

NO. 36324-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GEORGE W. SCANLAN, APPELLANT
ANTWONN D. WASHINGTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 06-1-01062-2

No. 06-1-01064-9

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

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STATE OF WASHINGTON
BY _____
DEPUTY

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying defendant's *Batson* challenge where the State provided a race neutral explanation (the juror's prior negative experience with law enforcement and hostile body language) and the court concurred in the prosecutor's observations? (Appellant Washington's Assignment of Error No. One).
2. Did the trial court properly exercise its discretion when it allowed State witness Travis Bride to invoke his Fifth Amendment privilege and where the court refused to strike Bride's testimony after this finding, where the record shows that Bride had a genuine issue regarding providing further evidence of his illegal drug activity and where most of Bride's testimony was cumulative? (Appellant Washington's Assignment of Error No. Two).
3. Did the State properly charge defendant under the current version of the burglary statute, RCW 9A.52.020, thus putting him on notice to all of the essential elements of the crime? (Appellant Scanlan's Assignment of Error).

B. STATEMENT OF THE CASE.

1. Procedure¹

a. SCANLAN.

On March 6, 2006, GEORGE W. SCANLAN, was charged by information in Pierce County Superior Court cause No. 06-1-01062-2, with first degree felony murder (count I), first degree burglary (count II), first degree robbery (counts III & IV), second degree assault (V), second degree arson (VI) and first degree unlawful possession of a firearm (VII) for his involvement in a home invasion robbery. S-CP 1-6. The first five charges contained weapon enhancements.

SCANLAN was convicted of first degree felony murder, first degree burglary, one count of first degree robbery, all with firearm enhancements, and second degree arson and first unlawful possession of a firearm. S-CP 81-88.

SCANLAN received a standard range sentence as follows 480 months (Count I), 96 months (Count II), 132 months (Count III), 72 months (Count VI), 48 months (Count VII), concurrent to each other, and three 60 month firearm enhancement consecutive to each other, for a period of total confinement of 660 months plus 24-48 months community custody on Count I and 18-36 months on count II, II, and VI. S-CP 84-85.

¹ This is a consolidated matter: WASHINGTON – 06-1-01064-9 and SCANLAN – 06-1-01062-2. This brief is the State's response to both matters.

b. WASHINGTON.

On March 6, 2006, ANTWONN DEMETRIES WASHINGTON was charged with first degree felony murder (count I), burglary in the first degree (Count II), robbery in the first degree (Count III), robbery in the first degree (count IV), assault in the second degree (count V), arson in the second degree (count VI). W-CP 1-6. Counts I-V all contained firearm enhancements. W-CP 1-6.

WASHINGTON was convicted of first degree felony murder, first degree burglary, one count of first degree robbery, all with firearm enhancements, and second degree arson. W-CP 69-80.

WASHINGTON was sentenced to 360 months on Count I, 60 months on Count II, 84 months on Count III, and 36 months on Count VI, all concurrent. Three 60 month firearm enhancements were imposed, consecutive to each other for a total of 540 months. W-CP 69-80.

2. Juror Selection

The court summonsed 78 jurors for juror selection in this matter and voir dire commenced on February 22, 2007. Supp. RP 2, 1/22/07.² During voir dire, several perspective jurors related that they had unpleasant experiences with police officers – some the State moved to

² All citations to the verbatim report of proceedings in this matter include the designated page number, along with the date of the hearing. E.g. RP 816, 3/21/07. The voir dire was transcribed as supplemental transcripts and this brief will cite to these three volumes as “Supp. RP #, date.”

remove for cause, and others after rehabilitation the State did not motion to remove for cause. Supp. RP 2, 2/22/07.

No. 72 stated that she did not think she could be fair in a criminal case because both her mother and her uncle owned a smoke shop and the shops were raided several times and she was arrested. Supp. RP 147, 2/22/07. The court granted the State's motion for removal for cause. Supp. RP 149, 2/22/07.

No. 74 stated that she had a son who spent almost two years in prison and she felt that the prison system did not provide her son with what he needed for rehabilitation and that she would be hesitant to send anyone to prison. Supp. RP 156-57, 2/22/07. The State asked to have her removed for both hardship (child care concerns) and for cause. Supp. RP 159, 2/22/07. The court granted on both bases. Supp. RP 159, 2/22/07.

No. 33 was removed without questioning. Supp. RP 168-170, 2/22/07. No. 33 was caught with drug paraphernalia while trying to enter the courthouse through security. Supp. RP 168, 2/22/07. When there was inquiry from security as to usage of marijuana, the man responded that he "smoked it whenever he wanted to and his last usage was a couple of days ago." Supp. RP 168, 2/22/07. Defense counsel Browne cautioned the court that they likely could not ask him questions regarding the paraphernalia without advising him of his rights. Supp. RP 168, 2/22/07. The prosecutor echoed this concern and asked to have him removed for cause because the juror had admitted to use of an illegal substance and that

the State was concerned that the juror may be using it throughout the course of the trial. Supp. RP 169, 2/22/07. Counsel Whitener and Counsel Browne stated that they would defer to the court, but Browne stated that he was concerned that the venire would be losing one of only two remaining African Americans and that this may “become an issue later if the state does challenge the remaining African American.” Supp. RP 170, 2/22/07. The court granted the motion for cause. Supp. RP 171, 2/22/07.

No. 8 was convicted of DUI and was on a current deferred prosecution. Supp. RP 248, 2/26/07. He stated that he was treated fairly by the trooper and that he held no grudge. Supp. RP 249, 2/26/07. No motion for cause was made. Supp. RP 255, 2/26/07.

No. 9 indicated that he had both positive and negative experience with law enforcement. Supp. RP 266, 2/26/07. He reported that he had been pulled over and had to submit to an alcohol test and that the officer was a little abrasive. The experience would not affect how he decided this case. Supp. RP 267, 2/26/07. He stated that the experience happened almost 20 years ago. Supp. RP 267, 2/26/07.

No. 17 had been convicted twice of DUI and the last one was in 1995 - locally. Supp. RP 334, 2/26/07. He related that everything went quite well when he was arrested all the “way up to the very end when I got the ticket.” Supp. RP 334, 2/26/07. He did not believe he deserved the ticket. Supp. RP 335, 2/26/07. When the prosecutor asked him whether

who he feels would “carry over into this case” the juror responded no, that it turned out to be a blessing and that he was grateful for the day that he was pulled over. Supp. RP 337, 2/26/07.

