

NO. 67332-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

PIERRE SPENCER WADE,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HEAVEY

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the trial court acted within its discretion in finding that Pierre Spencer Wade did not establish a prima facie case of purposeful discrimination with respect to the State's exercise of a peremptory challenge against Juror No. 34.

2. Whether Wade failed to demonstrate purposeful discrimination given the prosecutor's numerous race-neutral reasons for striking Juror No. 34.

3. Whether Wade has not preserved his claim on appeal that the trial judge closed the courtroom because he did not object and it is unclear from the record whether the court closed the courtroom to the public.

4. Whether a defendant's constitutional rights to be present and to a public trial do not apply when a trial judge excuses the jury for the day.

5. Whether the trial judge properly allowed the jury to re-watch the video of the robbery admitted into evidence, even though the court was unable to notify defense counsel.

6. Whether Wade's claim that the jury deliberated in open court is unsupported by the record.

7. Whether Wade has not shown that he received ineffective assistance of counsel because his attorney did not propose a cautionary instruction about dog tracking evidence.

**B. STATEMENT OF THE CASE**

On March 23, 2010, Angelina Dowell<sup>1</sup> was working at 7-11 at 47<sup>th</sup> Street and Stone Way in the Wallingford neighborhood of Seattle. 5RP 12-13.<sup>2</sup> At approximately 2:07 a.m., three people, all wearing dark clothing and hoods, entered the store. 5RP 14-15; Ex. 20. All three individuals had their faces covered; one person was wearing a ski mask, and the other two were wearing red bandanas over their faces. 5RP 14; Ex. 20. At least two of the robbers pulled out handguns and pointed them at Angelina. 5RP 15-16; Ex. 20.<sup>3</sup> They demanded that Angelina give them all the money. 5RP 15-16. One of the robbers pulled the trigger on

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<sup>1</sup> In order to avoid confusion, Angelina Dowell and Richard Dowell are referred to by their first names in this brief.

<sup>2</sup> The State uses the following abbreviations for the trial transcripts: 1RP: August 30, August 31, and September 2, 2010; 2RP: September 7, 2010; 3RP: September 8, 2010 (a.m.); 4RP: September 8, 2010 (p.m.); 5RP: September 9, 2010; 6RP: September 13, 2010; 7RP: September 14, 2010; 8RP: January 27, 2011; 9RP: June 10, 2011.

<sup>3</sup> Angelina testified that all three individuals had guns; in the video only two guns are visible. 5RP 15-16; Ex. 20.

the gun, and Angelina heard a click, yet the gun did not fire.

5RP 16.

Angelina pulled out the cash drawer and put it on the counter. 5RP 16; Ex. 20. The robbers began grabbing the money, including coins, but realized there was too much money to carry by hand. 5RP 16-17. Two robbers picked up the cash drawer and walked out of the store. 5RP 16-17; Ex. 20. The third robber in the ski mask grabbed two 12-packs of Fat Tire beer, and while leaving the store, said to Angelina, "Be safe." 5RP 18; Ex. 20.

The robbery was captured on videotape. 5RP 19-22; Ex. 20.

Angelina's husband, Richard Dowell, was sitting in his car outside the 7-11 store. 5RP 42-43. He saw the robbers enter the store and pull out their guns. 5RP 43-44. He called 911 with his cell phone. 5RP 44. He saw the robbers leave and head north. 5RP 44-45.

Within minutes, a Seattle police officer responded, and, anticipating that a dog track would be used, secured the front door of the store. 3RP 67-68. In a very short time, K-9 Officer Kirk Waldorf set his dog on the scent and was led north, with several other officers following along. 3RP 20-40; 4RP 12-13. Along the way, they saw the cash drawer on the ground. 3RP 38; 4RP 45-46.

The dog led the officers to an enclosed concrete patio, where they discovered Misty Cook hiding. 3RP 43-44. There was a loaded .38 caliber semiautomatic handgun near her leg. 3RP 97, 102-06; 4RP 36, 48-49. After a brief struggle, the officers took Cook into custody. 3RP 44-45; 4RP 15. Cook was wearing dark clothing and had an orange ski mask, a bandana and gloves. 3RP 98-99; 4RP 36-44. A case of Fat Tire beer was found near her. 5RP 59.

The dog continued the track and led the officers to a locked gate. 3RP 45-47. Officer Waldorf and his dog went under the gate and saw Pierre Spencer Wade jump up from behind a bush and begin running. 3RP 47-50, 55; 4RP 17-20. Officer Waldorf identified himself as a police officer and told Wade to stop. 3RP 48-50; 4RP 17-18. Wade leaped over the gate and continued running. 3RP 48. Officer Waldorf and his dog gave chase, and the dog caught up to Wade and bit him on the leg. 3RP 48-49, 55. The police found a case of Fat Tire beer near where they arrested Wade. 4RP 21-24.

Wade had a bandana and gloves in his pants pockets. 3RP 108-09. He had a large amount of coins, totaling over 19 dollars. 5RP 59-60.

The police transported Angelina Dowell to where Cook was detained. Angelina confirmed that Cook was wearing the same clothing as the robber who was wearing the ski mask and had taken the beer. 5RP 22-24. The police then took Angelina to look at Wade. 5RP 25. Angelina looked at Wade and confirmed that he had the same build, height and clothing as one of the robbers. 5RP 26-27.

The State charged Wade with one count of first-degree robbery. CP 1. The State further alleged a firearm enhancement. CP 2; 1RP 3-5.

