

64744-0

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No. 64744-0

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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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of the equal protection clause of the Fourteenth Amendment, the trial court erred in denying Harris' Batson<sup>1</sup> challenge to the prosecutor's peremptory strike of Juror 27.

2. The prosecutor committed misconduct in closing argument that shifted the State's burden of proof, diluted the presumption of innocence and disparaged the defense.

3. The prosecutor committed misconduct in closing argument that improperly appealed to the jury's passions and prejudices.

4. The trial court erred in failing to issue a curative instruction following prejudicial misconduct by the prosecutor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to equal protection prohibits the exclusion of otherwise qualified and impartial jurors from service solely because of their race. Where a prima facie showing of discriminatory purpose in a peremptory challenge has been made, the trial court is constitutionally required to engage in a comparative juror analysis in order to evaluate whether the prosecutor's stated race neutral reason for the strike is a pretext for unlawful discrimination. Did the

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

trial court err in upholding the prosecutor's peremptory strike of an African-American juror without evaluating whether the claimed race neutral reason for the strike was a pretext for discrimination?

(Assignment of Error 1)

2. Where a de novo review of the record reveals that the prosecutor failed to strike jurors who gave answers similar to the struck juror, raising an inference that the juror was struck because of her race, must Harris' conviction be reversed? (Assignment of Error 1)

3. Prosecutorial misconduct is constitutional error when the prosecutor's improper comments undermine a constitutional right of the accused. In closing argument, the prosecutor attempted to draw a distinction between "spoken" and "unspoken" defenses, characterizing general denial (Harris' defense at trial) as an "unspoken" defense brought by defendants who have no other recourse: "let's just throw everything up there, see if something sticks and say the State can't prove its case." Did this argument dilute the State's burden of proof, undermine the presumption of innocence, disparage the defense, and constitute constitutional error? (Assignment of Error 2)

4. Appeals to the jury to convict on the basis of passion or prejudice are misconduct. Did the prosecutor's closing argument exhorting the jury to conclude that our communities depend on effective law enforcement and that in committing the charged offense, Harris and his co-defendant put police officers and innocent bystanders in danger constitute an improper appeal to the jury's passions and prejudices? (Assignment of Error 3)

5. Although the court sustained objections to the prosecutor's misconduct in closing argument and privately admonished the prosecutor that the appeal to passions and prejudices was misconduct, the court did not issue a curative instruction to the jury. Did the court fail to ameliorate the taint from the improper argument? (Assignment of Error 4)

### C. STATEMENT OF THE CASE

During Kwame-Andre Harris' birthday party at Maxi's Lounge, a bar and nightclub in the Doubletree Hotel on International Boulevard, in SeaTac, two women, one of them Harris' wife, Novella Harris,<sup>2</sup> got into a physical altercation. 4RP 84, 124-

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<sup>2</sup> To avoid confusion, appellant Kwame-Andre Harris is referred to in this brief as "Harris", and his wife Novella Harris is referred to by her first name, "Novella." No disrespect is intended.

26.<sup>3</sup> Security attempted to separate the two women. Harris became upset when one of the security officers put his hands on Novella, and the situation escalated. 4RP 84, 97. Harris' brother intervened. He explained that it was Harris' birthday. He apologized, and said that they would leave without incident. 4RP 97, 126.

Harris and his guests rode down in two elevators to the main lobby of the hotel, accompanied by security guards. 4RP 100-01, 126. When they reached the lobby, police officers, who had been summoned when the altercation broke out, were waiting. 4RP 19; 5RP 20. Although Harris and his guests were leaving, security supervisor John Soileau said that he wanted the entire group identified and trespassed. 4RP 28, 101.