No. 11³ explained that he had been arrested in 2002 in Pierce County for a verbal argument with his girlfriend and “before I knew it, they put handcuffs on me and sent me here to the jailhouse, where I was for a day and they let me go.” Supp. RP 289-90, 2/26/07. It was believed that Tacoma Police Department made the arrest. Supp. RP 290, 2/26/07. No. 11 was unsure how the matter was resolved, he knew he was charged and had to go to anger management. Supp. RP 290-91, 2/26/07. When the prosecutor asked if he was accused of hitting his girlfriend, No. 11 responded, “No. I did not hit her. There was no hitting. All that they said was – the police said the reason why he handcuffed me was I had letters . . . And he said he saw me swinging the envelopes at him, so he thought I was going to hit him.” Supp. RP 291, 2/26/07. When asked whether it was a good experience No. 11 responded:

Definitely, yes, it was not a good experience. He put a handcuff on me, and I told him the handcuff was not right. Still the mark is still here, and it’s been four or five years now. And I told him it was too tight. And the words he said to me is not something I want to repeat. That wasn’t a good experience for me.

Supp. RP 292, 2/26/07.

³ Juror No. 11 is the basis for the *Batson* issue in this appeal.

When asked whether he would give less weight to what they have to say based upon his experience he said, "I'll have to wait for that." And then went onto explain that he had some police officers as friends. Supp. RP 293, 2/26/07. No. 11 reiterated that he believed he was treated unfairly by the police officer. Supp. RP 293, 2/26/07. No. 11 articulated that he thought the experience would not affect his ability to listen to "any evidence you hear in a case where there are police officers." Supp. RP 295, 2/26/07. However, he felt that the whole "process" of what happened to him was "useless," and that it was a waste of taxpayers' money. Supp. RP 295-96, 2/26/07.

The State exercised a peremptory challenge against No. 11. S-CP 111-12. Defendant WASHINGTON raised a *Batson* challenge, arguing that the "state is attempting to peremptory challenge the only African American on the jury." Supp. RP 397, 3/12/07. The State responded that it did not believe that this was the only African American juror left on the pool. Supp. RP 397, 3/12/07. This was later confirmed, and No. 24, was sworn in as a juror in this case. Supp. - 451, 3/12/07. The prosecutor explained:

This is not based upon his race. This is based on his response to questioning about the arrest that he had in 2002 for a domestic violence, which he described as being a verbal argument that he had with his girlfriend and that he was subsequently arrested, he felt, unjustly and, in fact, indicated that he still had handcuff marks on his wrists. When questioned further, he felt he was arrested because he

had turned toward the officer with some mail in his hand that that was somehow an assault on an officer.

I excused Juror Number 17. He had a previous arrest for DUI which he felt was unjust and felt that he hadn't been treated fairly. Juror No. 11 indicated that he didn't believe that he was treated fairly in this situation, and that's the sole reason for the state exercising its peremptory challenge. It has nothing to do with his race.

RP 398.

The prosecutor further explained:

Your Honor, Juror Number 11, in response to my questioning, appeared to be quite upset and hostile towards my questioning about that situation. In response to defense questioning, he indicated that he thought the process was useless, didn't require him to be arrested, it was a waste of taxpayer's money. These are all legitimate reasons for the state having concern about a person of that mind-set sitting on this jury or any criminal jury, and it has absolutely nothing to do with this juror's race. It has everything to do with the situation that he was in and his mind-set and beliefs about what happened in that situation.

RP 400-401.

The court ruled:

It's clear to me that the peremptory challenge by the state is not racially motivated. The reason I say that is because we have the juror's own statements about his unfair treatment in his 2002 arrest for domestic violence, where he felt he had to show us the marks on his wrists from being cuffed. It's true, as Ms. Whitener said, he does know other police officers and has them as friends, but this appears to me to

be a persuasive reason to exercise a peremptory challenge against him. So I'll deny the **Batson** challenge to Juror Number 11.

Supp. RP 404, 2/27/07.

3. Contempt Motion.

During cross examination of witness Travis Bride, Washington's counsel began to ask specific questions regarding the nature of Bride's drug dealing, at which time Bride invoked his Fifth Amendment right to remain silent. RP 1943/13/07.

Q: Who sold you your marijuana?

A: I'm not going to answer that.

////

Q: Who did you sell to?

A: My friends.

Q: Well, give me some names.

A: I'm not going to do it.

////

Q: Who would you buy your marijuana from?

A: I'm not answering that.

Q: The judge has ordered you to answer that.

A: I don't remember.

RP 193-96, 3/13/07.

Based on this exchange counsel for Washington asked to have Bride held in contempt. RP 203, 3/13/07. The court relieved Bride from the stand until he could find an attorney. RP 206, 3/13/07.

On March 14, 2007, Bride's counsel Bryan Hershman appeared for a contempt hearing. RP 356, 3/14/07. Washington's counsel argued that Bride had no Fifth Amendment right to invoke because the statute of limitations had run for the offense. RP 357, 3/14/07. He further argued that any privilege was waived when he admitted that he sold marijuana. RP 369, 3/14/07.

Mr. Hershman countered that the federal statute of limitations is five years and that had not run yet. RP 358, 3/14/07. Counsel also argued that there was a *corpus delicti* issue because while Bride's confession alone may not be enough to convict him, if he starts advising who he sold marijuana to, and providing witnesses, a real problem may arise. RP 359, 3/14/07.

The State argued against contempt, noting that the defense was trying to mount "other suspect" evidence and they had not met the threshold showing to introduce such evidence. RP 363, 3/14/07. The State argued that while it may be relevant to ask whether Blackwell, Scanlan, or Washington, purchased marijuana from Bride, it was not relevant to ask him to name everyone. RP 364, 3/14/07.

The court ruled that in terms of contempt, Bride did have a right to invoke the Fifth Amendment at any time in his answering. RP 373, 3/14/07.

