

64772-5

64772-5

NO. 64772-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NOVELLA C. HARRIS,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUE

Whether the trial court properly allowed the State to use a preemptory challenge against Juror 27.

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Novella Harris was charged by information with Assault in the Third Degree for intentionally assaulting a law enforcement officer. CP 1-8. The jury convicted Harris as charged. CP 51. The trial court imposed a standard range sentence. CP 56-63; 8RP 1-9. Harris now appeals. CP 65-66.

2. SUBSTANTIVE FACTS¹

Early one morning, two King County Sheriff's Deputies responded to a nightclub at a hotel in SeaTac, Washington. 4RP 57, 58, 123-24. Security called police after a fight broke out. 4RP 51, 58. When the deputies arrived, hotel security asked the officers to trespass the people involved in the fight. 4RP 58, 96.

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (10/28/09); 2RP (10/29/09); 3RP (11/02/09); 4RP (11/03/09); 5RP (11/04/09); 6RP (11/05/09); 7RP (11/06/09); 8RP (12/18/09 sentencing hearing).

When members of the group heard that security wanted them trespassed, the group shouted obscenities. 4RP 58-59. The officers put their hands up and tried to calm the group. 4RP 60-61; 5RP 17. Co-defendant Kwame Harris, the husband of Novella Harris, slapped Deputy Noel's hands down, took a fighting stance, and told him to "fuck off!" 4RP 59-61; 5RP 15-16. Deputy Noel told Kwame that he was being detained. 4RP 60-61; 5RP 17.

As Deputy Noel approached Kwame to handcuff him, Novella and others from the group tried to prevent the officers from handcuffing Kwame. 5RP 18-20. The officers ordered the group several times to calm down and back away. 5RP 17-20. The officers wrestled Kwame and tried to arrest him. 4RP 63-64; 5RP 18-19.

Kwame removed a metal flashlight from Deputy Noel's duty belt. 4RP 63-66. Kwame pinned Deputy Noel down and lifted the flashlight over Kwame's head as if to strike the officer with the flashlight. 4RP 64-65. Deputy Noel pushed Kwame off of him. 4RP 66-67.

During the struggle between Kwame and Deputy Noel, Novella grabbed Deputy Brunner's shirt in an effort to keep him from assisting Deputy Noel. 5RP 19-23. When Deputy Brunner

broke away from Novella's grasp, she struck Deputy Brunner in the eye with a closed fist, leaving a red mark to his cheek and eyelid. 5RP 20-23, 26. Deputy Brunner attempted to arrest Novella, but co-defendant Soloman Mayfield thwarted his efforts by grabbing Deputy Brunner from behind in a "bear hug." 5RP 23-24. Eventually more police arrived and restored order. 4RP 72-74. All of the events were caught on video. 4RP 51-75.

The State charged Kwame and Novella Harris with Assault in the Third Degree for assaulting Deputies Noel and Brunner, respectively. CP 23-24. The State charged Mayfield with Obstructing a Law Enforcement Officer. CP 24.

3. OTHER RELEVANT FACTS

During voir dire in the trial of Kwame and Novella Harris, the trial prosecutor focused on whether any prospective juror had ever had a negative experience with a law enforcement officer. 3RP 61-75, 106-13. Nine of the jurors² indicated that they had had negative experiences. 3RP 48. The prosecutor spent the majority

² Jurors 6, 8, 10, 11, 17, 19, 27, 31, and 34.

of his time in voir dire following up with these prospective jurors about their negative experience with police. 3RP 61-75, 106-13.

The court excused the first two of the prospective jurors³ for cause. 3RP 67, 71. Either the prosecutor or counsel for Novella Harris used preemptory challenges to strike five of the remaining prospective jurors⁴ who had had a negative police experience. 3RP 139-44. The two last prospective jurors who had had a prior negative experience with police (Jurors 10 and 34) indicated that their prior negative experiences with police would not affect their view of police in this case because the trial did not involve domestic violence (Juror 10) and because this case was investigated by metropolitan police who are more professional than "small-town" police (Juror 34). 3RP 72-74, 113.

The court empanelled a jury of 14 people. Supp. CP ___ (Sub 45A, Jury Trial Clerk's Minutes). Two of the 14 empanelled jurors were randomly designated as alternates before jury selection. 1RP 10; Supp. CP ___ (Sub 45A). The first alternate was in seat 13; the second alternate was in seat 12. 1RP 10; Supp. CP ___ (Sub 45A). The first alternate juror deliberated in the case,

³ Jurors 6 and 8.