As King County Sheriff's Deputy Travis Noel approached Harris, according to Noel, Harris adopted a "bladed stance" which Noel believed was cause to handcuff Harris. 4RP 30. Harris resisted, Harris' family members attempted to place themselves

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<sup>3</sup> Citations to the verbatim report of proceedings are as follows:

October 28, 2010	-	1RP
October 29, 2010	-	2RP
November 2, 2010	-	3RP
November 3, 2010	-	4RP
November 4, 2010	-	5RP
November 5, 2010	-	6RP
December 18, 2010	-	7RP

between Noel and Harris, and the scene immediately turned into a melée. 4RP 102-04. The group became entangled and according to Soileau, everyone seemed to fall on the floor. 4RP 111. At one point Harris, Novella, and another woman were all on top of Noel. Id. Noel was kicking at Harris while he was trying to get out from underneath him, and Harris was swinging at Noel in an effort to get away from him. 4RP 119-21.

After Noel and Harris had separated, Soileau heard the sound of Noel's flashlight hitting the floor. 4RP 112. He saw Harris raise the flashlight in his hand, but Noel reached for his taser and Harris immediately dropped the flashlight. 4RP 112. Several other police officers responded and were able to subdue and handcuff Harris. 4RP 116; 5RP 97. Harris sustained injuries to his face and a lacerated finger. 5RP 39.

Based on this incident and a related fracas involving rookie police officer Travis Brunner and Novella, both Harris and Novella were charged with third-degree assault. CP 53-54. They proceeded to a jury trial before the honorable Michael Heavey, and were convicted as charged. CP 33. This appeal follows. CP 51-52.

D. ARGUMENT

1. THE PROSECUTOR'S PEREMPTORY STRIKE OF JUROR 27 VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

a. The prosecutor used a peremptory strike to prevent juror 27, an African-American woman, from serving on the jury. During jury selection, Juror 27 was one of eight potential jurors who raised their cards when asked if they had had a memorable bad experience with police officers. 3RP 48. Of these eight jurors, Jurors 6 and 8 were excused for cause following extensive questioning by the prosecutor. 3RP 65-71. When the prosecutor turned his attention to Juror 27, she explained,

[W]hen I was younger and was driving home late from work, and I didn't know at the time but a police officer was following me, and it made me very nervous. I was driving on a highway, and I got off the exit ramp. I stopped at the stop sign, and I sped through the stop sign. Because I refused to stop, he pulled me over, and it just made me feel anxious and nervous.

And ever since then I am cautious and make sure I am obeying the speed limit and stop and signal. But it wasn't a positive experience.

3RP 110-11.

The prosecutor asked, "Does . . . that experience change how you view police officers today?" 3RP 111.

Juror 27 responded,

It depends on the situation. But I know for me personally, when I see police, or I know they are in the area, I make sure I'm not in a bad situation because it's easier, I feel it is easier for me to get caught up, or for a group of people, although I know I didn't do anything wrong.

3RP 111.

The prosecutor asked, "Why do you say that?" Juror 27 explained,

Just based on my experience. My brothers have been pulled over. They haven't been cited. But just because in an area, they match the descriptions. Friends get pulled over, you know, make sure you are going the speed limit and obeying the law. Sometimes, you know, I know police are concerned about safety and enforcing the statutes and laws, but it just depends on the situation. Sometimes people are breaking the law and they need to face the consequences, but I just feel it depends on the person.

3RP 111.

Following this response, the prosecutor began to aggressively interrogate Juror 27:

Prosecutor: Okay. So you feel the police are out to get you? Is that what you are saying?

Juror 27: No, not necessarily, but in certain situations, the circumstances for a group of people, they can't identify who said something or who threw something, then you get caught up in a situation.

Prosecutor: Okay. Do you feel like you trust police officers, or do you feel like you in general distrust them?

Juror 27: I can't say one way or another. It depends on the situation and the way they present themselves.

Prosecutor: Okay, what's your initial feeling when you see a police officer?

Juror 27: I just want to make sure I am following the law.

Prosecutor: Now, your experience, all these experiences you talked about, is that going to affect how you view a police officer who might testify in this case?

Juror 27: I can't say one way or another. Again, it just depends on what evidence is presented, fair to both sides.

Prosecutor: Do you think it might?

Juror 27: It may. I can't say one way or another because I don't really know.

Id. at 111-13.

The prosecutor did not challenge Juror 27 for cause.