On March 22, 2007, based on the State's briefing, the trial court denied the motion to strike Bride's testimony, finding that the defense issue involved collateral matters and Washington is still able to argue that unnamed individuals could have been involved in this crime. RP 968, 3/22/07.

Following the court's finding that Bride was entitled to raise his Fifth Amendment privilege, counsel for Washington made the following inquiry outside the presence of the jury.

Q: Good morning, Mr. Bride. Yesterday before the interruption of your testimony we were asking questions about your business of purchasing and selling marijuana; do you recall?

A: Yes.

Q: First of all, how long did you engage in selling marijuana, for what period of time?

A: Probably about a year or two years, year and a half.

Q: Okay. And do you purchase from one source or more than one source?

A: One source.

Q: And who was that person?

A: I take the Fifth

RP 194-95, 3/13/07.

4. Facts

June 14, 2003, was graduation day for Puyallup High School students, and Travis Bride planned on having a graduation party for his younger brother, Cody, at Bride's house in Puyallup. RP 68,-69-73.

As the party came to a close, a small group of people ended up staying the night at the house: Bride, Abbie, Erin Gregory, Dalton Rasmussen, Eddie Dolan, Eryn Hoke, Shawn Bender, and Josh May. RP 85. Cody ended up leaving the party. RP 85. All would awaken to intruders BLACKWELL, SCANLAN, and WASHINGTON entering the home, robbing the occupants, and ultimately killing Josh May.

a. Eyewitness account of robbery and murder.

Travis Bride.

At the time of the robbery and murder Bride was living in a house in Puyallup with his two roommates, friend, Josh Wallace, and brother, Cody. RP 63, 65, 3/12/07. Friend Josh May was also staying there at the time, sleeping on the couch. RP 71, 3/12/07. Bride supported himself by selling tires and wheels, as well as marijuana to his friends. RP 66, 3/12/07.

Bride expected approximately 100 people at the party. RP 74, 3/12/07. Although Bride knew defendant WASHINGTON from the wheel and tire store defendant owned in Puyallup, WASHINGTON was not invited to the party, and neither was SCANLAN, Blackwell, Reed, and Schodron. RP 68, 3/12/07. The party continued to approximately 3:00 to 4:00 in the morning. RP 85, 3/12/07.

At approximately 5:00 a.m., as Bride was sitting on the couch, the front door to his home opened. RP 95 3/12/07. Bride saw someone enter with a mask with holes around the eyes, wearing dark sweatshirt type clothes, and a shotgun with a flashlight on top of the barrel of the gun. RP 96, 97, 100, 102, 3/12/07. Bride could tell from the sound of his voice that he was male, and later on Bride could see the side of his eyes and he appeared to be white. RP 100, 3/12/07. Bride was suddenly hit in the head with a gun and went to his knees on the floor. RP 97, 3/12/07. At this time he saw another person come in wearing a bandana around his face, carrying some kind of assault rifle; he also had a male voice. RP 97, 101, 3/12/07. Bride turned to see who it was and got hit in the back toward the side of his head. RP 98, 3/12/07. Bride was ordered to the ground and complied. RP 98 3/12/07. Bride could also hear someone else running around the back of his house but he could not see anyone. RP 99, 3/12/07.

After Bride was struck in the head the intruder with the shotgun asked for his money, keys and to be shown where Bride's safe was. RP

103-04, 107, 3/12/07. Bride turned over approximately \$8,000 from his wallet. RP 104-105, 3/12/07. At first Bride denied that he had a safe, but the man with the shotgun insisted otherwise and threatened to shoot Bride if he did not show him the safe. RP 104, 3/12/07.

The second intruder had a bag to dump the money into and the two were discussing with each other whether there was a lot of money. RP 108, 3/12/07. The two asked to go to his other safe and Bride opened it for them but it was empty. RP 108, 3/12/07. During this time the defendant with the shotgun continued to point the shotgun at him, but the person with the assault rifle simply stood in the doorway. RP 109, 3/12/07. Throughout all of this Bride could hear the third person ransacking the back end of the house where the other two bedrooms were. RP 109, 3/12/07.

Bride could hear a walkie-talkie or Nextel come on from time to time and a girl's voice would say, "Hurry up." RP 111, 3/12/07. One of them then asked, "Are the cops here?" and she replied, "No, just hurry up." RP 111, 3/12/07.

As the safe was being unloaded, Shawn was on the bed, laying down, approximately one foot away. RP 117-18, 3/12/07. At one point Shawn looked over at the person with the shotgun and was hit in the nose with the shotgun. RP 118, 3/12/07. During this time Josh was lying on the other side of Shawn. RP 118, 3/12/07. Josh began talking back and forth to the man with the shotgun. RP 119, 3/12/07. Josh told him that

they could leave. RP 119, 3/12/07. The guy with the shotgun told Josh to stop talking and Josh said, "No. There is no reason. Everything is fine. Don't worry about it." RP 119, 3/12/07. The guy with the shotgun said stop talking or I'll shoot you. RP 119, 3/12/07. Josh responded again, "Don't worry about it; it's fine." RP 119, 3/12/07. Josh continued on, saying not to worry and that everything was fine. RP 120, 3/12/07. The man with the shotgun said, "Don't move or I'll shoot you." RP 120, 3/12/07. Bride then told Josh to be quiet. RP 120, 3/12/07. Josh refused and continued to talk. RP 120, 3/12/07.

The man with the shotgun asked everyone to empty their pockets. RP 121, 3/12/07. Josh had an inhaler in his pocket and did not want to hand it over. RP 121, 3/12/07. Josh and the gunman argued back and forth for approximately ten seconds and then the gun went off. RP 121, 3/12/07. At the time, Bride was not sure what happened and thought that the shotgun was just fired in the air. RP 122, 3/12/07.

The shotgun man then turned the gun on Bride, putting it in his face, telling him not to say anything or look at him or he would be shot. RP 123, 3/12/07. Bride remained silent. RP 123, 3/12/07. The man with the shotgun said not to move and approximately one minute after the shot was fired they all left. RP 124, 3/12/07. The shotgun man then reentered the home, placed the gun back in Bride's face, and said, "It's a good thing that you didn't move. I was going to shoot you." RP 124, 3/12/07. The

gunman left again and Bride heard them take off in his Tahoe. RP 125, 3/12/07.

