

64744-0

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No. 64744-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

KWAME-ANDRE HARRIS,

Appellant.

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

The Honorable Michael Heavey

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APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

Kwame-Andre Harris appeals his conviction for third degree assault on two bases: first, that the prosecutor's peremptory strike of an African-American potential juror violated the equal protection clause of the Fourteenth Amendment, and second, that prejudicial misconduct in closing argument denied Harris a fair trial.

In response, the State suggests that the trial court's ruling on Harris' Batson<sup>1</sup> motion should be accorded deference. But the trial court did not engage in the analysis required under federal law, thus no deference is due. The State alternatively claims that the peremptory strike was "harmless" because the potential juror was a potential alternate juror. However, the State fails to recognize that the equal protection clause's guaranty of a non-discriminatory jury selection process protects not only the rights of the defendant, but those of the struck juror and the integrity of our justice system as a whole.

The State last contends that the prosecutor's closing argument which disparaged Harris' defense and diminished the State's burden of proof was a "fair reply" to the defense closing

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<sup>1</sup> Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

argument. The State's contentions are meritless. Harris' conviction should be reversed.

B. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO ENGAGE IN A COMPARATIVE JUROR ANALYSIS WAS REVERSIBLE ERROR ACCORDING TO THE DECISIONS OF THE UNITED STATES SUPREME COURT.

a. Comparative juror analysis is required under *Miller-EI v. Dretke*. The State concedes that the trial court erred by bypassing the first stage of Batson and sua sponte soliciting a "race-neutral" reason for the prosecutor's strike of Juror No. 27. Br. Resp. at 14-15.<sup>2</sup> The State also concedes that the trial court did not engage in a comparative juror analysis. Br. Resp. at 15. The State asserts, however, that this analysis was not required, on the basis that "federal courts' decisions are not binding on Washington courts."<sup>3</sup> Id.

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<sup>2</sup> Later in its brief, the State disingenuously claims that the prosecutor "never had the opportunity" to explain how he differentiated jurors from one another "because Harris never established a prima facie case of discrimination." Br. Resp. at 20. To the contrary, the prosecutor expressly took the opportunity to supplement the record. 3RP 148.

<sup>3</sup> Curiously, despite making this argument, the State later cites to a California Court of Appeals decision on the issue of the limitations of comparative juror analysis on appeal. Br. Resp. at 20-21 (citing People v. Lenix, 187 P.3d 946, 961 (Cal. 2008)). The State does not mention that the California appellate court agreed that under Miller-EI, a comparative juror analysis "must be considered in the trial court and even for the first time on appeal if relied upon by

The State either chooses to ignore or fails to recognize that the decision that dictates the proper procedure for a Batson challenge is Miller-El v. Dretke, 545 U.S. 231, 126 S.Ct. 2317, 162 L.Ed.2d 196 (2005), a decision of the United States Supreme Court. “When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court’s rulings.” State v. Jasper, 158 Wn. App. 518, 530, 245 P.3d 228 (2010) (quoting State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)).

Further, the Ninth Circuit decisions cited by Harris interpreting Miller-El<sup>4</sup> were state court decisions presented to the court on habeas corpus. The State surely does not contest the federal courts’ authority to overrule state courts’ erroneous interpretations of federal law in habeas corpus proceedings.

Finally, the Washington Supreme Court decisions relied upon by the State are inapposite. State v. Wright, 78 Wn. App. 93, 896 P.2d 713 (1995), was decided ten years before Miller-El. In State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010), the Court was not presented with the question of whether a comparative juror

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defendant and the record is adequate to permit the urged comparisons.” Lenix, 187 P.3d at 961.

<sup>4</sup> See Br. App. at 18.

analysis is obligatory under federal law and so did not answer it. In the portion of Rhone mistakenly cited by the State for the proposition that the Court did not require a comparative juror analysis, the Court considered only the question of what factors may be evaluated at the prima facie stage. See Rhone, 168 Wn.2d at 656-57.

It is clear from the Supreme Court's application of comparative juror analysis in Miller-El, despite the fact that Miller-El's case was presented to the court following a denial of habeas corpus, that comparative juror analysis is a mandatory component of Batson's three-part framework. Cf., Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("In Miller-El, the Court made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (emphasis added)). Numerous courts that have considered the question have concluded such analysis is required under the Fourteenth Amendment. See e.g. Reed v. Quarterman, 555 F.3d 364, 372-75 (5th Cir. 2009); United States v. Ramos, 536 F.3d 542, 560 (6th Cir. 2008); Lenix, 187 P.3d at 961; Boyd v. Newland, 467 F.3d 1139, 1146 (9th Cir. 2006). This Court should

reject the State's claim that a requirement of comparative juror analysis is not settled federal law.

b. A comparative juror analysis shows that the State's strike of Juror No. 27 was pretextual. The State responds to Harris' comparative juror analysis by pointing to minor differences in the responses made by the pertinent comparator jurors<sup>5</sup> in an effort to undermine the inference that the State selectively excused Juror No. 27 because of her race. This approach ignores the lesson of Miller-El. "A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters." 545 U.S. at 247.

