Supreme Court No. 92908-8

(Court of Appeals No. 72356-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TEREZ LEJUAN BARDWELL,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Despite the promise of Equal Protection enshrined in the Fourteenth Amendment, "a growing body of evidence shows that racial discrimination remains rampant in jury selection." *State v. Saintcalle*, 178 Wn. 2d 34, 35, 309 P.3d 326 (2013). The present case demonstrates that this epidemic of exclusion continues.

The prosecutor claimed he removed African American juror 25 because her uncle was accused of a crime, her body language showed she was concerned about that fact, 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.

The Court of Appeals wrongly rejected Mr. Bardwell's Fourteenth Amendment argument, and it ignored Mr. Bardwell's proposal to adopt a more-protective standard under Washington law. The court apparently believed that this Court, having issued a call to action in *Saintcalle*, was the only Court that could address the response. This Court should accept its own invitation by granting review in this case.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Terez Bardwell, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Bardwell*, No. 72356-1-I (Slip Op. filed February 8, 2016). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Equal Protection Clause of the Fourteenth Amendment prohibits removing a juror because of race-based assumptions about how the juror will vote. The prosecutor claimed he removed African American juror 25 because her uncle was accused of a crime, her "body language and expression" demonstrated she was concerned about her uncle's situation even though she said it would not affect her, 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. Did the exclusion of Juror 25 violate the Equal Protection Clause of the Fourteenth Amendment? RAP 13.4(b)(3), (4).

2. In light of the pervasive problem of excluding minorities from jury service, should this Court adopt a standard in Washington that better protects the rights of all qualified citizens to serve on juries? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

1. The trial court denied Mr. Bardwell's *Batson* challenge despite the State's failure to question the juror about its claimed concern.

The State charged Terez Bardwell with burglary, attempting to elude a police vehicle, unlawful possession of a firearm, and possession of stolen property. CP 21-23. Prior to voir dire, the prosecutor asked the court to question jurors about whether any of them had family members who had been involved in the criminal justice system. RP (Voir Dire) 67-68. The court obliged, and the following exchange occurred:

> COURT: And then is there anyone here who has had the experience that you or someone close to you, a family member or close friend, has been accused of a crime? Juror No. 25? Yes ma'am?
>
> JUROR 25: I have an uncle that's in jail.
>
> COURT: And is he awaiting trial or was he convicted of something?
>
> JUROR 25: Convicted.
>
> COURT: What was he convicted of?
>
> JUROR 25: Assault.
>
> COURT: Okay, and was that recent?
>
> JUROR 25: Six years.
>
> COURT: Okay. Anything about that experience that would influence your ability to be a fair or impartial juror in this case?

JUROR 25: No.

RP (Voir Dire) 106.

Three other jurors answered the question affirmatively, including white Juror No. 5. RP (Voir Dire) 106-07. Juror 5 said that a family member had been accused of "breaking a domestic violence order during a divorce" but that "[n]othing ever came of it." RP (Voir Dire) 107.

The State then engaged in its first round of questioning, but did not ask Juror 25 any follow-up questions regarding her uncle's situation or challenge her statement that her relative's experience would not affect her. RP (Voir Dire) 121-36. The only time the prosecutor asked Juror 25 anything was during the second round of questioning, when the State asked, "Does anybody think that reasonable doubt is a good standard or we should have one perhaps that's lesser or on that's greater?" RP (Voir Dire) 163. Juror 25 responded, "I don't know how you really get it greater, you know, without somebody necessarily they've done it." RP (Voir Dire) 164. She said, "It's probably better – the best that we have right now." RP (Voir Dire) 164.

The State nevertheless exercised a peremptory strike against Juror No. 25. RP (Voir Dire) 179. Mr. Bardwell's counsel objected pursuant to *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

RP (Voir Dire) 179. He pointed out the lack of a legitimate basis for the strike, stating, "I saw no reason that she gave any answers to any questions to make her less desirable to the prosecuting attorney." RP (Voir Dire) 180. He noted the absence of "follow-up to the initial question of her relative being in prison, if that impacted her view of the proceedings here," and argued, "[s]o I don't think there's been a showing from the paucity of questions to the prospective juror that the challenge is for anything other than her race." RP (Voir Dire) 181-82.