After they left Bride stood up to see if everyone was okay. RP 128, 3/12/07. Bride found Josh lying between the bed and the wall and at first blush he appeared to be fine because there was no sign of blood. RP 128, 3/12/07. However, Josh was unresponsive when Bride told him to stand up. RP 129, 3/12/07. Bride tried to turn him over a little bit to look and get him up but he wouldn't get up so he stopped. RP 129, 3/12/07. Police were called. RP 129, 3/12/07.

Bride was unable to identify anyone as the assailants. RP 131, 3/12/07. Approximately \$15,000, was taken from the safe, and Bride's AK-47 and shotgun were also taken. RP 113, 114, 3/12/07.

Dalton Rasmussen

Rasmussen decided to sleep on the couch sometime between 12:00-2:00 a.m. RP 671, 3/19/07. He awoke to the door being kicked in and no more than two to three people coming into the home with masks on their face. RP 672, 673, 3/19/07. There were two people with guns (assault rifle and shotgun) and a person behind them. RP 674, 3/19/07. Someone grabbed him, put him on the ground and wrapped a blanket over his head. RP 676, 3/19/07. He was told not to move. RP 677, 3/19/07. Someone stomped on his head to make him still. RP 678, 3/19/07. One person, while holding a gun to Rasmussen's head, went through his pocket

and took his wallet containing approximately \$100 and cell phone. RP 678, 681, 3/19/07. He heard discussions via a walkie-talkie with what sounded like a girl on the other end. The next thing he heard was a gunshot from the bedroom. RP 683, 3/19/07. Moments later the intruders left and as the last person exited the door he warned them not to move. RP 684. Rasmussen learned May was dead and he fled home in a panic, fearing the intruders would come back and kill the rest of them. RP 687, 3/19/07.

Eddie Dolan

At around 3:00 to 3:30 in the morning, after drinking heavily, Eddie Dolan decided to go to sleep in Bride's bedroom, on the floor next to the bed. RP 341, 3/13/08. Shawn was on the bed right next to him. RP 342, 3/13/07. Dolan awoke to yelling and hearing "everybody get on the ground," and "shut the fuck up." RP 343, 344, 3/13/07. Dolan looked up to see a stocky white man, approximately 5'10", wearing a ski mask, coming towards the door of the bedroom with a shotgun, and another guy was headed toward the dining room area with what looked like an assault rifle. RP 345-46, 413, 3/13/07. Dolan could hear the person with the shotgun saying, "face down, keep your mouth shut," and "don't look up." RP 388, 3/14/07. Dolan kept his head down. RP 388, 3/14/07. Eryn, who was next to him, was scared and freaking out. RP 388, 3/14/07. He laid on her to cover her up and keep her quiet. RP 388, 3/14/07. Dolan could

also hear voices outside of the room and within the room he heard the shuffling through drawers. RP 390, 393, 3/14/07. Dolan also heard a walkie-talkie being used, and could hear a girl's voice. RP 390-91, 3/14/07.

The man with the shotgun was also yelling, "Where is the safe?" RP 387, 3/14/07. It appeared that the question was directed at Bride. RP 397, 3/14/07.

Dolan recalls May waking up and it seemed that May did not really know what was going on. RP 399, 3/14/07. The man with the shotgun was directing May to "shut the fuck up." RP 399, 3/14/07. This direction was repeated and then Dolan heard a gunshot. RP 399, 3/14/07.

Dolan got up and he heard a car start up. RP 401, 3/14/07. He looked through the blinds and saw Bride's vehicle taking off down the road. RP 401, 402, 3/14/07. Dolan then looked down and saw May, with a bloody neck, and it looked like he was sleeping. RP 403, 3/14/07.

Erin Gregory

Around 5:00 a.m. as light started to break, Erin Gregory began picking up garbage from the party. RP 426, 3/14/07. As she was picking up in the kitchen she heard the front door swing open. RP 428, 3/14/07. She looked around and saw two guys with guns. RP 428, 434, 3/14/07. They started yelling about checking the house to find out who was there so she immediately stepped out into the dining room and got on the floor as

ordered. RP 428, 3/14/07. The two intruders went right up to Abbie and Travis and cocked the shotgun in their face. RP 431, 3/14/07. She recalled that a third person came into the home shortly thereafter. RP 429, 432, 3/14/07. The guns looked like shotguns, but maybe a little shorter barrel on them. RP 430, 3/14/07.

All were dressed with dark clothes, dark hoodie sweatshirts, dark pants and what looked kind of like work pants. They had bandannas over their faces, but you could still see their eyes and part of their forehead. RP 433-34, 3/14/07. She could tell the first one looked a little darker, perhaps tan or another ethnicity, but could not tell the coloring of the second or third person. RP 435, 3/14/07.

She heard the first intruder cock his gun. RP 430, 3/14/07.

One of the gunmen came up to her and covered her face with a towel or a blanket. RP 432, 3/14/07.

She heard them constantly yelling to stay down and yelling at Travis to get something. RP 437, 3/14/07. She could hear yelling in the bedroom and then heard a gun go off. RP 438, 3/14/07. She then heard one of them say they were going to “smoke someone,” meaning that they were going to shoot someone. RP 439, 3/14/07. A Nextel two-way radio beeped, and on the other end Erin heard a girl’s voice asking if “they got it.” RP 439, 3/14/07. The female voice sounded as if it was in the kitchen or dining room. RP 439, 3/14/07.

Shawn Bender

Shawn went to sleep in Travis's bed around 2:00 a.m., and at that time there were still approximately 15 to 20 people at the party. RP 561-62, 3/15/07. Shawn awoke to the butt of a gun being struck across his face. RP 563, 3/15/07. Shawn heard shouting, a lot of cussing and yelling, and felt blood pouring down his face. RP 564, 3/15/07. It appeared that he was hit with a stock of a rifle. RP 564, 3/15/07. Shawn suffered several injuries as a result of the blow. RP 565, 3/15/07. The top part of his left nostril was torn off and the roots of two of his teeth were cracked. RP 565, 3/15/07.

