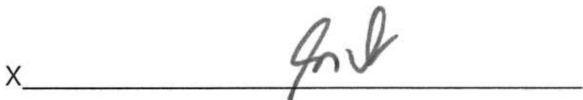
[X] TEREZ BARDWELL 357335 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2015.



X________________________________

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710