

65605-8

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No. 65605-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JARVIS REMONE GIBBS,

Appellant.

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

The Honorable Theresa Doyle

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

 1. THE PROSECUTOR’S USE OF A PEREMPTORY CHALLENGE TO STRIKE THE LONE AFRICAN-AMERICAN JUROR VIOLATED EQUAL PROTECTION..... 3

 a. The use of race or other protected class status to strike a potential juror violates Equal Protection under the Fourteenth Amendment. 6

 b. The prosecutor’s proffered reasons for challenging Juror No. 1 were pretextual..... 10

 2. THE PROSECUTOR’S INTENTIONAL MISSTATEMENT OF THE PRESUMPTION OF INNOCENCE TO THE JURY VIOLATED MR. GIBBS’ RIGHT TO DUE PROCESS 15

 a. Mr. Gibbs had a constitutionally protected right to a fair trial free from prosecutorial misconduct. 16

 b. The presumption of innocence lasts until the jury finds the State has proven the offenses beyond a reasonable doubt. 18

 c. The prosecutor’s argument warrants reversal. 20

3.	MR. GIBBS' CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE POLICE OFFICER TOLD THE JURY MR. GIBBS HAD INVOKED HIS RIGHT TO SILENCE.....	23
	a. A person possesses a constitutionally protected right to silence on which the State may not comment.	25
	b. The record in Mr. Gibbs' case shows the State improperly commented on his silence to imply guilt.	29
	c. The error was not harmless, requiring reversal.	30
E.	CONCLUSION	31

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....	1, 25, 26, 28
U.S. Const. amend. VI.....	2, 19
U.S. Const. amend. XIV	passim

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 9	25
----------------------------	----

FEDERAL CASES

<i>Arlington Heights v. Metropolitan. Housing Development Corporation</i> , 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)	6
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)	passim
<i>Berger v. United States</i> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1934)	16, 17
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	30
<i>Coffin v. United States</i> , 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895)	19
<i>Dodson v. United States</i> , 23 F.2d 401 (4th Cir. 1928).....	20
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)	17
<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)	18
<i>Griffin v. California</i> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)	25

<i>Hernandez v. New York</i> , 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)	8
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	19
<i>Leland v. Oregon</i> , 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952)	19
<i>Mahorney v. Wallman</i> , 917 F.2d 469 (10th Cir. 1990).....	20
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)	25
<i>McClain v. Prunty</i> , 217 F.3d 1209 (9th Cir. 2000)	9
<i>Miller-El v. Dretke</i> , 545 U.S. 231, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005)	passim
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	27, 28
<i>Nelson v. Scully</i> , 672 F.2d 266 (2d Cir.), <i>cert. denied</i> , 456 U.S. 1008, 73 L. Ed. 2d 1304, 102 S. Ct. 2301 (1982)	20
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)	19
<i>Smith v. Phillips</i> , 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)	17
<i>Snyder v. Louisiana</i> , 552 U.S. 472, 128 S.Ct. 1203, 1211, 170 L.Ed.2d 175 (2008)	9
<i>Strauder v. West Virginia</i> , 100 U.S. 303, 25 L.Ed.2d 664 (1880)	13
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)	19
<i>United States v. Battle</i> , 836 F.2d 1084 (8th Cir.1987)	10

<i>United States v. Braxton</i> , 877 F.2d 556 (7th Cir. 1989).....	20
<i>United States v. Fleischman</i> , 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950).....	19
<i>United States v. Gaudin</i> , 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)	19
<i>United States v. Jorge</i> , 865 F.2d 6 (1st Cir.), <i>cert. denied</i> , 490 U.S. 1027, 109 S. Ct. 1762, 104 L. Ed. 2d 198 (1989)	20
<i>United States v. Perlaza</i> , 439 F.3d 1149 (9th Cir. 2006)	19
<i>United States v. Vasquez-Lopez</i> , 22 F.3d 900 (9 th Cir. 1994)	10
<i>United States v. Walker</i> , 861 F.2d 810 (5th Cir. 1988).....	20
<i>United States v. Young</i> , 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985)	17
<i>Washington v. Davis</i> , 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)	9
WASHINGTON CASES	
<i>State v. Anderson</i> , 112 Wn.App. 828, 51 P.3d 179 (2002), <i>review denied</i> , 149 Wn.2d 1022 (2003)	21
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	16
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984)....	17, 18
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	25, 26, 28, 30
<i>State v. Fiallo-Lopez</i> , 78 Wn.App. 717, 899 P.2d 1294 (1995).....	20
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979)	27
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	26
<i>State v. Keene</i> , 86 Wn.App. 589, 938 P.2d 839 (1997).....	26