Shawn saw a man standing to the foot of his bed, with a hood pulled over his head and covering the rest of his face except for the eyes. RP 567, 3/15/07. Shawn believed that the person had more of a brown complexion, maybe Mexican. RP 569, 3/15/07. At one point the person pointed the barrel of the gun at him. RP 567, 3/15/07. The gun had a snake light attached to it. RP 567, 3/15/07. The man was yelling "keep your face down. Fuck you. Don't fucking look at us." RP 568, 3/15/07.

Shawn began to hear a lot of yelling back and forth. RP 572, 73, 3/15/07. The men were asking for keys from Travis and yelling at Joshua May, who was on the bed to the left of Shawn, to keep his head down. RP 569, 573, 3/15/07. At one point Shawn heard them communicating via Nextel with a female voice outside the home who was telling them that they were all clear and to hurry up. RP 574, 3/15/07.

May kept saying, "Hey, it's cool, it's cool, just take what you want, just leave. Everything is fine." RP 576, 3/15/07. The men yelled at May to stop looking at them and Shawn and Travis tried to also quiet May. RP 577, 3/15/07. Moments later, May was shot. RP 577, 3/15/07. Shawn felt May fall off the bed and could smell the sulfur smell of gunpowder in the air. RP 578, 3/15/07.

Afterwards Shawn heard the gunman start playing with the gun in what sounded like an attempt to cock the gun again. RP 579, 3/15/07. It appeared that he was having problems with the gun. RP 580, 3/15/07. The gunman yelled at Travis and Shawn, "I have got you now, and now you are both fucking dead." RP 579, 3/15/07. As they left the room the men told them to keep their heads down. RP 580, 3/15/07. Shawn heard them pull out of the driveway and leave. RP 581, 3/15/07. After looking out the window to see if they were gone, Shawn went to check on May and realized he was dead. RP 582, 3/15/07.

Shawn's wallet and watch were taken. RP 575, 3/15/07.

Shawn recalls that the police responded within two to three minutes. RP 583, 3/15/07.

Eryn Hoke

Eryn Hoke went to sleep in Travis Bride's room, on the floor next to Eddie. RP 712, 3/19/07. She awoke to masked intruders in the room. RP 714, 3/19/07. A gunman pointed a gun at them and told them to get

down and not move. RP 716, 3/19/07. Eddie put his arm around her head and she laid still. RP 716, 3/19/07. At one point she heard people talking on walkie-talkies and she heard girls saying on the other end of the walkie-talkie, "No, no cops." RP 717, 3/19/07. The intruders ransacked the room. RP 720, 3/19/07. A shot was fired and then they left. RP 720, 3/19/07.

b. The Plan, Robbery/Homicide, and Cover-up.

Seventeen year old Terisha Schodron liked to party with her friends WASHINGTON, SCANLAN, and Blackwell. RP 223-34, 3/13/07. She also dated Blackwell for a period of time. RP 225. Terisha Schodron and Lesley Reed are best friends, and through this, Lesley also knew WASHINGTON, SCANLAN, and Blackwell. RP 226 3/13/07, 310, 3/21/07. Schodron and Reed also worked together at Subway. RP 805, 3/21/07.

Schodron⁴ testified for the State that on the night of robbery/murder, she and Lesley Reed were down at the Ruston Way waterfront drinking. RP 231, 3/13/07. The two left there in Reed's BMW

⁴ Both Reed and Schodron were arrested and charged with murder one, two counts of first degree robbery, and burglary one for her involvement in the robbery and killing of Joshua May. RP 229, 3/13/07, RP 811, 3/21/07. Schodron reached an agreement with the State that if she testified to the truth she would plead guilty to first degree robbery and first degree burglary and receive a sentence recommendation of 48 months. RP 231, 3/13/07. Reed reached an agreement to plead guilty to the robbery and burglary, with a recommendation of 60 months in prison. RP 815, 3/21/07.

after getting a phone call, and went to Blackwell's house in downtown Puyallup, on Pioneer. RP 235, 3/13/07, 817-19, 3/21/07. When they arrived at Blackwell's they found Blackwell, WASHINGTON, and SCANLAN there, hanging out, drinking Hennessy. RP 236, 3/13/07, RP 820, 3/21/07.

Blackwell told Reed she had to leave because the guys were leaving to do a lick (robbery). RP 823. Reed said she wanted to go and see what it was like and be part of it. RP 823, 3/21/07. Blackwell agreed and they suggested she could drive. RP 825, 3/21/07. WASHINGTON, SCANLAN, Blackwell, Reed, and Schrodron were all in the same room when Reed and Blackwell discussed the robbery. RP 824-25, 3/21/07. Blackwell gave her a Motorola walkie-talkie so she could use it for a "look out." RP 826, 3/21/07.

They all left Blackwell's house in Lesley's car within 30 minutes of Schodron arriving. RP 245, 3/13/07. While in the car Chris Blackwell went over the details of how to use the walkie-talkies and that Reed was to use it if they saw anything. RP 829, 3/21/07. According to Blackwell, they were going to get some money. RP 261, 3/13/07. Schodron took this to mean that Blackwell was going to sell someone some drugs; Reed knew they were going in to rob them. RP 261, 3/13/07, RP 826, 3/21/07.

By the time they arrived at Bride's house it was starting to get light. RP 248, 3/13/07. When they first arrived Lesley pulled in front of the house, but then she was instructed to turn around and she parked

across the street. RP 247, 3/13/07. WASHINGTON, SCANLAN, and Blackwell exited the car and went around to the trunk area. RP 249, 3/13/07, RP 836, 3/21/07. WASHINGTON, SCANLAN, and Blackwell then ran across the street, with Blackwell carrying a gun, and WASHINGTON had something in his hands. RP 837, 838, 3/21/07. As the three arrived on the side of the house she saw them put masks over their heads. RP 250, 252, 3/13/07. The men then went to the back of the house. RP 253, 3/13/07.

Blackwell radioed Reed once he got in the home and Reed radioed back to say all was clear. RP 839, 3/21/07, RP 254-255, 3/13/07.

Schodron and Lesley got out of the car to go to the bathroom on the side of the road and when they did they heard a gunshot from inside Bride's house. RP 253, 254, 3/13/07, RP 840, 3/21/07.