Trial began on August 30, 2010. After the first jury was selected, the trial court granted Wade's motion for a mistrial based upon delays in getting him dressed in civilian clothing. 1RP 38-48. A few days later, a new jury was selected. 2RP 2-91. The jury found Wade guilty as charged. CP 10-11. This appeal follows.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY REJECTED WADE'S BATSON<sup>4</sup> CHALLENGE TO THE STATE'S EXERCISE OF A PEREMPTORY CHALLENGE AGAINST JUROR NO. 34.**

Wade claims that the trial court erred by permitting the State to exercise a peremptory challenge against Juror No. 34. However, the trial court properly found that Wade had not established a prima facie case of purposeful discrimination. When making his Batson challenge, Wade's trial counsel did not discuss any of the factors relevant to establishing a prima facie case. Instead, he simply claimed that he could not think of a reason to exercise a peremptory challenge against this juror. Given the failure to make a prima facie case and the fact that the prosecutor did not exercise a peremptory challenge against another African-American juror who actually served on the jury, the trial court did not abuse its discretion by failing to presume the prosecutor had some improper racial motive for exercising the strike.

Even if the trial court erred by not finding a prima facie case of purposeful discrimination, the record establishes that the prosecutor had numerous race-neutral reasons for exercising the

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<sup>4</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

peremptory challenge against Juror No. 34. Among other things, the prosecutor noted and the trial court agreed that Juror No. 34 appeared to be overly enthusiastic about serving on the jury. In addition, the prosecutor perceived that Juror No. 34 had bonded with defense counsel, an observation that defense counsel did not dispute. Moreover, Juror No. 34 was the *only* potential juror who had prior negative experience with law enforcement, and in this case, most of the State's witnesses were police officers. Given these facts, Wade has not demonstrated purposeful discrimination, and this Court should reject Wade's Batson claim.

a. Relevant Facts.

There were two African-Americans in the jury pool: Juror No. 5 and Juror No. 34. 2RP 93-94. Juror No. 5 served on the jury that convicted Wade; the prosecutor exercised a peremptory challenge against Juror No. 34. Id.

The prosecutor's first session of voir dire was devoted to a discussion of credibility and the type of evidence that the jurors might expect in a criminal case. 2RP 29-42. The prosecutor offered a hypothetical involving a broken lamp and two children who both denied responsibility. 2RP 31. The prosecutor asked

numerous questions about whether certain additional facts would be valuable in determining the credibility of the two children. 2RP 31-34. Juror No. 34 responded that additional information about prior similar behavior by one of the children would not be helpful in deciding credibility. 2RP 33.

During the second round of voir dire, the prosecutor individually questioned jurors on a range of subjects. 2RP 58-71. The prosecutor followed up on earlier questioning by the judge and asked the jurors about memorable bad experiences with police officers. 2RP 24-25, 61. Jurors No. 34, 43 and 46 responded that they had had such experiences, and the prosecutor briefly questioned them about the potential effect of these experiences on their ability to serve as jurors. 2RP 61-62.

In the last few minutes of the second round, the prosecutor pointed out that he, the defense attorney and the defendant were all minorities. 2RP 69-70. He asked whether some jurors felt that the criminal justice system was not fair to a certain group of people. 2RP 70. He then asked whether any jurors would "cut [the defendant] a little more slack because he's African-American?" 2RP 71. No one answered yes to this question. Id.

When defense counsel began his portion of voir dire, he stated, "I think there was an expectation that Juror No. 34 would say something about the fairness of the system. But I'm not going to come to you." 2RP 71-72.

Defense counsel then asked the jurors whether they wanted to be there. 2RP 81. Juror No. 34 volunteered that he wanted to serve on the jury, explaining, "I want to be here because if myself or my family were ever in that chair they would want somebody, a group of people who were interested in the process, not just thinking, I don't want to be here." 2RP 84.

The prosecutor exercised seven peremptory challenges; his last one was against Juror No. 34. 2RP 86-90. Defense counsel objected. 2RP 90, 93-94. He noted that there were two African-Americans in the jury pool and complained that Juror No. 34 gave "neutral answers." 2RP 93-94. Defense counsel stated that "I can't think of any reason to justify a peremptory here." 2RP 94.

In response, the prosecutor pointed out that he had not used a peremptory challenge against the other African-American juror, Juror No. 5, and argued there was no pattern established. 2RP 94-95. "The case law is clear that there needs to be a pattern, or, if Juror No. 34 was the only African-American then Mr. Swaby

[defense counsel] would have a point for me to put on the record the reasons why." Id. In order "to be safe on appeal," the prosecutor then explained why he struck Juror No. 34:

When Mr. Swaby talked to Juror No. 5 about the quote, unquote, switch, Juror No. 34, without prompting, said, oh, yeah, and started laughing, and there was a definite, shall we say, energy between the two. This is later corroborated when Mr. Swaby called him brother, and he actually started giggling and had a connection there that I saw. He missed a simple corroboration question that I asked about Johnny and Jane, and he said one piece of information whether it was the phone records or the fact that someone has something to lose, would not help him solve this problem.

I believe he said he was not able to reach a verdict on a case.

There was one other issue that I wrote down here as him saying something about negative. He was a little too enthusiastic to be on this jury by him stating that if he or a family member were sitting in Mr. Spencer-Wade's position he would want to be on that particular jury.

So, based on those reasons I did not feel comfortable having him on my jury.

2RP 95.

Defense counsel argued these reasons were illusory. Id. He did not dispute that he had bonded with Juror No. 34, but insisted that all of the jurors had bonded with him. 2RP 95-96. He noted that Juror No. 34 had not stated that he would give special

consideration to Wade due to his race. 2RP 96. He argued that striking fifty percent of the African-American prospective jurors was tantamount to a pattern. 2RP 97.

In response, the prosecutor added that he was concerned that Juror No. 34 had stated that he had a negative experience with law enforcement. Id.

The trial court rejected the challenge. The court first explained that "Mr. Kim [the prosecutor] doesn't have to give reasons not related to race because there was no pattern that was shown." Id. The court further observed, "I would agree with him in that I felt the juror was just a little bit too enthusiastic. And, he did, yes, he did say he had positive and negative wouldn't impact him, but he did have a negative experience with law enforcement." Id.

b. Wade Failed To Establish A Prima Facie Case Of Purposeful Racial Discrimination.