In response, the prosecutor advanced two ostensible reasons for the strike. First, he averred that he also intended to strike another African-American juror, No. 44. RP (Voir Dire) 182-83. He said that he intended to remove the jurors because they both responded affirmatively to the question of whether they had relatives in prison. RP (Voir Dire) 183. He also claimed that "both of them, when they answered that question, based on their body language and expression, seemed to have a lot of concern about that." RP (Voir Dire) 183.

Then, although he had not raised this concern to the court or counsel at any time during the two-day voir dire process, he asserted:

> The other reason that the State is exercising the challenge is Juror No. 25, as the court can see from the layout of the court, sits more or less directly in my line of sight. There's been at least two occasions where I believe she's been sleeping, and I don't want her on the jury if she's been

> falling asleep in court. That's the other reason for the peremptory challenge.

RP (Voir Dire) 183.

Mr. Bardwell's defense counsel noted he did not see Juror 25 sleeping. RP 184. The judge also never saw Juror 25 sleeping and said, "I have to admit, I have to rely on [the prosecutor's] representations as to Juror No. 25 falling asleep." RP (Voir Dire) 183. The court noted that because of the distance between the bench and the jurors, "I'm not sure I would have noticed it unless, you know, her head sagged or she started snoring or something like that[.]" RP (Voir Dire) 184. The court stated that it had "no reason to doubt" the prosecutor's representation. RP (Voir Dire) 184. The court further noted that "his statement about ... her body language and her level of concern about a relative who's in prison, that is a legitimate concern the State would have ... regardless of Juror No. 25's ethnicity or race or anything like that." RP (Voir Dire) 184. The court accordingly overruled Mr. Bardwell's Batson objection and permitted the peremptory strike. RP (Voir Dire) 184.

2. The Court of Appeals affirmed notwithstanding the State's failure to question the juror about the claimed concern, its failure to remove a similarly situated white juror, and its use of tactics commonly employed to remove jurors of color.

Mr. Bardwell was convicted as charged. CP 62-65. On appeal, he argued, inter alia, that the State's removal of African American Juror 25 violated the Equal Protection Clause of the Fourteenth Amendment. The reasons the State gave for the strike were not plausible in light of its failure to ask follow-up questions, its failure to strike a white juror whose relative was accused of a crime, its failure to alert the court that a juror was sleeping, and the lack of corroboration regarding that allegation. Br. of Appellant at 9-23; Reply Br. of Appellant at 4-12 (citing, inter alia, *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 1317, 162 L.Ed.2d 196 (2005); *Ali v. Hickman,* 584 F.3d 1174 (9th Cir. 2009); *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009); *People v. Collins*, 187 P.3d 1178 (Colo. Ct. App. 2008)).

Additionally, Mr. Bardwell pointed out that the reasons the State gave for removal were well-known tactics for striking minority jurors. It is far more likely that minority jurors will have relatives accused of crimes, so removing jurors on that basis is not race-neutral. *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* (March, 2011) at 1, 6-8, 10.

Furthermore, prosecutors tend to provide vague demeanor-based justifications and false allegations of inattention to mask discriminatory reasons for removal. *See* Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* (August 2010) ("EJI Report") at 18-24; Br. of Appellant at 11-15, 19-22.

The State's primary response was that there could not 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. Mr. Bardwell pointed out that this argument was akin to the "some of my best friends are black" defense to discrimination claims and that, in addition to being offensive, it was legally erroneous because "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana,* 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); Reply Br. of Appellant at 2-4.

The Court of Appeals did not adopt the State's facile quota-based claim, but it rejected Mr. Bardwell's Fourteenth Amendment argument. The court did not acknowledge the portion of *Miller-El* on which Mr. Bardwell relied, which held that "the 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." *Miller-El*, 545 U.S. at 246; *see also id.* at

250 n.8; Reply Br. of Appellant at 8; Br. of Appellant at 19. The court did not address *Ali*, *Reed*, or *Collins*. Slip Op. at 8-9. It appeared to recognize that the State failed to remove a similarly situated white juror, but ruled that this failure did not rise to the level of a *Batson* violation even in combination with the failure to question Juror 25. Slip Op. at 8. The court credited the vague, unsubstantiated demeanor-based reasons for removal, and rejected the Equal Protection argument. Slip Op. at 9-11.