⁴ Jurors 11, 17, 19, 27, and 31.

but the second alternate juror was not needed and did not deliberate. 4RP 90; 6RP 52; Supp. CP __ (Sub 45A). One of the prospective jurors who could have been the second alternate juror was prospective Juror 27. 3RP 141. The prosecutor used a preemptory challenge to excuse Juror 27 from seat 12, the second alternate position. 3RP 141-42.

The prosecutor and Juror 27 had the following discussion about her prior negative experience with law enforcement:

PROSECUTOR: Okay. Juror No. 27, you raised your card about a bad experience with a police officer?

JUROR NO. 27: Yes, when I was younger and I 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.

PROSECUTOR: Okay. Does that change how you, that experience change how you view police officers today?

JUROR NO. 27: 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, even though I don't do anything wrong.

PROSECUTOR: Why do you say that?

JUROR NO. 27: 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 law, 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.

PROSECUTOR: Okay. So, you feel like the police are out to get you?

Is that what you are saying?

JUROR NO. 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 can 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 NO. 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 feel when you see a police officer?

JUROR NO. 27: I just want to make sure I am following the law.

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

JUROR NO. 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 NO. 27: It may. I can't say one way or another because I don't really know.

3RP 108-13.

Before the parties exercised any preemptory challenges, the trial court called the parties to a sidebar and asked the prosecutor if he intended to exercise a challenge against any of the four or five African-American prospective jurors in the pool. 3RP 139, 148-49. The defendants were African-American. 3RP 148-49. The prosecutor indicated that of the four or five African-Americans in the jury pool, he intended to exercise a preemptory challenge only against Juror 27. 3RP 148-49. The court asked for a non-race related reason for that preemptory challenge. 3RP 148. The court later summarized this sidebar for the record:

THE COURT: . . . [The Prosecutor] gave me a non-race based reason that [Juror 27] felt apprehensive around, whenever she was around police officers based upon her experience from driving her general experience in general.

Do you wish to add anything to that, Mr. [Prosecutor]?

PROSECUTOR: 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 that it went beyond just her and into her family, that several of her family members felt the same way.

3RP 148-49.

The trial court asked if either opposing counsel had anything to add for the record related to the earlier sidebar. 3RP 149. The

co-defendant's attorney indicated that it was normal to be apprehensive around police and that "her statement was nothing out of the ordinary, and that tends to suggest that there is a Batson⁵ challenge to her." 3RP 149. Counsel for Novella Harris stated simply, "I guess for the record, I would just note an objection as well." 3RP 149.

The court concluded that:

It is my understanding -- well, 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.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO EXERCISE ITS PREEMPTORY CHALLENGE AGAINST JUROR 27.

Harris⁶ claims that the trial court erred by permitting the State to exercise a peremptory challenge against Juror 27. During voir dire, Juror 27 equivocated about whether her prior experiences might affect her view of police testimony. Given that the victims in

⁵ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

⁶ For the remainder of the brief Novella Harris will be referred to simply as Harris.

the case were police, the trial court acted within its discretion in finding that Harris failed to prove purposeful racial discrimination.

"The equal protection clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the jury solely by reason of their race." State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994), (citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

The trial court applies a three-part test when responding to a challenge under Batson. First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006). Second, if the defendant makes a *prima facie* case, the burden shifts to the prosecutor to give a race-neutral explanation for the strike. Id. The prosecutor must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge. Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is

persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." Id. (quoting Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)). Third, the trial court considers the proffered explanation and determines whether the opponent of the strike has proved purposeful racial discrimination. Rice, 546 U.S. at 338. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" Id. (quoting Purkett, 514 U.S. at 768).

a. There Was No *Prima Facie* Case Of Racial Discrimination.

The trial court skipped the first requirement of Batson: that defense must prove a *prima facie* case of racial discrimination. In fact, defense did not even initiate a Batson challenge. Instead, the court brought the parties to a sidebar before either party exercised a preemptory challenge and required that the prosecutor give a race-neutral reason if he intended to exercise a preemptory challenge against any of the four or five African-American jurors in

the pool. 3RP 139, 148-49. The prosecutor said that he planned to strike only one of the African-American prospective jurors:

Juror 27. 3RP 148. The fact that the prosecutor intended to strike a prospective juror of the same race of the defendant, without something more, does not establish an inference of racial discrimination. Therefore, the trial court erred when it bypassed the first step of Batson, since Harris never proved, and the court never found, a *prima facie* case of discrimination.