<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996)	26, 29
<i>State v. Luvene</i> , 127 Wn.2d 690, 803 P.2d 960 (1995).....	8
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245, <i>cert. denied</i> , 518 U.S. 1026 (1995)	18
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	18
<i>State v. Trickel</i> , 16 Wn.App. 18, 553 P.2d 139 (1976)	22
<i>State v. Wright</i> , 78 Wn.App. 93, 896 P.2d 713 (1995).....	8
OTHER STATE CASES	
<i>Lingo v. State</i> , 263 Ga. 664, 437 S.E.2d 463 (1993).....	14

A. ASSIGNMENTS OF ERROR

1. Mr. Gibbs' Fourteenth Amendment rights to equal protection and due process were violated by the State's use of a peremptory challenge to excuse the lone African-American juror.

2. Mr. Gibbs' Fourteenth Amendment right to due process was infringed by the prosecutor's misconduct during closing argument.

3. Mr. Gibbs' Fifth and Fourteenth Amendment rights against self-incrimination and his right to remain silent were violated when the investigating police officer testified that Mr. Gibbs invoked his right to silence to imply guilt to the jury.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A party's use of race as a basis to exercise a peremptory challenge violates the Fourteenth Amendment's guarantee of equal protection and due process. Here, over Mr. Gibbs' objection, the State utilized a peremptory challenge to strike the lone African-American in the jury *venire* on the basis that he was sensitive about race issues, had bad experiences with the Seattle Police, did not follow directions and was deceptive about his occupation. Was Mr. Gibbs' right to due process and equal protection violated when the

State's strike was racially based and the rationale asserted by the State was pretextual?

2. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor intentionally misstates the presumption of innocence to the jury during closing argument, the defendant is denied a fair trial. Did the deputy prosecutor's attempt at misleading the jury by misstating the presumption of innocence deny Mr. Gibbs a fair trial?

3. Where a police officer testifies regarding the defendant's invocation of the right to silence, thereby attempting to infer guilt from such silence, the Fifth and Fourteenth Amendment rights against self-incrimination are violated. Did the police officer's statement regarding Mr. Gibbs' invocation of his right to silence violate his constitutional rights against self-incrimination?

C. STATEMENT OF THE CASE

Jarvis Gibbs was charged in the second amended information with two counts of first degree robbery and one count of second degree identity theft. CP 52-53.

Bradley Scot testified that on September 1, 2009, at approximately 1 a.m., he was walking home in the Lake City neighborhood of Seattle when three men assaulted him and took

his wallet. 5/11/2010RP 6-23. Mr. Scott later discovered his VISA credit card has been used the following day to make several transactions. 5/11/2010RP 51-55.

Tyler Grieb testified that on September 8, 2009, at approximately 1 a.m., he was walking home in the Greenlake neighborhood of Seattle when two men, one later identified as appellant Jarvis Gibbs, assaulted him and took his wallet.

5/6/2010RP 73-80.

Mr. Gibbs was subsequently convicted as charged. CP 77-78, 111.

D. ARGUMENT

1. THE PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE TO STRIKE THE LONE AFRICAN-AMERICAN JUROR VIOLATED EQUAL PROTECTION

Mr. Gibbs objected to the State's peremptory challenge to Juror No. 1, an African-American man, on the grounds it was racially based. 5/6/2010RP 67. Implicitly finding Mr. Gibbs had made a *prima facie* showing as required under *Batson*, the trial court ordered the State to justify the challenge. *Id* at 68. In justifying the challenge, the prosecutor stated:

There was no pattern of this, of the two I struck one. I don't need to provide a basis, but I will. One is that he

listed himself as a professor on the jury biography. When Mr. Peale asked him what he did for a living he said he was a nurse. I don't know if he intentionally was being deceptive, but those are two different fields.

He told me during voir dire that he was not excited to be here and he raised his hand. He appeared as if he wanted to leave. He presented Your Honor with a hardship telling Your Honor that he had a conflict on Monday. But for me correcting Your Honor that we do not have court on Monday Your Honor was about to let him go because of that.