3. The Court of Appeals did not address Mr. Bardwell's argument that Washington should adopt a standard that is more protective than *Batson*.

In light of this Court's call to action in *Saintcalle*, Mr. Bardwell proposed a more-protective rule under Washington law. Br. of Appellant at 23-27 (citing *Saintcalle,* 178 Wn.2d at 54); Reply Br. of Appellant at 12-14 (citing *Saintcalle,* 178 Wn.2d at 54; *State v. E.J.J.,*183 Wn. 2d 497, 509-14, 354 P.3d 815 (2015) (Madsen, C.J., concurring)). The Court of Appeals did not address this issue, implying that only this Court could do so. Slip Op. at 4-5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review to answer the question left open in *Saintcalle* regarding Washington's response to the pervasive problem of race discrimination in jury selection.

1. This Court should adopt a more-protective standard in Washington to address the problem of unconscious bias in jury selection.

"Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries." EJI Report at 4. The "main problem" is that "Batson's third step requires a finding of 'purposeful discrimination'", where discrimination is often unconscious. *Saintcalle,* 178 Wn.2d at 53; *cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522, 192 L. Ed. 2d 514 (2015) (recognizing that "unconscious prejudices and disguised animus" result in the unfair exclusion of minorities from certain neighborhoods, and that the Fair Housing Act must be interpreted to address problems caused by such "covert" biases). Thus, "a new, more robust framework" should be adopted for jury selection in order to "eliminate [unconscious] bias altogether or at least move us closer to that goal." *Saintcalle,* 178 Wn.2d at 54; *see also id.* at 51 ("we should

strengthen our *Batson* protections, relying both on the Fourteenth Amendment and our state jury trial right").

In the Court of Appeals, 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; Reply Br. of Appellant at 12-13; *Saintcalle*, 178 Wn.2d at 54. The Court of Appeals did not address the question, but this Court should grant review in order to do so. In a supplemental brief, Mr. Bardwell would further flesh out the proposed standard, including suggesting detailed but clear guidelines for applying the new rule in practice. Amici have already committed to assisting in this effort.

The effort is important for many reasons. "[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. at 237-38. For excluded jurors, "[t]he sting of mistreatment can linger for years." EJI Report at 28. The harm from discriminatory jury selection touches "the entire community" and "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

"We have an obligation to promote confidence in the courts and our justice system." *E.J.J.*, 183 Wn.2d at 513 (Madsen, C.J., concurring). Thus, "we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *Saintcalle*, 178 Wn.2d at 49. This Court should grant review in order to meet these obligations. RAP 13.4(b)(3), (4).

2. This Court should clarify that regardless of whether a new standard is adopted, Washington courts may not opt out of the Equal Protection Clause.

The response to *Saintcalle* has been mixed. Some courts have read the opinion as requiring or at least suggesting more careful consideration of *Batson* objections. But others have read it as essentially foreclosing relief under the Fourteenth Amendment. Although the Court of Appeals here cited the *Batson* framework, it failed to apply it in the manner mandated by *Miller-El*, *Snyder*, and *Batson* itself. Under those cases, courts are required to review the record carefully and consider "all relevant circumstances" to determine whether the reasons the prosecutor

gave for striking the juror are "implausible." *Snyder,* 552 U.S. at 484-85; *Miller-El,* 545 U.S. at 240, 246; *see also 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."). This Court should clarify that such an analysis is required regardless of a separate state standard.

A careful review of the relevant circumstances here demonstrates that the allegation that Juror 25 was sleeping is implausible. The record 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 is significant evidence of improper race-based exclusion under Equal Protection caselaw. *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").

The Court of Appeals also misunderstood the significance of the prosecutor's failure to question Juror 25 about her uncle's situation, which was the State's primary alleged basis for removing the juror. 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 both black jurors at issue was that each had a relative in prison. *Miller-El*, 545 U.S. at 246, 250 n.8. But the prosecutor "never questioned [one juror] about his errant relative at all...," and only asked the other juror a handful of questions about his relative's situation. *Id.* The Supreme Court concluded, "the failure to ask undermines the persuasiveness of the claimed concern." *Id.* Other courts have properly considered this factor in the analysis. *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"); *Collins*, 187 P.3d at 1183 ("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.'").

Finally, a comparative juror analysis shows that the removal of Juror 25 was unconstitutionally discriminatory. 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. 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 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.").