Nevertheless, the prosecutor utilized a peremptory challenge to prevent Juror 27 from serving on the jury. 3RP 141-42.

Following jury selection, the court explained that because Juror 27 was black, the court solicited a non-race based reason for the challenge. The court explained "[the prosecutor] gave me a non-race based reason that she felt apprehensive around, whenever she was around police officers based upon her experience from driving and her general experience in general." 3RP 148.

The prosecutor added to the court's explanation,

Well, when I asked her straight out if she felt like the police were out to get her, she said, no. But she gave answers that indicated apprehensiveness around police officers and perhaps distrust, and also suggested it went beyond just her and into her family, that several of her family members felt the same way.

3RP 148-49.

Harris' attorney responded,

[I]t's very normal to be apprehensive around police officers, and under the circumstances should ask that question [sic]. She indicated that she had been followed by a police officer. So, I think her statement was nothing out of the ordinary, and that tends to suggest that there is a Batson challenge to her.

3RP 149.

The court ruled, "I might agree it is completely normal to have that feeling. It is, she expressed some concern about it, and that's a non race-based reason. So, it's an issue should your clients be convicted for appeal." 3RP 149.

b. The trial court failed to apply *Batson's* three-part inquiry and improperly relieved the prosecutor of his burden to overcome the presumption of discriminatory purpose in the peremptory challenge. Under Batson and its progeny, the exclusion of otherwise qualified and unbiased jurors from a venire solely because of their race violates federal constitutional guarantees of equal protection. An improper race-based challenge

of a potential juror compromises the guarantee of trial by impartial jury, violates the juror's equal protection rights under the Fourteenth Amendment and is harmful to the fundamental values of our judicial system and society as a whole. Miller-El v. Dretke, 545 U.S. 231, 126 S.Ct. 2317, 162 L.Ed.2d 196 (2005); Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1990); U.S. Const. amend. XIV.

A claim of purposeful discrimination in the selection of the petit jury requires the trial court to engage in three steps. First, the defendant must make a prima facie showing "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. Second, once the defendant has made a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strike. Id. at 94. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." Purkett v. Elem, 514 U.S. 765, 767, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995) (per curiam).

A defendant satisfies the requirements of Batson's first step by "producing evidence sufficient to permit the trial judge to draw an

inference that discrimination has occurred.” Johnson v. California, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). This requires three components: that (1) the juror is a member of a “cognizable racial group”; (2) the prosecutor used a peremptory strike to remove the juror; and (3) “the totality of the circumstances raises an inference that the strike was motivated by race.” Boyd v. Newland, 467 F.3d 1139, 1143 (9th Cir. 2006) (citation omitted).

“The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” Johnson, 545 U.S. at 172. The court may not abdicate its duty to engage in the inquiry; to the contrary, if a prima facie case of discrimination is established, a Batson analysis is obligatory. Johnson, 542 U.S. at 165-71.

In this case, the court either did not recognize or did not understand its duty to follow Batson’s three steps. The court made a practice of obligating the prosecutor to proffer a race-neutral reason every time the prosecutor struck a black juror. However the court neither weighed nor assessed this reason in light of the evidence of purposeful discrimination. In fact, the court expressly desisted from doing so, instead punting the question to the appellate court: “I might agree it is completely normal to have that

feeling [to be apprehensive around police officers]. It is, she expressed some concern about it, and that's a non race-based reason. So it's an issue should your clients be convicted for appeal." 3RP 149.

"A Batson challenge does not call for a mere exercise in thinking up any rational basis." Miller-El, 545 U.S. at 252. The court's failure to undertake the Batson three-step inquiry or, indeed, to engage in any analysis of the prosecutor's strike, was an error.

c. An evaluation of the record establishes that the strike of Juror 27 was discriminatory.

i. Harris made a prima facie showing that the strike was discriminatory. In evaluating the totality of the circumstances, the court can consider a "wide variety of evidence." Johnson, 545 U.S. at 169. Moreover, "the burden for making a prima facie case is not an onerous one." Boyd, 467 F.3d at 1151. It is appropriate to impose only a minimal burden on the defendant at this stage, "especially because proceeding to the second step of the Batson test puts only a slight burden on the government." United States v. Collins, 551 F.3d 914, 920 (9th Cir. 2009).