He's had two bad experiences with police officers when he drives his drop-down red sports car, in his memory. He said that one was being a little aggressive. The other held him for approximately 30 minutes in the middle of downtown, and he said it was very irritating and he was annoyed. We have Seattle Police Department detectives and officers in this particular case.

He admitted to Mr. Peale that he is sensitive about the race issue, and that everyone should be sensitive about the race issue. That's not something that he needed to volunteer, but he did regardless.

And this is another reason, on three occasions that I counted, he asked a question to the Court, to counsel, when it was a period of time where only the Court and only counsel were to ask questions. He did not follow the rules, in my opinion.

So, those five reasons were my basis. I don't need to provide any, but since Mr. Peale challenged Batson, that's for the record. Thank you.

5/6/2010RP 69-70.

The court found the prosecutor's rationale legitimate and overruled Mr. Gibbs' objection:

THE COURT: Okay. Assuming that all that is required to make a prima facie case under a Batson challenge is a challenge to the only person of color on the panel, I'm not sure that that's met here, because the alternate is a person of color. But assuming that we're past that threshold issue, the Court finds that there are legitimate reasons, those that have been given by Mr. Kim for his challenge. Number 1, he's concerned that there may have been a lack of being straight forward with what No. 1's profession is. He also said he wasn't excited to be here and he asked to be excused for hardship. It's legitimate for counsel to be then concerned how good a juror the person would be.

The fourth, bad law enforcement experiences that was a legitimate concern for the prosecutor.

Five, saying he is sensitive about race. I don't know.

Six, he asked questions, and, Mr. Kim thinks that that was a violation of the rules. And that may be a legitimate inference to draw.

So, for all those reasons the Court finds that there are sufficient reasons given that are not race based for the challenge. So I will deny the Batson challenge.

5/6/2010RP 70-71.

a. The use of race or other protected class status to strike a potential juror violates Equal Protection under the Fourteenth Amendment. Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), discriminatory peremptory challenges against a member of a protected class are prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The *Batson* Court noted that “a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause’” and that “[a] single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’” 476 U.S. at 95, quoting *Arlington Heights v. Metropolitan. Housing Development Corporation*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The Court further declared that “[f]or evidentiary requirements to dictate that ‘several must suffer discrimination’ before one could object would be inconsistent with the promise of equal protection to all.” *Id.* at 95-96 (citation omitted).

A *Batson* challenge involves a three-part analysis: (1) the defendant challenging the State’s use of a peremptory challenge must first establish a *prima facie* case of racial discrimination; (2) if

a *prima facie* showing of discrimination is made, the burden shifts to the State to offer a race-neutral reason for its peremptory challenge; and (3) the trial court then decides if the defendant has established that the State's use of the peremptory challenge was purposeful racial discrimination. *Batson*, 476 U.S. at 94-98.

The defendant establishes a *prima facie* case first “by showing that the peremptory challenge was exercised against a member of a constitutionally cognizable group” and second, by “demonstrate[ing] that this fact ‘and any other relevant circumstances raise an inference’ that the prosecutor's challenge of a venire person was based on group membership.” *Batson*, 476 U.S. at 96.

Relevant circumstances which a court may consider include: striking a group of jurors that share race as their only common characteristic, disproportionate use of strikes against a group, the level of a group's representation in the venire as compared to the jury, race of the defendant and the victim, past conduct of the state's attorney in using peremptory challenges to excuse all African-Americans from the jury venire, type and manner of State's questions and statements during venire, disparate impact (i.e. whether all or most of the challenges were used to remove

minorities from jury), and similarities between those individuals who remain on the jury and those who have been struck. *State v. Wright*, 78 Wn.App. 93, 99-100, 896 P.2d 713 (1995).

If the defendant makes out a *prima facie* case of racial motivation, the burden shifts to the State to articulate a race-neutral explanation for the peremptory challenge. *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005). The prosecutor must provide a clear and specific explanation of the reasons for exercising the peremptory challenge. *Miller-El*, 545 U.S. at 238.

Although there may be “any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause . . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].”

Miller-El, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 98 n.2.