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. This Court should clarify that under such circumstances, the Fourteenth Amendment prohibits excluding a juror from service. Such clarification is critical to protecting the "dignity of persons and the integrity of the courts." *Powers*, 499 U.S. at 402. RAP 13.4(b)(3), (4).

F. CONCLUSION

Terez Bardwell respectfully requests that this Court grant review.

DATED this 2nd day of March, 2016.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TEREZ LEJUAN BARDWELL, Appellant.	)	No. 72356-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 8, 2016

LEACH, J. — A prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection. But where, as here, the trial court finds the State's stated reason for challenging the juror race neutral, no violation occurs. Because the record supports the trial court's finding, the trial court properly denied Bardwell's request for a new trial.

Bardwell also contends, and the State concedes, that insufficient evidence supports his conviction for second degree possession of stolen property. We accept the State's concession. As agreed by Bardwell, we remand for his conviction of the lesser offense of third degree possession of stolen property.[1]

[1] Bardwell also contended that his right to a public trial was violated but properly concedes in his reply brief that under State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015), petition for cert. filed, No. 16-__ (U.S. Jan. __, 2016), his right to a public trial was not violated when the court accepted written rather than oral peremptory challenges in open court and filed those challenges in the record.

FACTS

Fleeing from the police, Terez Bardwell ran a red light and crashed his car into two other cars. Bardwell ignored police commands to stop and ran from the scene, carrying a red bag. The police found Bardwell hiding nearby. They recovered a red bag near Bardwell's hiding place. The bag contained cash, a purple wallet, and a broken wooden drawer containing some jewelry and mail addressed to a residence located near the collision. Someone had burglarized that residence earlier that same day. Police found additional items on Bardwell's person and in the car. The recovered items belonged to the family who lived at the residence. The police also found a .380 Smith & Wesson handgun on the floor of Bardwell's car.

The State charged Bardwell with first degree unlawful possession of a firearm, residential burglary, attempting to elude a pursuing police vehicle, and second degree possession of stolen property.

During voir dire, the court asked the panel whether any juror had a friend or close relative accused of a crime. Juror 25 responded affirmatively. She said that she had an uncle in jail, convicted for assault six years ago. Juror 25 also replied that this situation would not influence her ability to be a fair and impartial juror.

Bardwell raised a Batson[2] challenge to the State's dismissal of juror 25 with its third peremptory challenge. Outside the presence of the jury, the court directed Bardwell to state his reasons for the Batson challenge. Bardwell answered that the State must justify its decision to exclude juror 25 because both he and juror 25 were African American. Bardwell also noted that the State failed to ask juror 25 any follow-up questions about her relative in prison and how that would affect her view of the case.

In response, the State contended that it was not required to give a reason because it used a peremptory challenge and the reasons given by defense did not make a prima facie showing that race motivated the challenge. Nevertheless, the State set forth its reasons for peremptorily dismissing juror 25. First, the State expressed concern about juror 25's demeanor when she responded to the court's question about her relative in prison. Second, the State noticed that on two separate occasions, juror 25 appeared to be sleeping. The trial court ruled that the State had identified race-neutral reasons for exercising the peremptory challenge.

A jury convicted Bardwell of all counts as charged. Bardwell appeals.

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[2] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

ANALYSIS

Batson Challenge

The equal protection clause guarantees a defendant the right to be tried by a jury selected free from racial discrimination.[3] "A prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection."[4] We follow the three-part test described by the United States Supreme Court in Batson v Kentucky[5] to determine if discrimination played a role in a state's exercise of its peremptory challenge of a juror. First, the defendant must establish a prima facie case of purposeful discrimination;[6] second, the burden shifts to the State to articulate a race-neutral explanation for challenging the juror;[7] and third, the trial court must determine if the defendant has demonstrated purposeful discrimination.[8]

In State v. Saintcalle,[9] our Supreme Court recognized a need to change the existing Batson procedures in Washington but declined to do so on the briefing before it. The court found that "Batson . . . is failing us"[10] because modern-day racism is not overt but, rather, is embodied in "stereotypes that are