On appeal, Harris argues that the trial court must have found a *prima facie* case of discrimination because the court addressed the second stage of the Batson analysis. But Harris does not explain how a prosecutor could show racial discrimination before he even made his first preemptory challenge. Neither party had excluded any jurors when the court required that the prosecutor tell the court whether he intended to exercise a preemptory challenge against any of the four or five African-American jurors in the panel. 3RP 139, 148-49. Any finding that a juror was excluded based on discriminatory grounds -- prior to any juror being excluded -- would be clearly erroneous.

Even if the trial court had waited for the prosecutor to strike Juror 27, before inquiring about a race neutral reason, Harris failed

to prove a *prima facie* case of racial discrimination. Harris relies exclusively on State v. Hicks, 163 Wn.2d 477, 490, 181 P.3d 831 (2008), to argue that the trial court has discretion to find a *prima facie* case if only one identified minority is excluded from the jury. But Harris fails to note that in Hicks the prosecutor moved to strike the sole remaining minority juror without ever asking any questions of him. Id. at 491-92. The Hicks Court held that it would not disturb the trial court's discretionary finding that there was a *prima facie* case of discrimination in such a circumstance. Here, Juror 27 was not the only remaining African-American prospective juror and was questioned extensively by the prosecutor. Accordingly, Hicks is inapposite.

Further, in State v. Rhone, our Supreme Court clarified that the removal of one remaining minority juror does not automatically establish a *prima facie* case without a factual finding by the trial court. 168 Wn.2d 645, 655-56, 229 P.3d 752 (2010). The Court held that not only must the defendant establish sufficient evidence that the State challenged a prospective juror from a racially cognizable group, but, the defendant must also provide "something more" to "draw the inference that discrimination has occurred." Id. A non-exclusive list includes:

Such circumstances [as] (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

Id. at 656 (citing State v. Wright, 78 Wn. App. 93, 100-01, 896 P.2d 713 (1995)). Our Supreme Court held that a trial court "should not elicit the prosecutor's race-neutral explanation *before* determining whether the defense has established a prima facie case. To do so would collapse the Batson two-part analysis. If the trial court concludes no prima facie case exists, the prosecutor is not required to offer a race-neutral explanation." Id.

Here, the trial court made no express finding and had no basis to conclude that there was a *prima facie* case of discrimination. Without "something more" to infer discrimination, the trial court should not have required the prosecutor to state his reason for striking Juror 27.

The facts of our case do not evidence that there was "something more" to indicate discrimination. By striking only one of the four or five African-American members of the jury pool, the prosecutor did not strike a racially heterogeneous group of venire members. He did not use a disproportionate use of strikes against a particular racial group. While the record is silent as to the number of African-Americans ultimately empanelled on the jury, there is no reason to conclude that there was not minority representation. There is also no evidence that the prosecutor previously challenged jurors based on discriminatory reasons. The prosecutor followed up with each prospective juror who answered the court's question that he or she had a bad experience with police. The prosecutor exercised only one challenge against an African-American. His challenges were consistently used against those who could not confirm that their bad experiences with police would not affect their view of police in this case. These facts all show that there was no basis to show the prosecutor's racial discrimination.

The trial court should not have skipped the first step of Batson. The court on its own initiative required that the prosecutor give its reasons for any strikes before he had yet challenged a prospective juror from a racially cognizable group. While a court

may raise a *sua sponte* Batson claim when the record supports a *prima facie* case, there was not an inference of “something more” to show discrimination here. Accordingly, this Court should find that Harris's Batson claim fails. See State v. Evans, 100 Wn. App. 757, 569-75, 998 P.2d 373 (2000) (holding that a *sua sponte* court directive that a party provide a race-neutral reason for a strike when the record does not support a *prima facie* case collapses a Batson challenge). The trial court misapplied Batson and never found that Harris proved a *prima facie* case of racial discrimination, and his claim fails.

b. There Was A Race-Neutral Reason To Remove Juror 27.