The Equal Protection Clause guarantees the defendant the right to be tried by a jury selected free from racial discrimination. Batson, 476 U.S. at 85. When reviewing a Batson challenge, the trial court undertakes a three-part inquiry to determine whether the

challenged juror is being stricken based on discriminatory reasons.

State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010).

First, a defendant opposing the State's peremptory challenge of a juror must establish a prima facie case of purposeful discrimination. Id. Second, if the defendant establishes a prima facie case, then the burden shifts to the State to articulate a race-neutral explanation for challenging the juror that specifically relates to the case being tried. Id.; Batson, 476 U.S. at 98. Third, the trial court considers the State's explanation and determines whether the defendant has demonstrated purposeful discrimination. Rhone, 168 Wn.2d at 651. Although the final step involves evaluating the persuasiveness of the State's explanation, the ultimate burden of persuasion rests with the defendant. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

With respect to the first step, the defendant must establish a racially discriminatory purpose on the part of the prosecutor.

Batson, 476 U.S. at 93; State v. Thomas, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009). The defendant's burden can be met by showing that the "totality of the relevant facts" in his case gives rise to an inference of discriminatory purpose. Batson, 476 U.S. at 94;

Thomas, 166 Wn.2d at 397. The Washington Supreme Court has identified some factors to consider in determining whether there was purposeful discrimination:

(1) [S]triking 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.

Rhone, 168 Wn.2d at 656. The trial court's ruling on a Batson challenge is accorded great deference on appeal, and will be upheld unless clearly erroneous. State v. Meredith, 165 Wn. App. 704, 710, 259 P.3d 324 (2011).

In this case, defense counsel did not discuss any of these factors when attempting to make out a prima facie case. Instead, he noted that there were two African-American potential jurors and two Asian-American jurors. 2RP 93-94. He briefly mentioned some of Juror No. 34's comments during voir dire and then insisted that he "could not think of any reason to justify a peremptory here." 2RP 94.

Defense counsel's argument was completely insufficient to establish a prima facie case of purposeful discrimination. The fact that defense counsel could not think of a reason to exercise a peremptory challenge against a juror is not evidence that the prosecutor challenged the juror due to his race. If such assertions were all that were necessary, the requirement of a prima facie showing would be rather easily met in any case; defense counsel could simply assert that he or she could not think of a race-neutral reason for striking the juror. Because Wade failed to establish a prima facie case of purposeful discrimination, the trial court properly denied his Batson challenge.

Perhaps Wade's counsel did not discuss the Rhone factors because they did not support his position. The prosecutor did not strike venire members who had race as their only common characteristic - only one of his seven strikes was against an African-American, and he did not use a peremptory strike against the other African-American in the pool, Juror No. 5. In addition, the prosecutor did not exercise a disproportionate number of strikes against African-Americans; he used only one challenge out of seven. African-Americans were better represented in the jury (1 out of 13) than in the venire (2 out of 50). The defense offered

no evidence of past discriminatory use of peremptory challenges by the prosecuting attorney. Finally, nothing about the prosecutor's questions during voir dire suggested intent to discriminate based upon race.<sup>5</sup> Wade did not establish a prima facie case of racial discrimination.

Wade complains that the trial court erred by holding that a prima facie case had not been satisfied because no pattern had been shown. While a pattern of peremptory challenges against members of a racial minority need not be shown, as the factors in Rhone demonstrate, whether there is a pattern is certainly a relevant inquiry in deciding whether a prima facie showing has been made. In this case, the discussion of a pattern was an obvious reference to the fact that the prosecutor did not strike the other African-American juror, who ultimately served on the jury. This was a relevant fact in considering whether the defense had established a prima facie case of purposeful discrimination.

Even if the trial court applied the wrong legal standard in deciding whether a prima facie case was established, this Court

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<sup>5</sup> Wade asserts that during jury selection the prosecutor "was particularly focused on the issue of race." Appellant's Opening Brief at 12. This assertion is contradicted by the record. The prosecutor was allotted two voir dire sessions. 2RP 28-42, 57-71. He briefly discussed race in the last few minutes of the second voir dire session. 2RP 69-71.

may still affirm the trial court's conclusion that a prima facie case of purposeful discrimination was not made. In Meredith, "the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate 'a pattern of exclusion' in order to establish a prima facie case of purposeful discrimination," but the Court of Appeals affirmed because the record showed that Meredith failed to establish a prima facie case of purposeful discrimination. 165 Wn. App. at 714-15.

In Meredith, when attempting to establish a prima facie case, defense counsel made an argument similar to that made by Wade's counsel. After the prosecutor struck the sole African-American juror, Meredith's counsel did not address any of the factors in Rhone. Instead, counsel complained that "nothing in juror 4's answers indicated 'that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror.'" 165 Wn. App. at 713. The Court of Appeals held this argument was insufficient:

[W]ithout this "something more" a court will not ascribe discriminatory motives to the challenge. We recognize that there are a host of other factors, any one of which may determine a trial attorney's choice to remove a venire member, including the tone and inflections in a venire member's voice, as well as non-verbal cues, including eye contact, body

gestures, reactions to other venire members' responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

Id. at 84.

Similarly, in this case, defense counsel made a brief, weak argument attempting to establish a prima facie case. He ignored the factors in Rhone, perhaps because they did not support his position. The trial court did not err by concluding that Wade failed to meet his burden to show a prima facie case of purposeful discrimination.