The State also vastly overstates Juror No. 27's responses. Contrary to the State's assertions, Juror No. 27 did not "mention[] multiple, negative experiences with police and remain[] apprehensive and concerned about the police falsely accusing her." Br. Resp. at 19-20. Juror 27 described a single negative experience with a police officer during a traffic stop. 3RP 310-11. She stated that when she was around police she wanted to make sure she was "following the law." 3RP 311-13. She stated that if

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<sup>5</sup> As noted in the Brief of Appellant, these are Jurors 6, 8, 10, 11, 17, 19, 27, 31, and 34.

she were selected as a juror she would be “fair to both sides.” 3RP 313. In short, a comparative juror analysis establishes that the prosecutor’s strike of Juror No. 27 was pretextual. Harris’s conviction should be reversed.

c. The trial court’s failure to maintain a record of jury selection requires reversal. The State also notes the “glaring absence of information about the potential jurors’ races.” Br. Resp. at 15. The State wrongly faults Harris for this insufficient record. However to the extent that the record is deficient, the responsibility lies with the trial court.<sup>6</sup>

It is settled that due process entitles a criminal defendant to a “record of sufficient completeness” to present errors to the appellate court. Draper v. Washington, 372 U.S. 487, 497, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963). In keeping with this principle and with the rights explicated by the Court in Miller-EI, a defendant claiming a Batson violation has the right to a complete record of voir dire. Boyd, 467 F.3d at 1149-51. “Miller-EI II makes comparative juror analysis a centerpiece of the Batson analysis, and that analysis

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<sup>6</sup> On March 24, 2011 and again on March 30, 2011, undersigned appellate counsel contacted the trial court to determine whether it had maintained a record of the venire at Harris’ trial. Counsel was informed by Judge Heavey’s bailiff that they “wouldn’t have done that” and that the juror information forms – which would have contained information about the demographic makeup of the venire – “would have been shredded.”

cannot be done in the absence of a voir dire transcript.” Id. at 1150.

Additionally, because Batson concerns itself not merely with the equal protection rights of the defendant but of the struck juror, the obligation to ensure a trial that is fair “at the outset” rests first with the trial court. Powers v. Ohio, 499 U.S. 400, 413, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1990); United States v. Stephens, 421 F.3d 503, 511 (7th Cir. 2005) (district court flagged Batson issue after the guilty verdict, concluding it had erred in not raising Batson sua sponte based on the government’s strikes of non-white jurors). Yet, where the lower court’s rulings “insulate from review a prosecution’s use of peremptory strikes, the holdings of [Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) and Miller-El] would be undermined.” Boyd, 467 U.S. at 1150.

This Court can engage in a limited comparative juror analysis on appeal based on the answers given by other jurors. However, to the extent that this analysis is hamstrung by the absence of a record, the fault lies with the trial court which did not maintain the necessary documents.

If the State is correct that an effective comparative juror analysis is not possible, the trial court’s misguided suppression of

the record severely limits review of the Batson error. “[J]ust one racial strike calls for a retrial.” Green v. LaMarque, 532 F.3d 1028, 1033 (9th Cir. 2008) (citation omitted). This Court should reverse and remand with instructions that Harris be granted a new trial.

2. THE STATE’S CLAIM THAT THE ERROR WAS  
“HARMLESS” IS CONTRARY TO *SNYDER V.*  
*LOUISIANA*.

Citing several decisions that preceded the Supreme Court’s opinions in Miller-EI and Snyder, the State claims that the error in striking Juror No. 27 was harmless because Juror No. 27 would have been the second alternate juror, and the second alternate juror did not deliberate. Br. Resp. at 22-24. In so contending, the State fails to appreciate that the equal protection clause protects not only the rights of the defendant but of the struck juror.

In Powers, the Supreme Court suggested a Batson violation in jury selection could be structural error:

A prosecutor’s wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the jurors’ first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may

persist through the whole course of the trial proceedings.

Powers, 499 U.S. at 412. The Court in Powers also observed that “racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt” and that the unconstitutional selection procedure “may pervade all the proceedings that follow.” Id.

In Snyder, the Court clarified that a Batson error may be structural: “the 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) (emphasis added); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (“We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice”) (emphasis added); see also, Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (defining criteria for issuance of a certificate of appealability in a Batson habeas case without reference to harmless error analysis).

Further, many federal courts have found that discrimination during the jury selection process, in addition to violating the equal protection rights of the defendant and the struck juror, undermines the integrity of the judicial process and is harmful to society as a whole. See e.g. United States v. McFerron, 163 F.3d 952, 955 (6th Cir. 1998) (citing cases); accord United States v. Harris, 192 F.3d 580, 587-88 (6th Cir. 1999) (finding Batson/Powers error structural because the effects of racial discrimination during voir dire “may persist through the whole course of the trial proceedings”) (citing Powers, 499 U.S. at 412); Rosa v. Peters, 36 F.3d 625, 635 (7th Cir. 1994) (“we do not believe that the Supreme Court would deem a Batson violation a ‘constitutional error of the trial type’ so that we would apply the harmless error standard”); Ramseur v. Beyer, 983 F.2d 1215, 1225 (3rd Cir. 1992) (finding harmless error analysis “inappropriate in cases involving discrimination in the jury selection process”), cert. denied, 508 U.S. 947 (1993).