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[3] U.S. CONST. amend. XIV; Batson, 476 U.S. at 85.
[4] State v. Cook, 175 Wn. App. 36, 39, 312 P.3d 653 (2013).
[5] Batson, 476 U.S. at 93-96.
[6] Batson, 476 U.S. at 93-96.
[7] Batson, 476 U.S. at 97-98.
[8] Batson, 476 U.S. at 98.
[9] 178 Wn.2d 34, 52, 55, 309 P.3d 326 (2013).
[10] Saintcalle, 178 Wn.2d at 46.

ingrained and often unconscious."[11] "Unconscious stereotyping upends the Batson framework," which is "equipped to root out only 'purposeful' discrimination, which many trial courts probably understand to mean conscious discrimination"[12]

Nonetheless, the lead opinion applied Batson, leaving it as the controlling authority we must follow. The lead opinion confirmed the deference a reviewing court must give to the trial court under the existing Batson "purposeful discrimination" standard:

> A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of the juror and the attorney. Batson, 476 U.S. at 98 n.21. The defendant carries the burden of proving purposeful discrimination. Id. at 93. The trial judge's findings are "accorded great deference on appeal" and will be upheld unless proved clearly erroneous. Hernandez [v. New York], 500 U.S. [352,] 364[, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)]. Deference to trial court findings is critically important in Batson cases because the trial court is much better positioned than an appellate court to examine the circumstances surrounding the challenge. Further, deference is important because trial judges must have some assurance that the rest of the trial will not be an exercise in futility if it turns out an appellate court would have ruled on a Batson challenge differently.[13]

This standard does not require that the trial court analyze the first step of whether the defendant has established a prima facie case of purposeful discrimination if,

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[11] Saintcalle, 178 Wn.2d at 44.
[12] Saintcalle, 178 Wn.2d at 48.
[13] Saintcalle, 178 Wn.2d at 55-56.

as here, the State articulates a race-neutral explanation for its challenge.[14] "'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'"[15] "Batson requires the judge to determine whether a race-neutral reason offered for a challenge is honest, and [trial court] judges are much better situated than appellate judges to evaluate the honesty of the lawyers who practice in [trial] court."[16] The State's explanation of its reasons "must be viewed in the totality of the prosecutor's comments."[17]

Bardwell argues that the trial court erred in accepting the prosecutor's explanations because "African Americas are over-represented in the criminal justice system," the prosecutor did not ask juror 25 any follow-up questions about her relative's situation and the impact it had on her, and, further, the State did not remove a white juror whose family member had been accused of a crime.

Standing alone, Bardwell's contention that he and juror 25 belong to the same protected class does not establish prejudice.

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[14] See, e.g., State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (citing Hernandez, 500 U.S. at 359).

[15] Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (alteration in original) (quoting Hernandez, 500 U.S. at 360).

[16] United States v. Roberts, 163 F.3d 998, 1000 (7th Cir. 1998).

[17] Cook, 175 Wn. App. at 43.

United States v. Bishop[18] and Turnbull v. State[19] do not support his allegations of prejudice. Both cases dealt with questions focusing on jurors' perceptions of police as indicative of an improper proxy for race in jury selection. In Bishop, the prosecutor excused a juror because she resided in a predominantly African American neighborhood, arguing that she would likely be anesthetized to violence and believe that police are unfair.[20] The court rejected that rationale as being "little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant."[21] Likewise, in Turnbull, the State asked jurors if they thought police racially profiled people. Five African American individuals answered affirmatively. The State struck all five jurors, four peremptorily and one for cause.[22] The Turnbull court concluded that the State's question was little more than "subterfuge," noting that racial profiling was not an issue in the case and that the State did not ask the question to learn the jurors' perceptions about law enforcement.[23]

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[18] 959 F.2d 820 (9th Cir. 1992).
[19] 959 So. 2d 275 (Fla. Dist. Ct. App. 2006).
[20] Bishop, 959 F.2d at 825.
[21] Bishop, 959 F.2d at 825.
[22] Turnbull, 959 So. 2d at 276.
[23] Turnbull, 959 So. 2d at 276-77.

Bishop, Turnbull, and similar pretext decisions do not support Bardwell because of the difference in the total circumstances here from those in cases where prosecutors used pretextual criteria to purposefully discriminate.