The trial court's determination of a *Batson* challenge is “accorded great deference on appeal” and will be upheld unless clearly erroneous. *State v. Luvene*, 127 Wn.2d 690, 699, 803 P.2d 960 (1995), quoting *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

The final step *Batson* requires is that the trial court must weigh the evidence of discrimination against the reasons presented for dismissing the juror to “determine whether the defendant has carried his burden of proving purposeful discrimination.” *Id.* at 359. “An invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . .” *Id.*, quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). “A prosecutor’s motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.” *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000). See also *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 1211, 170 L.Ed.2d 175 (2008) (“The implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the excused juror’s].”). Where a proffered reason is shown to be pretextual, it “gives rise to an inference of discriminatory intent.” *Id.* at 1212.

b. The prosecutor's proffered reasons for challenging Juror No. 1 were pretextual. The use of its peremptory to strike the lone African-American constituted a *prima facie* showing of racial discrimination on the part of the State, thus requiring the State to proffer a race-neutral reason for exercising the challenge.¹ *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose”); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir.1987) (“[T]he striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.”). Mr. Gibbs contends the State’s rationale for challenging Juror No. 1 were not race-neutral reasons.

A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El, 545 U.S. at 252.

¹ Both the State and the court were skeptical that Juror No. 1 was the lone juror. The State and the court inferred that a juror chosen as an *alternate* might be African-American. It was never confirmed by the court whether this person was indeed African-American. Further, this juror was chosen to be an alternate, thus was most likely not going to deliberate and was not a member of the “jury.”

A closer look at the prosecutor's reasons for striking Juror 1 shows a striking ignorance and/or racial animus based on age-old racial stereotypes. The prosecutor's first basis for challenging Juror 1 was based on the juror's employment status. The prosecutor argued Juror 1 was deceptive when he stated he was a nurse but had listed his profession as a professor in the juror biography. 5/6/2010RP 69. The prosecutor made no attempt to clarify this distinction but nevertheless held it against the juror. The court also found this a legitimate concern despite the lack of clarification about what the juror meant and the obvious discrepancy between the two professions. 5/6/2010RP 70.

Nurses teaching at nursing schools and who hold a Ph.D. are referred to as "professors." *See, e.g.* <http://www.son.washington.edu/faculty/alphabetically.asp>. Had the prosecutor questioned the juror further, the juror could have disclosed he taught at nursing school, *ergo* was indeed a professor.

Juror 1 also indicated he had two bad experiences with the Seattle Police Department and the prosecutor was troubled because Seattle Police officers would be testifying at trial. 5/5/2010RP 59. Importantly, Juror 21 also indicated they had a bad experience with the Seattle Police but they were not the subject of

State peremptory challenge. 5/5/2010RP 60. “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. The court also noted this basis as a “legitimate concern for the prosecutor.” 5/5/2010RP 70. But, Juror No. 20 also stated they had bad experiences with the police, though they were not specific as to what police department. 5/5/2010RP 58-60. The State did not use a peremptory challenge to Juror 20 or 21 despite their bad prior police experiences; only Juror 1.

The prosecutor was further concerned about Juror No. 1’s sensitivity on race issues. 5/5/2010RP 81.

Q: Juror No. 1, do you have any sense you might have a prejudice or a bias based in your position of being perhaps the one African American juror?

A. No.

Q. You think I should be concerned about that?

A. I think that you should be concerned that you have jurors who will not pre-judge based on race given the history of our country. I think that you should be concerned that you have people, jurors who will presume that your client to be innocent beyond a reasonable doubt. And that you should always be concerned about the prejudice in a jury.

Though you may not be able to discern it, or do anything about it, you should be sensitive to this possibility.

Q. So you are not offended by my questions?

A. Not at all.

Q. Do you think anyone else should be?

A. I can't speak for - -

Q. Not that they are, but whether they should be or not.

A. I don't think they should be, if they are going to follow those tenants [sic].

5/5/2010RP 80-81.

In fact, contrary to the prosecutor's claim that Juror No. 1 was "sensitive" about the race issue, Juror No. 1 merely stated the obvious: some people are prejudiced and one should be sensitive to that possibility when the defendant is African-American. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny persons of those classes the full enjoyment of that protection which others enjoy." *Miller-El*, 545 U.S. at 237, quoting *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed.2d 664 (1880). Further, the Juror's answer was not inappropriate as noted by the prosecutor. The question posed

asked specifically about being the only African-American juror and whether the juror might have some prejudice or bias as a result. The juror merely answered the question posed; the juror did not inappropriately volunteer anything as he was accused by the prosecutor.