After erroneously skipping the first step of Batson, the trial court requested, and the prosecutor gave, the reason that the prosecutor planned to excuse Juror 27. 3RP 148-49. The prosecutor had asked Juror 27 if her and her family's bad experiences with police would affect her view of a police officer testifying in this case. Juror 27 said that "it may" and that she "can't say one way or another because I don't really know." 3RP 113. The prosecutor explained to the court how Juror 27 "gave answers

that indicated apprehensiveness around police officers and perhaps distrust, and also suggested that it went beyond just her and into her family . . ." 3RP 148-49. Because there was a reason for exercising the preemptory challenge that was not "inherently discriminatory," the State met its burden under the second step of Batson. See Rice, 546 U.S. at 338; Wright, 78 Wn. App. at 101-02.

c. The Trial Court Properly Determined That Harris Failed To Prove Purposeful Discrimination.

The trial court found that the prosecutor's race-neutral explanation for striking Juror 27 was valid, and thus not pretextual.⁷ 3RP 149. The trial court's determination on the third part of the test is accorded great deference on appeal. Hernandez, 500 U.S. at 364. The evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's

⁷ After providing a race-neutral explanation for that strike, the court proceeded to address the second and third steps of Batson. Once a prosecutor offers a race-neutral explanation for the strike and the trial court rules on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a *prima facie* case is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvone, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). While the issue of a *prima facie* case "does not become moot merely because the prosecutor makes an offer of proof as to his or her race-neutral explanation," where, as here, the trial court finds that there was not intentional discrimination, then a Batson claim fails and any *prima facie* issue is moot. See Wright, 78 Wn. App. at 101.

province. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). The trial court's finding will be upheld unless it is clearly erroneous. Luvene, 127 Wn.2d at 699.

Harris has not shown that the trial court's ruling was clearly erroneous. Juror 27 equivocated about whether her negative experience with police would affect her trust of police in this case. Since police officers were the victims in this case, it is understandable that the prosecutor would have serious reservations about empanelling a juror whose deliberations might be affected by prior bad experiences with police. All prospective jurors who indicated that their experience might negatively affect their view of police were excused by the prosecutor, Harris's counsel, or the Court. 3RP 67, 71, 139-44. When the trial court inquired if the prosecutor intended to strike any of the four or five African-American prospective jurors, Juror 27 was the only one. 3RP 148. The trial court did not err in finding that the defense failed to establish that the prosecutor had an improper racial motive for striking Juror 27.

Harris, citing Miller-El, 545 U.S. at 238, argues for the first time on appeal that the prosecutor's racial motive for striking Juror 27 is demonstrated by the prosecutor's decision not to strike

Jurors 10 and 34, who he argues were similarly situated to Juror 27. This argument is flawed. Juror 10 and Juror 34 indicated that their prior negative experience with police would not affect their view of police in this case. 3RP 72-74, 113.

When asked about her negative experience with police, Juror 10 clarified that "my experience[s] personally have been pretty good" with police. 3RP 72. Juror 10 explained that she was upset that the Grant County⁸ police had not responded aggressively to aid her friend, a domestic violence victim, who was ultimately killed by her batterer. 3RP 72-73. Juror 10 was clear, however, that her feelings would not affect her view of police officers in this case. 3RP 74. She explained that it had been six years since her friend was killed, that she had positive experiences herself with police, and that she could set aside her prior negative experience because the case did not involve domestic violence. 3RP 74.

Moreover, Juror 10 was upset that police had not been aggressive enough in responding to reports of violence. This is unlike Juror 27, who felt that police had been overaggressive in

⁸ The transcript refers to "Granite County" but it appears that this was either an error in the record or the name was misspoken by Juror 10. 3RP 73.

investigating her and her family. It makes sense that the prosecutor would want to keep Juror 10, who personally had good experiences with law enforcement and wanted police to respond aggressively to calls for help, particularly since this trial involved police responding to a report of an assault. Any comparisons between Juror 27 and Juror 10 are misplaced.

Like Juror 10, Juror 34 also indicated that his prior bad experience with law enforcement would not affect his view of police in this case. After discussing how he suffered "small town harassment" from police who are "bored and have nothing else to do sometimes," Juror 34 explained that his view toward the police in this case would be different. 3RP 113. Juror 34 explained how "small town" police lack the professionalism that police in "metropolitan areas" maintain. 3RP 113. When asked specifically almost whether any of his prior experiences with police would change his view of police, Juror 34 said, "No, not really." 3RP 113.

Juror 27, on the other hand, left a lingering doubt as to whether her experience with police would negatively affect her view of police in this case. This was not the case with Juror 34. He saw the police in this case to be more professional than those with

whom he had prior experiences. He indicated that any prior bad experience would not affect his view of police here.