Discriminatory intent may be shown by a single peremptory challenge. Snyder v. Louisiana, 552 U.S. 472, 477, 128 S.Ct.

1203, 170 L.Ed.2d 175 (2008); Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006); see also Ali v. Hickman, 584 F.3d 1174, 1193 (9th Cir. 2009) (noting that because the record compelled a finding that a single strike was racially motivated, it was unnecessary to analyze a Batson claim regarding a different juror). “For evidentiary 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 (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from denial of certiorari)).

To establish such a case . . . the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”

Johnson, 545 U.S. at 169 (quoting Batson, 476 U.S. at 96).

By articulating (1) that Juror 27 was African-American and (2) that the proffered reason from the prosecutor was not a basis to distinguish Juror 27 from the majority of people who might feel apprehensive around police officers, Harris made a prima facie showing of discriminatory purpose.

ii. A comparative juror analysis demonstrates that the prosecutor’s race-neutral reason for the strike was a pretext for

unlawful discrimination. Following Harris' Batson challenge, the court simply noted that the prosecutor had articulated a race-neutral reason for the strike. The court did not conduct a comparative juror analysis or otherwise evaluate the strike in light of the other strikes exercised by the prosecutor. In Ali, the Ninth Circuit Court of Appeals criticized the trial court for failing to engage in a comparative juror analysis before finding the prosecutor had legitimate non-discriminatory reasons for striking an African-American juror. 584 F.3d at 1184. After reviewing the record and conducting its own comparative juror analysis, the Court found that the prosecutor in fact had failed to apply a consistent standard to jurors similarly situated to the struck juror. Id. This difference "compel[led] the conclusion" that the alleged justification was "pretextual make-weight[]." Id.

A review of the record in this case suggests that the prosecutor's claimed race-neutral reason for the strike of Juror 27 was a pretext for discrimination. Nine jurors raised their cards when the court asked jurors who had had a memorable bad experience with law enforcement to identify themselves: jurors 6, 8, 10, 11, 17, 19, 27, 31, and 34. 3RP 48. Of these jurors, jurors 6 and 8 were excused for cause. 3RP 67-71. The prosecutor struck

jurors 19, 27, and 31. 3RP 141-42. Counsel for Novella Harris struck jurors 11 and 17. Jurors 10 and 34 were empaneled and permitted to serve on the jury. The relevant comparators, therefore, for purposes of assessing whether the prosecutor had a discriminatory purpose in striking Juror 27 are Jurors 10, 11, 17, and 34.<sup>4</sup> See Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (the pertinent record includes not only the prosecutor's explanations for the peremptory strikes, but also the characteristics of the venire members that were not challenged).

*Juror 10:* Juror 10 stated that a close friend had been badly treated by police. The friend was a victim of domestic violence who the police repeatedly refused to aid, and who ultimately was murdered by her abuser. 3RP 71-74. Juror 10 said, however, that her own experiences with law enforcement had been pretty good. 3RP 74. The prosecutor did not question her further.

*Juror 11:* Juror 11 gave little information about the prior bad experience, but made an oblique reference to "evidence" and stated that the experience did not impact whether Juror 11 could be

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<sup>4</sup> The prosecutor went through three rounds of strikes before Novella's counsel excused Juror 17, and the prosecutor twice accepted the panel before Novella's counsel struck Juror 11.

impartial if a police officer testified. 3RP 74-75. The prosecutor accepted this answer and did not question Juror 11 further.

*Juror 17:* Juror 17 described the experience of having been wrongly accused of throwing rocks at a car as a child. 3RP 107. Juror 17 explained that this was the prior bad experience involving police officers and stated that the experience “could” affect Juror 17’s perception of the credibility of police officers. 3RP 107-08.