Further, the prosecutor and the court were concerned about the juror's questioning out-of-turn, declaring this "a violation of the rules." 5/6/2010RP 69-71. However, "[t]his nation is great because it encourages rather than discourages strong individuals to participate in our system of justice. It should be no detriment that an individual exhibits the ability to freely think about issues and express himself accordingly." *Lingo v. State*, 263 Ga. 664, 674, 437 S.E.2d 463 (1993) (Sears-Collins, J., dissenting). Juror No. 1's strong personality should not have been a reason for being called "inappropriate."

Finally, both the prosecutor and the court questioned whether a *Batson* challenge was appropriate since an alternate juror who was not struck was also African-American. 5/6/2010RP 68, 70. But it is important to note that in order to show a pattern of racial discrimination in peremptory challenges, it does not require that no members of the minority class be on the jury. In *Miller-El v.*

Dretke, the prosecutor used peremptory challenges to strike all but one of the African-American jurors: one African-American was allowed to serve on the jury. *Miller-El*, 537 U.S. at 342.

The prosecutor's rationale for excusing Juror No. 1 was a mere pretense for striking the only African-American juror on the panel. As a result, Mr. Gibbs submits the challenge was not race-neutral but pretextual to mask a discriminatory purpose. Mr. Gibbs is entitled to a reversal of his convictions and remand for a new trial.

2. THE PROSECUTOR'S INTENTIONAL
MISSTATEMENT OF THE PRESUMPTION
OF INNOCENCE TO THE JURY VIOLATED
MR. GIBBS' RIGHT TO DUE PROCESS

During the rebuttal portion of the State's closing argument, the prosecutor misstated the law regarding the presumption of innocence:

Mr. Peale's right with one thing. The defendant is presumed innocent. *Not right now though.* He was presumed innocent at the beginning of the trial. And you owe that to him. *But the minute the State started producing evidence, the minute that Tyler Gerbe came in on a Thursday morning and testified, he was guilty.*

5/13/2010RP 53-54 (emphasis added). The defense immediately objected and the court reread to the jury the instruction regarding the presumption of innocence:

All right. Jurors, as I instructed you earlier, a defendant is presumed innocent. This presumption continues throughout the entire trial, unless you find during deliberations that it has been overcome by the evidence beyond a reasonable doubt. The State has the burden of proving that a reasonable doubt exists [sic].

5/13/2010RP 54.

a. Mr. Gibbs had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not

unfairly “exploited the Government’s prestige in the eyes of the jury.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88 (1935).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. “The touchstone of due process analysis is the fairness of the trial,” i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was

harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial.

Davenport, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. The presumption of innocence lasts until the jury finds the State has proven the offenses beyond a reasonable doubt. Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of

criminal justice.” (citation omitted)); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“It [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”), *quoting Leland v. Oregon*, 343 U.S. 790, 802-03, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952) (Frankfurter, J., dissenting); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006).² The presumption of innocence continues to operate until overcome by proof of guilt beyond a reasonable doubt. *United States v. Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950).

² See also *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (“We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” (citations omitted)); *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (“The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

The prosecutor's comments here were impermissible because they undermined two fundamental aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and (2) is extinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt. See generally *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990); *United States v. Braxton*, 877 F.2d 556, 562 (7th Cir. 1989); *United States v. Walker*, 861 F.2d 810, 813-14 n. 14 (5th Cir. 1988); *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928); *Nelson v. Scully*, 672 F.2d 266, 269 (2d Cir.), cert. denied, 456 U.S. 1008, 73 L. Ed. 2d 1304, 102 S. Ct. 2301 (1982); *United States v. Jorge*, 865 F.2d 6, 10 (1st Cir.), cert. denied, 490 U.S. 1027, 109 S. Ct. 1762, 104 L. Ed. 2d 198 (1989). As a consequence of the prosecutor's improper argument, Mr. Gibbs' right to due process and a fair trial was violated.

c. The prosecutor's argument warrants reversal.

Prosecutorial misconduct does not require reversal if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of error. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995).

However, the State cannot meet this standard by speculating that a hypothetical reasonable juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

Here, the State cannot prove beyond a reasonable doubt Mr. Gibbs's jury would have reached the same result absent the error. The prosecutor's argument was clearly an intentional misstatement of the presumption of innocence designed to mislead the jury and lessen the State's burden of proof.