The fact that Jurors 10 and 34 remained on the jury does not show that Harris proved discriminatory intent by the prosecutor. Neither Juror 10 nor 34 expressed the same equivocation as Juror 27, who could not say whether her negative experiences with police would affect her view of police officer's testimony. 3RP 112-13. Contrary to Harris's claims, the fact that the prosecutor kept Jurors 10 and 34 does not show that he had discriminatory intent. Rather, it shows that the prosecutor consistently challenged prospective jurors who indicated that their negative experiences might affect their view of police in this case, and kept jurors who viewed police in a more favorable light.

This Court should reject Harris's claim that the State's failure to strike Juror 10 and Juror 34 reveals his racial motivation to strike Juror 27. The trial court properly determined that Harris did not prove purposeful discrimination in this case. Because Harris cannot show that this finding was clearly erroneous, his claim fails.

2. ANY ERROR WAS HARMLESS.

Had she not been struck, Juror 27 would have been the second alternate juror, and she would never have deliberated in this case even if the prosecutor had not exercised a peremptory challenge against her. Accordingly, any possible error by the court in permitting the strike was harmless beyond a reasonable doubt.

Before any jury selection, the trial court randomly selected two alternative jurors. 1RP 10. After selecting the first alternate juror, Juror 27 was called as the potential second alternate juror, and the State exercised its peremptory challenge. 3RP 141. The second alternate juror was ultimately never used in the case; the court excused the second alternate juror before deliberations began. 6RP 52.

The United States Supreme Court has recognized that most constitutional errors can be harmless and applies harmless error analysis to a wide range of errors. Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). A limited number of structural errors are not subject to harmless error review because they affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Fulminante, 499 U.S. at 310. When such an error occurs, the "criminal trial

cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. If there was any error in excusing Juror 27, it does not fall within this limited class of errors.

In State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), this Court held that an error depriving the defendant of a peremptory strike against an alternate juror was harmless because that juror never deliberated. Similarly, numerous courts have recognized that constitutional error during the selection of jurors is subject to harmless error review if the error concerned an alternate juror who never would have deliberated. United States v. Lane, 866 F.2d 103, 106 n. 3 (4th Cir.1989) (noting defendant would not be prejudiced if no alternate juror deliberated); Nevius v. Sumner, 852 F.2d 463, 468 (9th Cir.1988) (finding any error concerning alternate juror harmless because no alternate juror was called to serve in the case); State v. Ford, 334 S.C. 444, 449, 513 S.E.2d 385, 387 (S.C. App. 1999) ("Any Batson violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations").

These decisions make sense. "[I]f no alternate deliberates on the verdict . . . the improper exclusion of an alternate juror is not a structural error because it is clear the error never affected the makeup of the petit jury that decided to convict the defendant."

Carter v. Kemna, 255 F.3d 589, 592-93 (8th Cir. 2001). As the Connecticut Supreme Court has explained:

There are cases holding that structural error analysis is appropriate when addressing a case in which the trial court refused to allow the defendant to exercise a challenge to a juror who ultimately was seated and not excused. There is a critical distinction, however, between such cases and one in which the improperly seated juror remains an alternate and, therefore, had no possible impact on the deliberative process, as in the present case. In such cases, the alternate juror who should not have been included on the panel had no "pervasive effect on the trier of fact..." In the present case, because K.N. had no opportunity to sit as a fact finder and, therefore, to influence the deliberative process, the impropriety is subject to a harmless error analysis and, indeed, was harmless.

State v. Latour, 276 Conn. 399, 414-15, 886 A.2d 404, 414-15 (2005) (internal citations omitted).

Here, even if the court erred in permitting the State to strike Juror 27, any error was harmless. Juror 27 would have never deliberated as a juror in the case, and her exclusion from the jury had no possible impact on the case.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Harris's conviction.

DATED this 29th day of September, 2010.

Respectfully submitted,

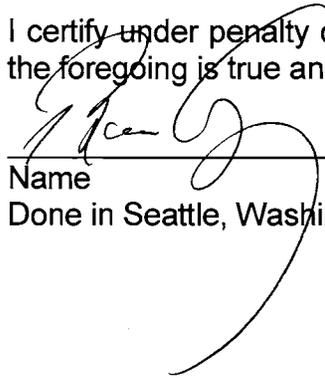
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
MICHAEL J. PELLICCIOTTI, WSBA #35554
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison St., Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. NOVELLA HARRIS, Cause No. 64772-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

09-30-10

Date