This Court should reject the State’s contention that the Batson error was “harmless” because Juror No. 27 did not deliberate. Rather, like Harris, she also was entitled to a jury selection process “free from state-sponsored group stereotypes

rooted in, and reflective of, historical prejudice.” J.E.B., 511 U.S. at 128.

### 3. PROSECUTORIAL MISCONDUCT DENIED HARRIS A FAIR TRIAL.

Harris also argued that the trial prosecutor’s closing argument, which distinguished between “spoken” and “unspoken” defenses, disparaged his general denial defense as an “unspoken defense”, and appealed to the jury’s passions and prejudices, was misconduct. The State claims that the arguments were a fair reply. The State’s claims are untenable.

a. The State’s disparagement of Harris’ general denial defense was misconduct. Harris claimed a general denial defense, and in closing argument identified the several reasons to doubt the State’s case. In response, the prosecutor argued,

Ladies and gentlemen, there are two types of defenses in criminal cases, there’s the spoken defenses and the unspoken defenses. Spoken defenses are the ones you all know . . . [a]libi, insanity, self-defense, those are the spoken defenses, the ones you all know about, those defenses aren’t a part of this case. Then there’s the unspoken defenses, the general denial, the let’s just throw everything up there, see if something sticks and say the State can’t prove its case, but we know that the evidence has proved that both Mr. Harris and Mrs. Harris committed Assault in the Third Degree, and there is no reasonable doubt.

5RP 48-49.

The appellate prosecutor tries to characterize this inflammatory argument as a “direct response” to Harris’ discussion of the reasons to doubt the State’s evidence. This is a specious claim. A “direct response” to Harris’ argument would have addressed each of the individual points raised by Harris. Cf., State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 207 (2008) (“A criminal defendant can ‘open the door’ to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to “open the door” to prosecutorial misconduct.”).

But this was not the prosecutor’s tack. Instead, the prosecutor sarcastically suggested to the jurors that Harris’s general denial defense was less worthy of credence than a so-called “spoken” defense. Indeed, the appellate prosecutor as much as concedes that the trial prosecutor’s argument was calculated to disparage the defense. See Br. Resp. at 31 (“the State’s response fairly characterized the defense strategy…”).

The appellate prosecutor also contends that “the State cast the defenses on equal footing.” Br. Resp. at 31-32. This contention not only is disingenuous, it sidesteps the question why

the prosecutor's discussion and negative characterization of Harris's defense were in any way germane to the issues before the jury. They were not. They were not an appropriate or fair response to Harris' analysis of the inconsistencies in the State's evidence. They were not pertinent to the jury's consideration of the facts. The prosecutor's irrelevant characterization of Harris' general denial defense as an "unspoken defense" – "the let's just throw everything up there, see if something sticks and say the State can't prove its case" defense – wrongly implied that Harris had a duty to present an affirmative defense to the charge. The argument undermined the State's burden and Harris' right to be presumed innocent of the charge. The argument was misconduct.

b. The State's appeal to the jury's passions and prejudices was misconduct. Finally, the appellate prosecutor claims that the remarks objected to by Novella Harris, which the trial court found to be misconduct and for which the court chastised the prosecutor, were not improper.<sup>7</sup> The appellate prosecutor

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<sup>7</sup>The State attempts to contend that because the objection to the argument was made by Novella's counsel, Harris cannot challenge the misconduct on appeal or, alternately, he should be subject to the "flagrant and ill-intentioned" standard of review. Br. Resp. at 36. This contention is meritless. See RAP 2.5(a) ("A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.").

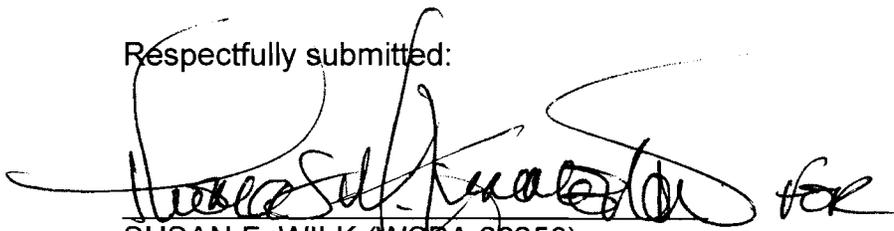
contrasts the trial prosecutor's blatant appeal to the jury's sympathies and prejudices to the reprehensible arguments made by the trial prosecutor in State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006). However the fact that this prosecutor's arguments may not have been as offensive and repugnant as those of the prosecutor in Perez-Mejia does not mean that they were not misconduct. The trial court properly admonished the prosecutor that his "statements about the community and about police officers coming home safe appeal[] to the passion or prejudice of the jurors." 6RP 53. This Court should reject the appellate prosecutor's claim that this argument was somehow acceptable.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Andre-Kwame Harris' conviction should be reversed.

DATED this 31<sup>st</sup> day of March, 2011.

Respectfully submitted:

  
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