Further, the court's curative instruction could not have remedied the error. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Russell*, 125 Wn.2d at 85. This claim regarding the use of curative instructions ignores the behavior of jurors and can lead to absurd results:

If juries could honestly be counted upon to literally construe and obey an instruction that closing arguments are "not evidence," and that their verdict is to be based solely on the evidence, it would make no sense for the jury to do anything but disregard closing arguments altogether. If that were the case it would be impossible to justify the Supreme Court's holding

that a criminal defendant has a constitutional right to give a closing argument. Nor could one possibly justify the rule that it may be reversible error to grant a jury's request to read back portions of the prosecutor's closing. It would also be absurd for attorneys to object at all to improper closings, although we insist that they do so, and redundant for judges to strike improper closing remarks. It would always be pointless for the prosecution to exercise its right to give a rebuttal argument because it would merely be responding to an argument that the jury had been told to disregard. And as one court of appeals has correctly noted, that logic, if taken seriously, "would permit any closing argument, no matter how egregious."

James Joseph Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To Send A Message With Their Verdict?* 22 Am. J. Crim. L. 565, 653-655 (1995) (internal footnotes omitted).

Finally, the prosecutor's argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction. "[A] bell once rung cannot be unring." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Gibbs' convictions and remand for a new and fair trial which comports with due process.

3. MR. GIBBS' CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE POLICE OFFICER TOLD THE JURY MR. GIBBS HAD INVOKED HIS RIGHT TO SILENCE

During the defense cross-examination of Seattle Police detective Jerome Craig, the officer gratuitously told the jury that Mr. Gibbs had invoked his right to silence:

Q: And your [interview] style is based upon your experience and your training?

A: Yes. And the case and people involved, yes.

Q: And you modify the tone of your voice, the phrasing of questions and how you present yourself, and what opportunities you give the speaker to speak depending on the case and individual, fair enough?

A: Well, no, it's not painting a picture, that's not really – actually, I'm just honest with people and let them know what I've got and try to find out what they want to tell me.

Some people, *in this particular case like Mr. Gibbs, didn't want to talk to us about the robbery.*

5/12/2010RP 100 (emphasis added).

Mr. Gibbs immediately objected and moved for a mistrial, noting that this appeared to be an intentional reference by the police officer. 5/12/2010RP 102. The court was clearly troubled by the police officer's remark:

Okay, I'm going to defer ruling on the motion for a mistrial. I'd like to finish up this witness before the end of the day.

Mr. Peale's motion is timely made. The error, if any, is preserved. But, we're going to go ahead with this witness' testimony.

5/12/2010RP 103. The court agreed to give a curative instruction to the jury:

The jury is reminded that a defendant in a criminal case is not required to answer a question asked by a police officer or to give evidence in a criminal case. Disregard any inference to the contrary derived from the last questions and answer by this witness.

Id. at 104-05.

The following day, before the court issued its ruling regarding the mistrial motion, Mr. Gibbs withdrew the motion but did not withdraw his original objection. 5/13/2010RP 2.

Subsequently, following the jury's verdict, Mr. Gibbs moved for a new trial based upon the comment on his invocation of the right to silence. CP 122-26. The court summarily denied the motion. CP 127.

a. A person possesses a constitutionally protected right to silence on which the State may not comment. The United States and Washington Constitutions protect the right of an accused to remain silent. Const. amend. V; Wash. Const. art. I, § 9; *Griffin v. California*, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The Fifth Amendment to the federal constitution provides, in pertinent part, that no person “shall . . . be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V; *Easter*, 130 Wn.2d at 235. The United States Supreme Court ruled that the Fifth Amendment applied to the states via the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The state constitution similarly denotes that no person “shall be compelled in any criminal case to give evidence against himself.” Wash. Const. art. I, § 9; *Easter*, 130 Wn.2d at 235. These provisions have been interpreted to provide the same protections to the accused. *Easter*, 130 Wn.2d at 235.

This provision is broad, protecting the accused’s pre-arrest silence:

The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.

Easter, 130 Wn.2d at 243.

Thus, the State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. *Easter*, 130 Wn.2d at 236. “[A] defendant's pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant's guilt.” *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). “An accused's Fifth Amendment right to silence can be circumvented by the State ‘just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.’” *Easter*, 130 Wn.2d at 236, quoting *State v. Fricks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). “A comment on an accused's silence occurs when the State uses the evidence to suggest guilt.” *State v. Keene*, 86 Wn.App. 589, 594, 938 P.2d 839 (1997).