Within 5 to 10 minutes of the men entering the home, SCANLAN and Blackwell came running out of the house with guns. RP 842, 3/21/07, RP 257-58, 3/13/07. Blackwell came towards the car, carrying a gun, and WASHINGTON had a large wicker laundry basket. RP 357, 3/13/07. Blackwell got in the front seat and SCANLAN got in the back with Terisha. RP 843, 3/21/07. WASHINGTON got into Bride's Tahoe with the wicker basket, and SCANLAN and Blackwell got back into Lesley's car with Blackwell still carrying the "long, long, black gun." RP 258-59, 3/13/07.

Once in the car Blackwell started freaking out, saying he thought he “shot that guy.” RP 845, 3/21/07. SCANLAN told Blackwell to shut-up. RP 845, 3/21/07.

Once they arrived back at Blackwell’s house WASHINGTON parked the Tahoe in the garage. RP 262, 3/13/07. A wicker basket was removed from the Tahoe and there were guns, money, IDs, and wallets inside the basket. RP 264, 3/13/07.

Schodron recalled that as soon as the garage door was closed all three of the guys started taking the rims off of the truck. RP 264, 3/13/07. Reed believed that the rims were removed by Blackwell and SCANLAN after the girls returned from McDonalds. RP 847-48, 3/21/07. At the request of one of them, Lesley and Schodron began counting the money. RP 264, 3/13/07. Schodron began counting, but then stopped because she did not feel comfortable. RP 265, 3/13/07. There was approximately \$50,000 in the basket and Blackwell gave Schodron a \$1,000 cut. RP 265, 3/13/07. All five people received shares of the money. RP 265, 3/13/07. Lesley and Schodron left to go get something to eat at McDonalds. RP 266, 3/13/07. The two girls returned with food for everyone. RP 266, 3/13/07.

There was no discussion about what had just happened, other than Blackwell telling Schodron not to talk about it. RP 3/13/07, 267.

Lesley then drove Schodron home to Schodron’s parent’s house so she could get some sleep. RP 268, 3/13/07. The two slept in pretty late

and then went to Fred Meyer's to spend some of the loot money. RP 268, 3/13/07, RP 853, 3/21/07. Reed called Blackwell when she lost her keys. RP 855, 3/21/07. SCANLAN and Blackwell showed up at Fred Meyer to remove the guns from Lesley's car. RP 272, 3/13/07, RP 856, 3/21/07. Blackwell removed the guns from Lesley's car and placed them in his vehicle. RP 272-73, 3/13/07. Reed waited until the next day, after the guns were taken out of her vehicle, to call a locksmith to get into her vehicle. RP 856, 3/21/07.

The girls followed Blackwell and SCANLAN back to Blackwell's house that evening where they stayed for an hour or two. RP 274, 3/13/07. Blackwell discussed getting rid of the Tahoe. RP 276, 3/13/07.

WASHINGTON and Blackwell arrived at long time friend Jesse Copley's mother's home on the morning of the incident, around 10-11:00 a.m., looking to have Jesse help them in getting rid of the Tahoe. RP 756-57, 759, 3/19/07. WASHINGTON told Copley that he needed to get rid of a truck because he had just pulled a lick (robbed somebody) the night before. RP 759, 3/19/07. The truck was at Chris's house. RP 759, 3/19/07. Jesse, his friend James, and WASHINGTON all headed over to Blackwell's house to see if they could dispose of the truck. RP 760, 3/19/07. When they arrived Jesse saw a Tahoe in Blackwell's garage with the large, 22 inch rims removed. RP 761, 3/19/07. The stereo had also been removed. RP 762, 3/19/07. They devised a plan to have James drive the car somewhere once it got dark out and dump it off. RP 762, 3/19/07.

The men headed to Subway where two of the girls involved in the incident work. RP 764, 3/19/07. Blackwell and WASHINGTON showed Jesse guns they had in the trunk of the girl's BMW. RP 764, 765, 3/19/07. Jesse, James, and Blackwell then went up to Lake Tapps, rented a boat, and spent the day at the lake. RP 763-64, 3/19/07. Later in the evening, around 11:00/12:00 p.m., Jesse and James headed back to Blackwell's to get rid of the truck. RP 766, 3/19/07. When Jesse and James arrived at Blackwell's house the two girls were there, along with WASHINGTON, SCANLAN, and Blackwell. RP 766, 767, 3/19/07. The men got in WASHINGTON's suburban and Jesse followed in the stolen suburban. RP 768-69, 3/19/07. WASHINGTON brought gas to burn the suburban. RP 771, 3/19/07. The vehicles stopped somewhere in Edgewood. RP 772, 3/19/07. James poured gasoline over the suburban and WASHINGTON walked up and lit it with a lighter. RP 774, 3/19/07. They then left in WASHINGTON's car. RP 776, 3/19/07.

After the arson, the men went back to Blackwell's house where they found Reed and Schodron sitting on the couch, crying, and at that point Jesse realized that the guys had killed someone during the lick. RP 776, 777, 3/19/07, RP 860, 3/21/07. Jesse saw a picture of a truck on the news that was the truck they had just burned. RP 777, 3/19/07. Jesse began yelling at all of them, upset that they involved him in all of this and warned the guys that the "stupid B's" were going to get them caught up. RP 777, 3/19/07. He felt they were stupid for doing a robbery with two

girls driving them. RP 778, 3/19/07. Jesse then had WASHINGTON drive him within a few blocks of home. RP 778, 3/19/07. Both Jesse and James were paid \$500 for their involvement. RP 779, 3/19/07.

After that summer Schodron removed herself from the group and joined Job Corps. RP 277, 3/13/07. However, she ran into SCANLAN on the way to court and he told her not to testify. RP 278, 3/13/07.

Terish, Reed, WASHINGTON, and Erica all went to Apple Blossom in May of 2005 over in Wenatchee. RP 862, 3/21/07. Schodron tried to talk to WASHINGTON about what happened and he told them it did not happen and to “shut up,” and “don’t talk about it.” RP 863, 3/21/07.

c. The Investigation

Pierce County Sheriff’s Deputy Estes arrived at the scene at 5:23 a.m. and it was daylight. RP 209, 217, 3/13/07. Estes spoke with a male and was directed into the bedroom of the house where she found Joshua May lying on the ground with blood around his neck area. RP 211, 3/13/07. May appeared to be deceased. RP 211, 3/13/07. The home was cleared and medical aid went inside. RP 212, 3/13/07.