Finally, on appeal, in his discussion of whether a prima facie case was made, Wade engages in an extended discussion of the prosecutor's stated race-neutral reasons for exercising the peremptory challenge against Juror No. 34. Appellant's Opening Brief at 14-20. However, the prosecutor stated that he was offering his reasons in order to have a complete record on appeal in the event the appellate court disagreed with the trial court's ruling that no prima facie case was established. See State v. Wright, 78 Wn. App. 93, 101, 896 P.2d 713 (1995) (holding that the

prosecutor's offer of the race-neutral reasons for the strike do not render moot the initial issue of whether a prima facie case was established). Only if this Court concludes that a prima facie case of purposeful discrimination was made, should the Court then evaluate the reasons offered by the prosecutor. Accordingly, these are discussed in the section below.

c. The Trial Court Properly Denied Wade's Batson Challenge Given The Prosecutor's Race-Neutral Reasons For Striking The Juror.

Even if Wade made a prima facie showing of discriminatory intent, the trial court properly denied the Batson challenge given the prosecutor's proffered race-neutral reasons. On review, the trial court's Batson determination is accorded "great deference" and "upheld unless clearly erroneous." Felkner v. Jackson, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1305, 1307, 179 L. Ed. 2d 374 (2011); State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). The trial court plays "a pivotal role" in evaluating Batson claims because the third step of the inquiry involves evaluating the prosecutor's credibility, and the best evidence of discriminatory intent is often the demeanor of the attorney exercising the challenge. Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). Further,

race-neutral reasons that invoke a juror's demeanor, are best determined by the trial court who "must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." Id. Determinations of credibility and demeanor are "peculiarly within a trial judge's province" and must be deferred to on appeal absent exceptional circumstances. Id. (citations omitted).

The prosecutor identified a number of reasons motivating his decision to exercise a peremptory challenge against Juror No. 34. At trial, Wade complained that they were "illusory, though he offered little specific argument and did not dispute many of them. On appeal, Wade dissects each reason offered and presumes that each reason must stand alone in justifying the strike. Yet it is the accumulation of concerns and doubts about a particular juror that may prompt a prosecutor to exercise a peremptory challenge. Wade also ignores the deference that must be afforded the trial judge, who had the opportunity to see the juror and hear the prosecutor's reasons and observe the prosecutor's demeanor. This Court should reject Wade's assertions that the prosecutor engaged in purposeful discrimination by striking Juror No. 34.

One reason the prosecutor gave for striking Juror No. 34 was that he "was a little too enthusiastic" to be on the jury, and that he had expressed his desire to serve as a juror by imagining that he or a family member was in Wade's position. 2RP 95. The trial court agreed with this observation, and stated that Juror No. 34 "was just a little bit too enthusiastic." 2RP 97. Though Wade did not dispute this reason below, on appeal, he challenges this reason by engaging in comparative juror analysis. Wade complains that Juror No. 4 also expressed a desire to be on the jury, but the prosecutor did not strike her. Appellant's Opening Brief at 19.

Wade's attempt to compare the level of enthusiasm based upon the appellate record should be rejected. The record does not reflect the tone of voice, inflections, and expressions by the jurors as they talked. As the United States Supreme Court has observed, "We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." Snyder, 552 U.S. at 483. Here, at trial, Wade never suggested that Juror No. 4 was similarly situated to

Juror No. 34. In fact, in responding to the prosecutor's reasons, he never even commented or disputed that Juror No. 34 seemed overly enthusiastic. 2RP 95-97. Juror No. 34's level of enthusiasm cannot be reflected in the cold record, and the trial court's observations are afforded great deference.

In any event, some differences between Juror No. 4 and Juror No. 34 are readily apparent. Unlike Juror No. 34, Juror No. 4 did not state her interest in serving as a juror by placing herself or a family member in the shoes of the defendant. Instead, she stated that she was willing to serve as part of her civic duty and that she could be a good juror because she could be objective. 2RP 29, 82. In contrast, the prosecutor was entitled to be concerned about Juror No. 34, who stated that his desire to serve on the jury was motivated by thinking about the possibility that he or a family member would be a defendant.

Another reason the prosecutor offered for exercising the peremptory was that Juror No. 34 had memorable negative experiences with law enforcement. Only two other jurors indicated that they also had such experiences, and Juror No. 34 was the only one who had the potential to serve on the jury. 2RP 61. The other two prospective jurors, Jurors No. 43 and 46, never made it into the

jury box, and the prosecutor did not have reason to use a challenge against them. 2RP 90. Though Juror No. 34 indicated that he did not think his experience would affect him, given that the majority of witnesses in this case were police officers, the prosecutor could remain legitimately concerned about potential bias against the police.

Wade claims that this reason was pretextual - that the prosecutor was "trolling for reasons to exclude Juror No. 34, trying to elicit information that would make Juror 34 unqualified to serve." Appellant's Opening Brief at 31. However, it was the trial judge who first inquired about whether the jurors had memorable good or bad experience with police officers. 2RP 24-25. The prosecutor subsequently followed up and asked all three jurors some brief questions about how their experience might affect them as jurors. 2RP 61-62. The prosecutor did not single out Juror No. 34, but asked the same questions of the two other jurors. There is no evidence that the prosecutor used this issue as a pretext to strike Juror No. 34.

Another reason the prosecutor offered was the bond that appeared to be developing between defense counsel and Juror No. 34, which he described as an "energy between the two."

be helpful to know that Jane was facing no punishment if she was responsible and that Johnny was facing punishment because he had broken two things in the past. 2RP 33. Juror No. 34 responded that this information would not be helpful in judging credibility. Id.