*Juror 34:* When questioned about prior bad experiences with law enforcement, Juror 34 said,

Just small town harassment, being pulled over for a minor infraction that wasn’t an infraction, like a shake-down. I don’t think that’s the right thing to be doing. It happened to me more than once. They are bored and have nothing else to do sometimes.

3RP 113.

When the prosecutor asked if these experiences had altered Juror 34’s perception of police officers, Juror 34 said “not really”, explaining that the level of professionalism differed between police in small towns and metropolitan areas. 3RP 113.

With the exception of Juror 10, each of these four jurors gave answers that were substantially like the answers given by Juror 27. In particular, Juror 17 indicated that having been wrongly accused of a crime “could” affect Juror 17’s ability to be impartial.

Notwithstanding this answer, the prosecutor did not excuse the juror despite three opportunities to do so. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson’s third step.” Miller-El, 545 U.S. at 241.

Similarly, Juror 34 described having been repeatedly harassed by police officers, but claimed that his opinion of police differed based upon “small town” versus “metropolitan” professionalism. 3RP 113. The prosecutor accepted this answer and did not press further. In contrast, the prosecutor aggressively questioned Juror 27, who simply stated that she wanted to make sure she was following the law. 3RP 111-13. When Juror 27 rejected the prosecutor’s suggestion that the police were “out to get” her, the prosecutor repeatedly tried to get Juror 27 to say that she would find a police officer less credible than another witness. Id. Juror 27 politely did not accept this characterization.

Juror 27 gave no other reasons to indicate that she would be anything other than an engaged, careful, and responsible juror. She actively participated in jury selection. She stated that she was acquainted with someone who worked for the court system or

judicial branch. 3RP 49. When asked if she was excited to serve, she stated candidly that although she was not “thrilled to come,” she viewed jury duty as a “civic responsibility.” 3RP 101-02. She said that “if I was at the table, I would want someone that was responsible that cared about the system to weigh the evidence.” 3RP 103.

The trial court’s failure to conduct a comparative juror analysis was a misapplication of mandatory federal law. As explained by the Ninth Circuit Court of Appeal:

[I]f the Supreme Court's endorsement of comparative juror analysis on appeal constituted a new procedural rule, the Court would not have applied that rule to Miller-EI, whose case came before the Court on an appeal from a denial of habeas corpus. Because the Court did engage in extensive comparative juror analysis, we can infer that Miller-EI II must only have clarified the extant Batson three-step framework.

Boyd, 467 F.3d at 1146; see also McGee v. Kirkland, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 2572542 at 6 (C.D. Cal. 2010) (finding that the use of comparative juror analysis to evaluate Batson claims is based on clearly established federal law, faulting trial court for failing to engage in such analysis, and vacating conviction based on de novo review of record).

As shown by the above discussion, had a comparative juror analysis been conducted, instead of the court accepting the

prosecutor's race neutral reason for the strike of Juror 27 at face value, the court would have concluded that the prosecutor's stated reason was a pretext for discrimination.

iii. The error requires reversal of the conviction. The failure to engage in comparative juror analysis prevented the court from assessing the prosecutor's strike of Juror 27 in light of his failure to strike other similarly situated prospective jurors. The court paid lip service to Batson, but in actuality relieved the State of any duty to advance more than a perfunctory explanation of a race-neutral reason, which the court then did not evaluate. Compare Green v. LaMarque, 532 F.3d 1028, 1031 (9th Cir. 2008) ("By merely reiterating the prosecutor's stated reasons, and then finding they were race-neutral, without analyzing the other evidence in the record to determine whether those reasons were in fact the prosecutor's genuine reasons, the California Court of Appeal made exactly the same mistake for which the Supreme Court criticized the California courts in Johnson."). De novo review of the record establishes the strike was discriminatory. Harris' conviction must be reversed.

## 2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED HARRIS A FAIR TRIAL.

a. The prosecutor's closing argument diminished the burden of proof and the presumption of innocence, disparaged the defense, and improperly appealed to the jury's passions and prejudices. At trial Harris attempted to raise a defense of lawful use of force. 1RP 5. The court barred Harris from offering lawful force jury instructions<sup>5</sup> and Harris accordingly presented a defense of general denial; specifically, that the State had not proven that he had the intent to commit an assault. 6RP 13.