Detective Larson searched the home and documented the crime scene. RP 1031, 3/22/07. He found a safe in the center of the living room with a little wooden box inside. RP 1031, 3/21/07. One of the bedrooms was completely ransacked, with dumped drawers all over. RP 1032,

3/22/07. The master bedroom was the location of the homicide. RP 1033, 3/22/07. A 12-gauge shotgun shell was located on the floor and there was a 7.62 round found on the TV set. RP 1033, 3/22/07.

The following day, June 16, 2003, Estes responded to a vehicle fire in the 6800 block of Sumner Heights Drive East. RP 214, 3/13/07. The vehicle was severely torched. RP 215, 3/13/07. Washington State Patrol fire and emergency program specialist Grant determined that the fire originated within the passenger compartment and that the fire was intentionally set. RP 635, 636, 3/15/07. Deputy Fire Marshall Hill further opined that the origin of the fire was the floor level of the vehicle and that the fire was deliberately set using an accelerant. RP 749, 752, 3/19/07. A lighter was recovered approximately 20 feet from the vehicle. RP 733, 3/19/07. Officers confirmed the Tahoe belonged to Travis Bride. RP 1034, 3/22/07. The original wheels were missing. RP 130-31.

Stills were made from videotape surveillance at a gas station located in the middle of Puyallup. RP 957, 3/21/07. P's Ex. 121-130. The photos show two individuals carrying gas cans. RP 977, 978, 3/22/07. The two individuals came into the gas station on June 15, 2003, at about 11:30 p.m. RP 979, 3/22/07. Detective Larson showed the photographs to Jesse Copley and he stated he recognized one of the individuals as Willy SCANLAN (ex. 122) and that he was involved in the arson with Copley. RP 1045, 3/22/07. He identified the other individual as Chris Blackwell (Ex. 127). RP 1046, 3/22/07.

Medical Examiner, Dr. Howard, conducted the autopsy. RP 1070, 3/22/07. Dr. Howard opined that May died as a result of a gunshot wound to the neck, which struck the spinal column, then fractured the neck, tore the spinal cord, fractured the upper left ribs, bruised the lungs next to those, and continued to his left and towards his back and passed through his shoulder blade, exiting his back. RP 1079, 3/22/07. The shotgun was fired very close, within a few inches to a few feet. RP 1077, 3/22/07. RP 1077, 3/22/07. Shotgun shell fragments were recovered from the body. RP 1082, 3/22/07.

SCANLAN was arrested on March 2, 2006. RP 1043, 3/22/07. When SCANLAN was arrested he took a deep breath and said, "Well, I guess this is the last fresh air I'll be breathing for a while." RP 1043, 3/22/07.

The following stipulation⁵ was read to the jury:

On February 21, 2007, co-defendant Christopher Blackwell, while represented by counsel, entered a plea of guilty to the crime of murder in the first degree.

No. 2, Christopher Blackwell's statement to the Court regarding what he did in his own words that makes him guilty of this crime was, "On June 15, 2003, in Pierce County, WASHINGTON I committed the crimes of robbery

⁵ The parties also stipulated that prior to June 15, 2003, SCANLAN was convicted for a serious offense." RP 1088, 3/22/07.

in the first degree and burglary first degree, and during the commission of these crimes I accidentally shot Joshua May and caused his death.”

RP 1106, 3/26/07.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE **BATSON** MOTION WHERE THE STATE’S EXERCISE OF A PEREMPTORY AGAINST JUROR NO. 11 WAS BASED ON THE FACT THAT NO. 11 HAD A PRIOR NEGATIVE EXPERIENCE WITH LAW ENFORCEMENT AND APPEARED OPENLY HOSTILE.

A trial court’s ruling on a request to remove a juror for cause is reviewed for manifest abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 601-02, 940 P.2d 546 (1997)(citations omitted). A trial judge is in the best position to observe a juror’s demeanor and determine if the juror will be impartial. *Id.* As quoted in *Brown*, “[t]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record” 132 Wn.2d at 602 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, n.9, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)(quoting *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 2d 244 (1878)). “The question is not whether we, as a reviewing court, might disagree with the trial court’s findings, but whether those findings are fairly supported

by the record.” *State v. Gentry*, 125 Wn.2d 570, 635, 888 P.2d 1105 (1995).

RCW 4.44.170⁶ outlines challenges for cause and provides that there are jurors who may be excused for implied bias and actual bias. Actual bias is defined as the existence of a state of mind which satisfies the judge that the juror “cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). *State v. Latham*, 100 Wn.2d 59, 63, 67 P.2d 56 (1983). Implied bias, on the other hand, arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action. RCW 4.44.180. *Id.*

When a party raises a *Batson*⁷ challenge, the trial court applies a three-part test to determine if the peremptory challenge is race-based: (1) the trial court must determine initially whether the party raising the

⁶ Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

⁷ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)(holding “the State’s privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.”).

Batson challenge “has made out a prima facie case of racial discrimination”; (2) if it determines there is a prima facie case of racial discrimination, “the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation”; and (3) if the proponent of the strike tenders a race-neutral explanation, “the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.” *State v. Vreen*, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001)(quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)).

Although not a “factual question” on the merits of the underlying case, “the trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.” *Hernandez v. New York*, 500 U.S. 352, 364, 372, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)(plurality opinion but with six justices agreeing on this rule)(citing *Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. 1712); *State v. Rhodes*, 82 Wn. App. 192, 197, 917 P.2d 149 (1996) (quotations omitted); see also *Snyder v. Louisiana*, --- U.S. ---, 128 S. Ct. 1203, 1207-08, 170 L. Ed. 2d 175 (2008). Indeed, the United States Supreme Court has characterized the “intent to discriminate” determination as a “pure issue of fact” because the underlying question is whether counsel’s race-neutral explanation for striking a juror should be believed. *Hernandez*, 500 U.S. at 364-65, 111 S. Ct. 1859; *Rhodes*, 82 Wn. App. at 196, 917 P.2d 149.