Wade argues that Juror No. 34's answer was correct under ER 404(b). Appellant's Opening Brief at 16, 24. However, the question posed by the prosecutor was not about the admissibility of such evidence. Instead, he simply inquired whether it would be "helpful" when assessing credibility to know about the suspect's past behavior and motivation. The fact that Juror No. 34 did not think such information would be helpful was something the prosecutor could consider in deciding whether to keep Juror No. 34 on the jury.<sup>6</sup>

Wade complains that the prosecutor did not exercise peremptory challenges against several other jurors who gave the same answer. Appellant's Opening Brief at 15-16. This argument

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<sup>6</sup> Wade asserts that by expressing concern about Juror No. 34's answer to the hypothetical question, the prosecutor implied that Juror No. 34 was not intelligent. Wade cites to authorities reporting that claims of low intelligence have been a common tactic used to remove African-American jurors. Appellant's Opening Brief at 24-25. However, here, the prosecutor never stated that he thought that Juror No. 34 was not intelligent. He simply expressed concern about his answer to a hypothetical question.

ignores the fact that the prosecutor's decision as to which juror to strike is not based upon a single answer to a single question, but on all of the juror's answers and behaviors during voir dire. This answer coupled with other observations of this juror - his overly enthusiastic desire to serve on the jury, his bonding with defense counsel, his prior negative experience with law enforcement - were legitimate race-neutral reasons to exercise the strike.

Finally, the prosecutor also expressed concern that Juror No. 34 had served on a jury that did not reach a verdict. In stating this reason, Wade correctly notes that the prosecutor apparently confused Juror No. 34 with Juror No. 5. Neither Wade nor the trial court caught this error. On appeal, Wade argues that because Juror No. 5 was also African-American, this error is evidence of "racially biased decision-making on the part of the prosecutor." Appellant's Opening Brief at 15.

It is a leap to claim that the prosecutor's confusion over answers provided by jurors is evidence that his use of a peremptory strike was based upon racial considerations. There is no reason to presume it was anything other than an innocent mistake. If the prosecutor was truly seeking to strike jurors due to race, would he not have used this reason to strike Juror No. 5?

In sum, the prosecutor identified numerous race-neutral reasons for exercising the peremptory challenge against Juror No. 34. Any fair consideration of these reasons should leave no doubt that Wade failed to demonstrate purposeful discrimination.

**2. THE TRIAL COURT DID NOT VIOLATE WADE'S RIGHT TO A PUBLIC TRIAL AND RIGHT TO BE PRESENT AT TRIAL.**

For the first time on appeal, Wade claims that the trial court closed the courtroom, violating his right to a public trial and his right to be present. These claims are based upon the trial judge's comment that the parties were excused and that without anyone present he would then tell the jurors that the case was recessed for the day. This Court should hold that the claim of error is not preserved because there was no objection, and the record does not indicate whether the parties actually left the courtroom or whether the courtroom was actually closed to the public. In any event, given that the trial judge was simply engaged in the ministerial act of telling the jurors that they were excused, the constitutional right to a public trial and the constitutional right to be present are not implicated. Wade's claims should be rejected.

a. Relevant Facts.

On the afternoon of September 9, 2010, during the testimony of Detective Craig, defense counsel objected when the prosecutor began eliciting testimony about the gun that was recovered. 5RP 60-61. Outside the presence of the jury, defense counsel complained that he had not been told that the detective had test-fired the gun. 5RP 61. After hearing argument, the trial court decided to recess the case until the following Monday in order to allow defense to further investigate the issue. 5RP 72. The judge then stated, "You are all excused. I'm going to bring in the jury and tell them they are excused until Monday morning." 5RP 73. After some further discussion about exhibits, the judge finally stated, "All right. Let's clear the courtroom so I can talk to the jurors without anybody here." Id. There was no objection or response to this comment. The record does not indicate whether anyone else was in the courtroom, whether anyone actually left the courtroom, or what the judge said to the jury.

- b. Wade Has Failed To Preserve His Claim That The Trial Court Committed Constitutional Error When Excusing The Jury.

This Court should refuse to consider Wade's claim that the trial court closed the courtroom and excluded him from the proceedings. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show that constitutional error occurred and caused actual prejudice to his rights. Id.

Issues raised for the first time on appeal are frequently more difficult to analyze because the facts were never developed below. In State v. Kirkpatrick, 160 Wn.2d 873, 879-81, 161 P.3d 990 (2007), the Supreme Court refused to consider the constitutionality of a search where the claim was not raised in the trial court, explaining that it was impossible to assess the record when no factual record was developed. Likewise, in State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007), the Supreme Court held that to fall within the RAP 2.5(a)(3) exception, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of

actual prejudice that makes the error 'manifest,' allowing appellate review."

Here, there is no record that the trial court actually closed the courtroom to the public or Wade. The circumstances surrounding the court's comment do not suggest any reason why the court would have closed the courtroom. The court had decided to recess the case and had excused the parties. There was no discussion of closing the courtroom, nor was there any reason to do so. It is not even clear from the record that counsel or Wade left before the trial court informed the jurors of the recess. One can only speculate concerning to whom the court's comments were directed to and why they were made. Perhaps defense counsel or Wade were already in the process of leaving the courtroom, and the court's comments were directed to the prosecutor in order to ensure that he was not the only party remaining when the jury was brought out. Given the lack of an objection and the limited record, it is not possible to know.

Although the Supreme Court has permitted public trial claims to be raised for the first time on appeal, in each case it was clear

that the courtroom had been intentionally closed to the public.<sup>7</sup> In contrast, the record here offers no reason for a closure and does not clearly indicate that a closure even occurred. As the Supreme Court recently observed, the appellate court does not presume facts in order to justify reversal of a conviction. "[T]he appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." State v. Jasper, \_\_\_ Wn.2d \_\_\_, 271 P.3d 876, 891 (2012) (quoting Barker v. Weeks, 182 Wash. 384, 391, 47 P.2d 1 (1935) (quoting 4 C.J. 736)).

Even assuming that the trial judge closed the courtroom, Wade cannot show that his constitutional rights were violated. Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial.