Bardwell argues that the State's retention of the white juror with an accused family member clearly demonstrates racial bias. While courts have found purposeful discrimination where the reason offered by the prosecutor applies equally to an otherwise similar nonblack juror, Bardwell has not shown that is the case here.[24] Here, the State offered two additional reasons for its peremptory challenge: (1) the demeanor of juror 25 when responding to the question and (2) the State's observation that juror 25 appeared to be asleep on two separate occasions.

Bardwell contends that the prosecutor's failure to ask follow-up questions about juror 25's relative shows that the prosecutor used this as a pretext. But Bardwell cites no authority requiring an attorney to follow up with subsequent questions. Bardwell's reliance on Miller-El v. Dretke,[25] is misplaced. In Miller-El, the prosecution struck 91 percent of the black panelists.[26] The Miller-El Court noted that a comparison of similarly situated white and black venire members provided "more powerful" evidence of racial discrimination.[27] There, the State

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[24] See Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010).
[25] 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).
[26] Miller-El, 545 U.S. at 240-41.
[27] Miller-El, 545 U.S. at 241.

struck a black male whom the Court viewed as an ideal juror for the State but did not strike white panelists with similar viewpoints.[28] The Court found additional indications of the prosecution's bias in its request to shuffle the array of panelists after black venire members reappeared at the front of the line.[29] Further, the prosecutors gave a bland description of the death penalty to almost all of the white panelists before inquiring about their individual feelings on the death penalty but used a graphic description of the death penalty when speaking to over half of the black panelists.[30] The circumstances present in Miller-El clearly demonstrated racial discrimination. The circumstances present here raise no comparable level of suspicion.

Also, the State struck juror 25 based on her demeanor when she answered the question about a relative in prison, not because she had a relative in prison. In addition, the State observed two instances where the juror appeared to be sleeping. The record supports the trial court's finding that these reasons were not pretextual.

Moreover, in reaching its conclusion that the Batson challenge lacked merit, the trial court had the opportunity to observe the prosecutor's demeanor. Here, the trial court analyzed the responses of the juror and the explanation

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[28] Miller-El, 545 U.S. at 247.
[29] Miller-El, 545 U.S. at 254-55.
[30] Miller-El, 545 U.S. at 255-56.

offered by the prosecutor. The trial court found that the prosecutor had a good faith concern that juror 25 would be predisposed to the defense because of her demeanor and body language when responding about her relative's lengthy incarceration. Further, the trial court found the prosecutor's observation that the juror was sleeping on two separate occasions credible. As noted previously, the trial court is in the best position to evaluate credibility of a witness.

Bardwell's reliance on Snyder v. Louisiana[31] is misplaced. Snyder did not hold that a judge accepting a demeanor-based explanation for a peremptory challenge must have personally seen the demeanor. Although noting the importance of a judge's observations of the demeanor, nothing in the opinion requires that the judge observe the demeanor.[32]

This analysis comports with the later United States Supreme Court opinion in Thaler v. Haynes,[33] where the Court noted that a judge, even though he himself did not observe the juror's demeanor, need not reject a demeanor-based explanation for a challenge to a jury by a prosecutor. Instead, a court may accept the demeanor-based objection because "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor."[34]

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[31] 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).
[32] Snyder, 552 U.S. at 477.
[33] 559 U.S. 43, 49, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010).
[34] Thaler, 559 U.S. at 49.

Here, the trial court found the attorney's demeanor determinative and his observations about the sleeping juror credible. Bardwell fails to demonstrate that the trial court ruling was clearly erroneous.

Sufficiency of the Evidence

Bardwell challenges the sufficiency of the evidence to support his conviction of second degree possession of stolen property because the record contains insufficient evidence to establish that the value of the stolen items exceeded $750, an essential element of second degree possession of stolen property.[35]

Sufficient evidence supports a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.[36] In order to prove that second degree possession of stolen property as charged, the State had to prove that the defendant possessed stolen property exceeding a value of $750. The State concedes insufficient evidence supported the charge. A review of the record supports the State's concession.

Bardwell agrees that the appropriate remedy is a remand to the trial court to convict him of the lesser degree charge of third degree possession of stolen property.

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[35] RCW 9A.56.160(1)(a).
[36] State v.Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Accordingly, we deny Bardwell's Batson challenge and remand for resentencing on the lesser degree charge of third degree possession of stolen property.

Leach, J.

WE CONCUR:

Appelwick, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72356-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: March 2, 2016

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