In *Easter*, over defense objections, the State was permitted to elicit testimony from an arresting officer that the accused “totally

ignored” him when the officer asked about the car accident at issue. 130 Wn.2d at 232. The officer said Easter ignored him and ignored his questions. *Id.* Thereafter, the officer read Easter his *Miranda*³ warnings and, according to the officer, Easter’s attitude changed, he “finally talked and was no longer evasive.” *Id.* at 233. The officer, based on his experience, then characterized Easter as a “smart drunk” who prevented the officer from smelling his breath and observing his eyes by his evasive behavior. *Id.* The prosecutor subsequently repeatedly referred to Easter as a “smart drunk” in closing argument. *Id.* at 234. The trial court denied Easter’s motion for a mistrial based on improper closing argument, which this Court affirmed in an unpublished opinion. *Id.* The Supreme Court subsequently reversed. *Id.*

The *Easter* Court explained that the right against self-incrimination precludes the State from forcing the accused to testify at his criminal trial. *Id.* at 236, *citing State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979) and *Miranda, supra*. Furthermore, the right prevents the State from “elicit[ing] comments from witnesses or [making] closing arguments relating to a defendant’s silence to

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

infer guilt from such silence.” *Easter*, 130 Wn.2d at 236. As stated by the *Miranda* Court:

The prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation

Id., quoting *Miranda*, 384 U.S. at 468, n.37.

The *Easter* Court noted that the Fifth Amendment provides the accused with an on-going right to “remain” silent, both before and after arrest. *Id.* at 238-39. This right is unaffected by the giving of *Miranda* warnings. *Id.* at 238.

When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence.

Id. Ultimately, the *Easter* Court found the defendant’s right to silence

was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about his papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony *Easter* was a smart drunk also violated *Easter*’s right to silence.

Id. at 241. The *Easter* Court next rejected the State’s claim that the error was harmless. *Id.* at 242-43. The officer’s comments were used to insinuate *Easter*’s guilt to the jury. *Id.* at 242. This error

was compounded by the State in closing argument when the State emphasized Easter's pre-arrest silence. *Id.* at 243

b. The record in Mr. Gibbs' case shows the State improperly commented on his silence to imply guilt. In the instant matter, Mr. Gibbs was similarly prejudiced by comments on his right to remain silent, requiring reversal of his conviction.

A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.

Lewis, 130 Wn.2d at 707. Similar to the *Easter* officer's comment that the defendant was a "smart drunk," here the officer gratuitously commented that Mr. Gibbs, like others he had observed, invoked their right to silence, claiming Mr. Gibbs like the others was guilty, otherwise he would have been happy to talk to the police.

In *Lewis*, the Supreme Court found an officer did not comment on the accused's right to silence since, "[t]he detective did not say that Lewis refused to talk to him." 130 Wn.2d at 706. Here, in contrast, the officer plainly stated that Mr. Gibbs "didn't want to talk to us." 5/12/2010RP 100. The fact of the matter is that Mr. Gibbs elected to remain silent and his position was pointed out to

the jury by the officer describing him as not forthcoming about his whereabouts.

As in *Easter*, the State violated Mr. Gibbs's right to silence by permitting the officer to tell the jury that Mr. Gibbs was not talkative and non-responsive to the officers' questions. 130 Wn.2d at 241.

c. The error was not harmless, requiring reversal. As in *Easter*, the State cannot demonstrate that the State's violation of Mr. Gibbs's right to remain silent was harmless. 130 Wn.2d at 242-43; *Chapman v. California*, 386 U.S. 18, 25, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Like *Chapman* in itself, the case against Mr. Gibbs was "was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 25-26. Under these circumstances, the State cannot demonstrate the error was harmless.

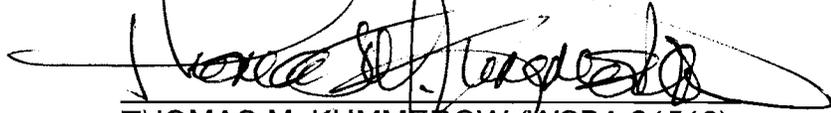
The State's violation of Mr. Gibbs' constitutional right against self-incrimination and his right to remain silent require reversal of his residential burglary conviction. *Easter*, 130 Wn.2d at 243.

E. CONCLUSION

For the reasons stated, Mr. Gibbs requests this Court reverse his convictions and remand for a new trial.

DATED this 27th day of January 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", is written over a horizontal line. The signature is stylized and somewhat cursive.

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65605-8-I
v.)	
)	
JARVIS GIBBS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JANUARY, 2011.

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