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<sup>7</sup> See State v. Strobe, 167 Wn.2d 222, 217 P.3d 310 (2009) (the trial court conducted private voir dire in the judge's chambers in order to question prospective jurors who had been victims of sexual abuse or accused of committing a sexual offense); State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (the trial court ordered that the courtroom be closed for the entire 2½ days of voir dire); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) (trial court granted the State's request to clear the courtroom for pretrial testimony of an undercover detective).

Similarly, article I, section 10 provides that “[j]ustice in all cases shall be administered openly....” A defendant's constitutional right to a public trial requires that the court be open during adversary proceedings, including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. State v. Koss, 158 Wn. App. 8, 16, 241 P.3d 415 (2010). However, a defendant does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts. Id. at 17.

This Court recently held that public trial rights did not apply to an in-chambers conference in which the trial court discussed evidentiary objections and made rulings. In re Detention of Ticeson, 159 Wn. App. 374, 381-87, 246 P.3d 550 (2011). The court explained:

Public trial rights “ensure a fair trial,” “foster the public's understanding and trust in our judicial system, and... give judges the check of public scrutiny.” None of these purposes is served by eliminating a trial judge's discretion to handle ministerial or purely legal matters informally in chambers. Rather, public trial rights apply to “adversary proceedings,” including presentation of evidence, suppression hearings, and jury selection. The resolution of “purely ministerial or legal issues that do not require the resolution of disputed facts” is not an adversary proceeding.

Id. at 383-84 (footnotes omitted).

Here, Wade complains that the trial judge closed the courtroom when he told the jury that they were recessed until Monday. However, no case holds that the ministerial act of excusing the jury is subject to the public trial requirements. Indeed, in many instances, the court's bailiff excuses the jury by entering the jury room and telling the jurors that they are free to leave. This Court has recognized that the judge or bailiff may interact with the jury without requiring the presence of the defendant. See State v. Hunsaker, 74 Wn. App. 209, 212, 873 P.2d 546 (1994) (rejecting claim that trial court acted improperly by not notifying defense counsel when the court dismissed the jury for lunch, and then directing them to continue to deliberate).

Due to the lack of an objection and clear record, and the failure to identify an issue of constitutional magnitude, this Court should hold that Wade has failed to preserve any claim of error under RAP 2.5(a)(3).

- c. Even If The Trial Court Violated Wade's Right To A Public Trial, He Is Not Entitled To A New Trial.

Even if Wade's constitutional right to a public trial was violated, it does not automatically follow that Wade is entitled to a

new trial. The right to a public trial right is designed to “ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” Strode, 167 Wn.2d at 226 (quoting Brightman, 155 Wn.2d at 514). The Supreme Court has recognized that the remedy for a specific violation of the right to a public trial must be appropriate in light of the violation that has occurred:

If, on appeal, the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. An error is structural when it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” ... [N]ot all courtroom closure errors are fundamentally unfair and thus not all are structural errors....

State v. Momah, 167 Wn.2d 140, 149-50, 217 P.3d 321 (2009).

Here, any courtroom closure did not render the trial so fundamentally unfair as to constitute structural error. The trial court simply informed the jurors that the case was in recess and they were excused until Monday. The remedy sought by Wade -- reversal of his conviction -- is not commensurate with the alleged violation. As the Supreme Court recognized in Momah, reversal of

Wade's conviction "cannot be the remedy under these circumstances." Id. at 156.

d. The Court Did Not Violate Wade's Right To Be Present At Trial.

In a brief argument, Wade also asserts that the trial court violated his constitutional right to be present during trial. Appellant's Opening Brief at 38. This claim fails; Wade did not have a constitutional right to be present when the court informed the jurors that they were excused for the day.

A criminal defendant does not have a constitutional right to be present at every court hearing that occurs in a case. Under the Confrontation Clause of the Sixth Amendment, a defendant generally has a right to be present and to confront witnesses and evidence offered against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). The Due Process Clause also provides a right to be present in some situations where the defendant may not confront witnesses or the evidence. "[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."

Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Accordingly, a defendant does not have a right to be present during *in camera* or bench conferences between the court and counsel on legal matters. In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); State v. Pirtle, 136 Wn.2d 467, 483-84, 965 P.2d 593 (1998).

Here, in the hearing at issue, the trial court simply excused the jurors for the day. This was a ministerial matter, and involved no ruling from the court. Wade cites no authority for his claim that he had a constitutional right to be present when this occurred. This Court should reject the claim that the trial court's act of excusing the jury is a critical stage of the proceedings.

**3. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ALLOWING THE JURY TO REVIEW THE VIDEO OF THE ROBBERY.**

After the jury began deliberating, they asked to watch the video of the robbery again. The trial judge was unsuccessful in reaching defense counsel, and then arranged to have the prosecutor's paralegal play the video for the jury in open court. Wade claims that the trial court committed reversible error by not

giving him notice of the jury's inquiry, and then by allowing the jury to deliberate in open court while they watched the video.

Wade has not demonstrated that the trial court committed reversible error. The jury was entitled to watch the video again, and, Wade's attorney had encouraged them to do so. Wade suffered no prejudice as a result of the court's inability to inform his attorney of the jury's request. Wade's claim that the jury engaged in deliberations in open court is based upon pure speculation. Neither the paralegal nor the bailiff reported overhearing the jury deliberate. This Court should reject these claims of error.

a. Relevant Facts.

During closing argument, defense counsel encouraged the jury to "look at the video over and over and over again." 6RP 38. The trial court did not allow the video into the jury room. 7RP 2. During deliberations, the jury sent out an inquiry asking to watch the video. CP 35; 6RP 51. The court attempted to give notice of the inquiry to defense counsel and the prosecutor. Id. However, the court was informed that defense counsel was unavailable due

to a medical emergency.<sup>8</sup> 6RP 51. Because the video was on the prosecutor's computer, the court asked the prosecutor to send his assistant, Lori Bridgewater, to play the video. Id.; 7RP 7. The court instructed her not to talk but to simply follow the instructions from the jury when playing the videotape. 6RP 51. The jurors were not told that Bridgewater worked in the prosecutor's office. 7RP 8.