Despite having strenuously opposed any lawful force instruction, and presumably well understanding the State's burden of proof at trial, the prosecutor nevertheless argued in closing:

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, alibi, insanity, self-defense –

5RP 48-49.

At this point, Harris' counsel objected to the argument, but the court overruled the objection. 5RP 49. The prosecutor continued:

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<sup>5</sup> In response to a jury inquiry during deliberations, the court ultimately issued a lawful force instruction. 6RP 12-13; CP 109-10.

Alibi, 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 49.

The prosecutor then argued, "Our communities depend –" but was interrupted by an objection from Novella's counsel, which the court sustained. Id. Undeterred, the prosecutor argued,

When Mr. Harris and Mrs. Harris assaulted Deputy Brunner and Deputy Noel, they put everyone in danger there, they put themselves in danger, they put innocent bystanders in danger, and they put the officers in danger, all of them, not just Brunner and Noel, but all of them. These are officers who have vowed to their families –

5RP 49.

Novella's counsel objected again, and the court sustained the objection. 5RP 50. Yet the prosecutor continued to argue, "Because they put them in danger --" Id. Novella's counsel stated, "Your honor, I'm still objecting," and the court again sustained the objection. Id.

After the court excused the jury, the court admonished the prosecutor:

Mr. Elsner, I think you know this, but you can't argue to appeal to the passion or prejudice of the jurors. Your statements about the community and about police officers coming home safe appeals to the passion or prejudice of the jurors. Obviously appropriate everything else you did. So I just wanted to let you know that.

5RP 53.

b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, § 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

Allegedly improper arguments must be reviewed in the context of the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)). The touchstone of this inquiry is not whether the misconduct was harmless or not harmless, but whether the misconduct denied the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 761, 685 P.2d 1213 (1984) (citing, inter alia, Smith v. Phillips, 455 U.S. 209, 210, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).

An improper comment generally is reviewed for whether there is a substantial likelihood that the comment affected the jury's decision, but where the comment infringes on a constitutional right, it is subject to constitutional harmless error analysis. State v. Moreno, 132 Wn.2d 663, 671-72, 132 P.3d 1137 (2006). "Under this standard, the court must reverse unless convinced beyond a

reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt.” Id.

i. The prosecutor’s argument shifted the burden of proof, diluted the presumption of innocence, and disparaged the defense. The State bears the burden of proving each element of its case beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is misconduct for the prosecutor to make an argument that diminishes or dilutes the burden of proof. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009). Further, “[a] criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise.” State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

In differentiating between “spoken defenses” – “the ones you all know” – and “unspoken defenses” – Harris’ general denial defense – the prosecutor baldly attempted to portray a general denial defense as less legitimate, and less worthy of credence, than affirmative or so-called “spoken” defenses. 6RP 49. The prosecutor described a general denial defense as “the let’s just throw everything up there, see if something sticks and say the State can’t prove its case.” Id. The clear significance of this argument

was to try to imply that Harris was guilty – otherwise he would have offered a “spoken defense.”

But the State’s burden to prove each element of the crime beyond a reasonable doubt is the same regardless of whether the defendant mounts an affirmative defense, claims self-defense, or claims general denial. An accused person is presumed innocent and has no duty to present evidence, call witnesses, or otherwise prove his innocence. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, rev. denied, 1006 Wn.2d 107 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). There is no constitutional difference between a “general denial” defense and a statutory defense; the State’s burden remains unchanged.