The bailiff set a time limit of 30 minutes. 7RP 3.

Bridgewater played the video for the jury, following their instructions to go frame by frame. 7RP 4. She did not talk with them other than to acknowledge their requests. Id. After about 15 minutes, the jurors asked to look at the clothes, apparently in order to compare them with the video. 7RP 3.

The next morning, the jury announced that they had reached a verdict. 7RP 2. Defense counsel's supervisor appeared and indicated that defense counsel was still in the hospital. 7RP 6. Prior to taking the verdict, the trial court made a record of the circumstances surrounding the playing of the videotape and took testimony from Bridgewater and the bailiff. 7RP 2-6.

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<sup>8</sup> Defense counsel's supervisor later indicated that defense counsel had been taken to the hospital. 7RP 6.

b. The Trial Court Did Not Violate Wade's Right To Notice Of The Jury Request.

In his assignment of error and in a brief argument, Wade claims that the trial court violated his constitutional right to a fair trial by communicating with the jury about its request to watch the video of the robbery without first giving him notice. Appellant's Opening Brief at 1, 39-40. In fact, the trial court attempted to give Wade notice but Wade's attorney was unavailable. Because the video was admitted into evidence and the jury was clearly entitled to watch this video, Wade has not shown that he was prejudiced.

The Supreme Court has held that replaying recordings at a jury's request without notice to counsel is improper. State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Criminal Rule 6.15(f)(1) requires that the trial court notify the parties of any jury question posed to the trial court during deliberations and allow the parties an opportunity to comment upon an appropriate response.

In Caliguri, during deliberations, the jury asked to hear tape recordings, and the court arranged to have an FBI agent replay the recordings. 99 Wn.2d at 505. A portion of the recordings that had been excluded at trial was also inadvertently played for the jury. Id. Only the court, the FBI agent, and jury were present, and Caliguri

was not notified about the jury request until afterward. Id. Citing the principle that "there should be no communication between the court and the jury in the absence of the defendant," the Supreme Court held that it was error to replay tape recordings without prior notice to the defendant. Id. at 508. However, the court held that the error was harmless beyond a reasonable doubt and rejecting the argument that Caliguri was somehow prejudiced by the playing of the excluded portion of the tapes. Id. at 508-09.

Here, the trial court attempted to comply with Caliguri and the court rule by providing notice to defense counsel and the prosecutor of the jury's request. However, defense counsel was unavailable, due to a sudden illness. The record is unclear as to what, if any, steps defense counsel took to arrange for coverage before leaving. Given that the jury simply asked to view an admitted exhibit that defense counsel had encouraged them to watch and which they were clearly entitled to examine,<sup>9</sup> the trial court was not required to wait indefinitely for some response from the defense. Given these unusual facts, this Court should reject

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<sup>9</sup> In fact, the trial court could have simply sent the video along with a machine into the jury room. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (holding that the trial court properly allowed the jury to take audiotapes of the drug transaction with a playback machine into the jury room during deliberations).

Wade's claim that the trial court erred by allowing the jury to watch the video.

Even if the trial court erred by failing to give proper notice of the jury inquiry to Wade, he suffered no prejudice. Cases since Caliguri have recognized that while the trial court should first consult with both counsel before responding to a jury inquiry, the failure to do so can be harmless error. For example, in State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988), the jury posed a legal question about accomplice liability, and the court, without notifying defense counsel, instructed the jury to reread their instructions and continue deliberating. This Court held that the trial court's communication was harmless error because the answer to the jury inquiry was neutral and conveyed no affirmative information. Id. at 420. Though the defendant argued that he was prejudiced because his counsel could have helped craft an appropriate supplemental instruction, the Court rejected this argument, observing that "[defense counsel] could not have required the court to answer the jury's specific inquiry since whether to give further instructions is within the trial court's discretion." Id. State v. Jasper, 158 Wn. App. 518, 538-43, 245 P.3d 228 (2010), aff'd on other grounds, \_\_\_ Wn.2d \_\_\_, 271 P.3d 876 (2012) (holding

that trial court's failure to inform the parties of the jury's inquiry and allow defense counsel an opportunity to participate in developing an appropriate response was harmless).

Here, the jury was entitled to view the video of the robbery, and Wade's attorney encouraged them to watch it. In Caliguri, the Supreme Court held that the defendant suffered no prejudice when an audiotape was played for the jury during their deliberations. 99 Wn.2d at 508-09. Consistent with Caliguri, this Court should hold that the error was harmless beyond a reasonable doubt.

c. The Jury Did Not Deliberate In Public.

Wade also argues that the jury improperly deliberated in public by watching the video and by examining some admitted evidence in the open courtroom. This claim is without merit. The record does not support Wade's claim that the jury engaged in deliberations when they watched the video and examined the clothing.

The Supreme Court has held that the presence of a third person during jury deliberations "violates the cardinal requirement that juries must deliberate in private." State v. Cuzick, 85 Wn.2d 146, 149, 530 P.2d 288 (1975). In the cases where courts have

held that this rule was violated, a third party sat in on the jury's private deliberations. In Cuzick, the trial court allowed an alternate juror to be present during the jury's entire deliberations with instructions that the alternate juror not participate in the deliberations. 85 Wn.2d at 147. Similarly, in Jones v. Sisters of Providence in Washington, Inc., 140 Wn.2d 112, 113, 994 P.2d 838 (2000), an alternate juror sat through the deliberations in the jury room.

In Wade's case, no party sat in on jury deliberations. Instead, the jury asked to watch the videotape of the robbery, and they were brought into the courtroom to do that. While watching the videotape, they also examined clothing that had been admitted into evidence. The examination of evidence does not qualify as deliberations; throughout a trial, after evidence is admitted, jurors may examine it in open court. There is no evidence that the jurors actually deliberated while in open court. In fact, there is no evidence of the substance of any discussion among the jurors other than their instructions to Bridgewater about the playing of the video.

Even if the jury did deliberate in public, prejudice is only presumed; this Court may affirm if it affirmatively appears that there was not, and could not have been, any prejudice. Jones, 140

Wn.2d at 117-18. Here, it is difficult to conceive of what prejudice Wade could possibly have suffered by the presence of Bridgewater and the bailiff while they watched the videotape. Bridgewater did not talk with the jurors other than to acknowledge their directions in playing the videotape, and the jurors were not aware of who she was. The bailiff was not even present the whole time and was doing other work. 7RP 5. The entire time in open court lasted 30 minutes. By contrast, in Cuzick and Jones, the alternate juror sat through the entire deliberations. The record in this case affirmatively establishes that that there was no prejudice.

**4. WADE HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON HIS ATTORNEY'S DECISION NOT TO REQUEST A DOG TRACKING INSTRUCTION.**

Wade claims that he received ineffective assistance of counsel because his attorney did not propose a cautionary instruction about dog tracking evidence. The purpose of a dog tracking cautionary instruction is to warn the jury that they cannot rely upon dog tracking evidence alone in order to convict the defendant. In light of the abundant evidence that established that Wade committed the robbery, defense counsel could make the

reasonable strategic decision that a dog tracking cautionary instruction was unnecessary. In addition, given the evidence corroborating the dog track and the fact that defense counsel was able to argue his theory of the case based upon the instructions given, Wade has not shown a reasonable probability that the results of the trial would have been different if a dog tracking cautionary instruction had been given.

To prevail on a claim of ineffective assistance of counsel, Wade must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

With respect to deficient performance, the court must begin with "a strong presumption counsel's representation was effective,"

and must base its determination on the record below. McFarland, 127 Wn.2d at 335. “[T]his presumption will only be overcome by a clear showing of incompetence.” State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Alvarado, 89 Wn. App. 543, 553, 949 P.2d 831 (1998).

The Washington Supreme Court has held that a criminal conviction cannot be based on dog tracking evidence alone; there must be corroborating evidence identifying the accused as the perpetrator of the crime. State v. Loucks, 98 Wn.2d 563, 566-69, 656 P.2d 480 (1983). Accordingly, a defendant may be entitled to a cautionary instruction that dog tracking evidence standing alone is insufficient for a criminal conviction and that it must be supported by corroborating evidence. State v. Bockman, 37 Wn. App. 474, 483-84, 682 P.2d 925 (1984); State v. Wagner, 36 Wn. App. 286, 287-88, 673 P.2d 638 (1983).

To date, no published case holds that an attorney provides ineffective assistance of counsel by failing to propose a dog tracking instruction. In Wagner, the defendant proposed an instruction on dog tracking evidence, and the Court of Appeals held that the trial court committed error by failing to give it. 36 Wn. App.

at 287-88. The court's brief discussion of the facts suggests that the dog tracking evidence was the primary evidence establishing the identification of the defendant as the burglar. Id.

In Bockman, one of the defendants also requested a dog tracking cautionary instruction, and the trial court refused to give it. 37 Wn. App. at 483. However, the Court of Appeals held that the error was harmless in light of the other evidence corroborating the dog tracking evidence. Id. at 383-84. The court explained that, "even with a cautionary instruction, the jury is permitted to consider the dog tracking evidence in conjunction with the other evidence. It follows that generally where abundant evidence corroborates dog tracking evidence, failure to provide the instruction is of minor significance." Id. at 484.

Here, Wade has not shown that his attorney was deficient by not proposing a dog tracking cautionary instruction because there was no realistic danger that the jury might convict him based upon the dog tracking evidence standing alone. There was substantial other evidence that Wade was one of the robbers: (1) in the middle of the night and minutes after the robbery, he was found a short distance from the 7-11 store hiding in a backyard, (2) he fled when the police approached and told him to stop, (3) he was wearing

clothing similar to that of the robbers, (4) he had an usually large amount of coins in his pockets, and (5) Angelina Dowell confirmed that he was dressed like one of the robbers. The purpose of the dog tracking cautionary instruction -- to warn the jurors that they could not rely upon the dog tracking evidence alone -- would not have been served in this case. In light of all the other corroborating evidence, defense counsel could make the reasonable strategic decision that a dog tracking cautionary instruction was unnecessary.

In addition, for these same reasons, Wade cannot show that if a dog tracking instruction had been given, there is a reasonable probability that the outcome would have been different. As this Court noted in Bockman, when abundant evidence corroborates dog tracking evidence, the failure to provide a cautionary dog tracking instruction is of "minor significance." 37 Wn. App. at 484. Here, there was abundant evidence corroborating the dog tracking evidence, and a dog tracking instruction was unnecessary.

In addition the Washington Supreme Court has held that the failure to request a particular jury instruction will not establish ineffective assistance of counsel if defense counsel is able to argue his theory of the case based upon the instructions given. State v.

Cienfuegos, 144 Wn.2d 222, 224-30, 25 P.3d 1011 (2001). Here, based upon the instructions given, Wade was able to argue his theory of the case. He has not shown sufficient prejudice to meet the second prong of the Strickland test.

**D. CONCLUSION**

This Court should affirm Wade's conviction and sentence.

DATED this 10<sup>th</sup> day of April, 2012.

Respectfully submitted,

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By:   
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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 Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. PIERRE SPENCER WADE, Cause No. 67332-7-I, 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.

U Brame  
Name  
Done in Seattle, Washington

4/10/12  
Date