The prosecutor’s argument improperly shifted the burden to the defense by implying that the general denial defense was essentially a concession of guilt. Compare State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor argued the defense had “no case”). The argument was particularly egregious given that the prosecutor battled vigorously to prevent Harris from raising a justifiable use of force defense at trial. Having prevailed in this argument, the prosecutor then sought to portray the general

denial defense as the last stand of an accused person who is guilty. This argument was prejudicial misconduct.

ii. The prosecutor's appeal to the jury's passions and prejudices was misconduct. Equally improper was the prosecutor's argument urging the jurors to conclude that all of the police officers were placed in danger by Harris' behavior. It is well-settled that prosecutorial appeals to the jury's passions and prejudices are improper and constitute misconduct. Perez-Mejia, 134 Wn. App. at 915-16; Echevarria, 71 Wn. App. at 598. Such comments violate the prosecution's "duty to seek a verdict based on the evidence and free of prejudice" and create an unacceptable risk that the jurors will convict based not on the evidence but upon the prosecutor's inflammatory appeals. Echevarria, 71 Wn. App. at 598.

The trial court appropriately recognized the impropriety of the prosecutor's comments urging the jury to consider the "vows" that the officers had made to return safely "to their families" and the danger in which the officers allegedly were placed by Harris' and Novella's actions. 6RP 49-50. But although the court twice sustained defense objections to the inflammatory argument, the court failed to issue curative instructions to the jury. Cf. Perez-

Mejia, 134 Wn. App. at 920 (finding that failure to issue curative instructions to the jury following prosecutorial misconduct in closing argument prevented the court from ameliorating the prejudicial impact of improper argument).

Thus, although the court admonished the prosecutor, the admonishment was hollow, as it occurred outside the jury's presence. 5RP 53. The court did not inform the jury that the argument was misconduct. Nor was the jury told that the alleged danger to the police officers who responded to the Doubletree Hotel was an improper consideration in their deliberations.

The prejudicial impact of the court's failure to issue a curative instruction was augmented by the court's instructions to the jury. Specifically, the jury was told:

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

CP 58.

Although the court sustained Novella's counsel's objections, in light of the court's instructions, the jury had no basis to speculate that the prosecutor's remarks may have been improper. In fact, the

court's written instructions explicitly directed the jury to refrain from doing so.

c. The misconduct prevented Harris from receiving a fair trial. This Court should conclude that the prosecutorial misconduct denied Harris a fair trial. Davenport, 100 Wn.2d at 757. The evidence was uncontroverted that Noel decided to handcuff Harris before there was any basis for his arrest. 4RP 30. Harris' family was upset by Noel's precipitous action and attempted to interpose themselves between Noel and Harris. 4RP 102-04. "Pandemonium" ensued. 5RP 60.

Although Noel claimed that Harris responded aggressively, 4RP 31-35, this testimony was contradicted by the testimony of other witnesses, who believed that Harris was simply resisting arrest, and that the chaotic scene was caused in part by the intervention of other people. 4RP 102-04, 111; 5RP 71.

Similarly, Noel's testimony that Harris took his flashlight and deliberately menaced him with it was controverted by the testimony of other witnesses. Compare 4RP 35-36 (Noel claims Harris took and brandished the flashlight) with 4RP 111 (Soileau testifies that the flashlight fell to the ground, and Harris picked it up and raised it, but dropped it when Noel drew his taser) and 5RP 65, 85 (two

officers did not see Harris with a flashlight). There thus was a substantial question whether Harris intentionally assaulted Noel.

The prosecutor's effort to portray Harris' general denial defense as somehow illegitimate was calculated to make any doubts the jury may have had about the conflicting evidence appear unreasonable. Likewise, it is natural that citizens might feel outrage when police officers in the line of duty are placed in danger. The prosecutor's brazen appeal to this aspect of the jury's passions and prejudices urged a conviction not on the strength of the State's evidence, but of their emotions.

This Court should conclude that in light of the inconsistent evidence regarding Harris' intent, the prosecutor's improper remarks were likely to have impermissibly swayed the jury toward reaching a guilty verdict. Harris' conviction should be reversed.

E. CONCLUSION

This Court should conclude that purposeful racial discrimination in jury selection requires reversal of Harris' conviction. In the alternative, the Court should conclude that prosecutorial misconduct in closing argument prevented Harris from receiving a fair trial.

DATED this 5<sup>th</sup> day of November, 2010.

Respectfully submitted:

Handwritten signature of Susan F. Wilk, written in cursive, with the number 28806 written to the right of the signature.

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