Even though the trial court is not taking sworn testimony from witnesses, the attorney's explanation itself constitutes new facts not previously before the public, and the court's decision involves an evaluation not only of whether the attorney's explanation is consistent with what the trial court observed during voir dire, but also of the challenging attorney's credibility. See *Snyder*, 128 S.Ct. at 1208; *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831 (2008)(quoting *Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. 1712). As the Court recently reiterated, “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.” *Snyder*, 128 S. Ct. at 1208 (alteration in original)(quoting *Hernandez*, 500 U.S. at 365, 111 S. Ct. 1859).

Here, this court must accord great deference to the trial court's determination that the State's use of a peremptory against Juror No. 11 was not race based - especially where it involves observations of the juror's demeanor and attitude. The juror at issue here - Juror No. 11 - articulated that he had a negative personal experience with local law enforcement. Supp. RP 292, 2/26/07. Juror No. 11 also displayed outward animosity towards the prosecutor, both in his answers and body language. As the trial court noted in its ruling on *Batson*, it was not enough to explain his dislike of the process, he had to physically show scars from the event:

It's clear to me that the peremptory challenge by the state is not racially motivated. The reason I say that is because we have the juror's own statements about his unfair treatment

in his 2002 arrest for domestic violence, where he felt he had to show us the marks on his wrists from being cuffed. It's true, as Ms. Whitener said, he does know other police officers and has them as friends, but this appears to me to be a persuasive reason to exercise a peremptory challenge against him. So I'll deny the **Batson** challenge to Juror Number 11.

Supp. RP 404, 2/27/07. The court's ruling comported with the prosecutor's articulation of its race neutral explanation. Supp. RP 398, 400-401, 2/27/07.

The framing of defendant's **Batson** challenge both below at the trial level, and on appeal, also demonstrates the flaw in defendant's argument and supports the trial court's ruling.

The basis of the articulated *prima facie* case that the defense believed they made was unfounded. Defense argued below that: "[the] state is attempting to peremptory challenge the only African American on the jury." Supp. RP 397, 2/27/07. However, an examination of the record reveals that Juror No. 24 is African American and was sworn on this panel as a deliberating juror. Supp. RP 451, 2/27/07.

Similarly, the **Batson** framing raised at the appellate level overstates the record. The defense offers up Juror No. 9's response to questions as evidence that the striking of Juror No. 11 was race based because Juror No. 9 also related a negative experience with law enforcement. (Opening Brief of Appellant at 12-13). What defense overlooks is that following this statement by Juror No. 9, the State did

press for more details and soon learned that the incident was *over 20 years old*. Supp. RP 267, 2/27/07. After revelation of this detail the State left the matter alone. Unlike Juror No. 9, No. 11's experience was within five years of the current jury duty, involved a local investigating agency, and scars that were still visible.

Defendant also complains that after Juror No. 8 revealed his past with law enforcement the State did not press further for bias like it did with No. 11. This is untrue. The State went on for ten pages of transcript with Juror No. 8, asking both law enforcement and general questions following his reveal that he had a prior arrest. Supp. RP 246-256, 2/26/07. This is the same length of questioning Juror No. 11 received. However, unlike Juror No. 11, Juror No. 8's recitation of his history was fairly benign. No. 8 related that he was currently on a two year deferred prosecution program for a DUI. RP 248. The prosecutor then inquired, "Okay. And obviously, that's not a pleasant experience?" Supp. RP 249, 2/26/07. To which the No. 8 responded, "Oh, no." Supp. RP 249, 2/26/07. The prosecutor then asked:

P: "Do you think you were treated fairly by the trooper that stopped you?"

8: Oh yes.

P: What about the court system?

8: Fairly.

P: Anything about that experience that you think would affect you in this case at all?

8: No.

P: You don't have a grudge against police or prosecutors?

8: No.

P: Defense attorneys?

8: No.

P: I think you also indicated that someone had been in jail. Was that what you were talking about? You knew somebody that had been in jail?

8: Oh, no. Did I mark that?

P: Have you or anyone you know ever been in jail or prison?

8: Oh, yes. My sister.

RP 249.

Contrary to defendant's assertion the prosecutor did not simply "accept[]" Juror 8's "word that he harbored no resentment towards police or the courts. (OBA at 14.). The State inquired at length as to his bias in his own case and the handling of his sisters. RP 246-256.

Defendant contends that the alleged disparate treatment of Juror No. 11 versus Juror No. 8 and 9 establishes pretextual discrimination, relying on *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Snyder v. Louisiana*, *supra*. However, these death penalty cases on appeal from Texas and Louisiana offer little guidance.

First, it is important to note that in *Miller-El*, the court did not find a violation of *Batson*, but rather determined that there was a “debatable” issue of discrimination and therefore the denial of a finding of a certificate of appealability in a habeas petition was erroneous. 537 U.S. at 348. The court concluded that the issue was debatable where: (1) statistical evidence demonstrated that a disproportionate number of African-American were struck from the venire, that 94% of whites were informed of the statutory minimum sentence compared with 12 ½ % of African-Americans; (2) the prosecution’s use of a “jury shuffle” which permitted the court to reshuffle the jury and this occurred whenever the panel had considerable African-Americans; (3) and historical evidence of racial discrimination by the District Attorney’s office. 537 U.S. at 342, 345-46, 348.

In contrast, it was the flimsiness of the excuses the prosecutor articulated in *Snyder* that gave rise to a finding of purposeful discrimination. The prosecutor offered two reasons for striking a young African-American juror (1) that he appeared very nervous, and (2) that he’s a student teacher and might be concerned with reaching a quick verdict so that he could go home quickly. 128 S. Ct. at 1208. The Supreme Court rejected these proffered reasons, noting that the trial court made no determination that the juror was in fact nervous, that the school had assured the student that he could miss time for trial, and the prosecutor

did not use strikes against similarly situated white venire. 128 S. Ct. at 1209, 1210, 1212.

As stated above, the prosecution did not treat the venire differently during questioning based on race. The State articulated specific reasons based on bias of Juror No. 11 and the trial court made a finding that the reasons were solid and not race driven. The race neutral explanation the State offered was not only plausible, but supported in the record, and the trial court properly declined to find a racial motive behind the strike.

2. DEFENDANT WASHINGTON WAS NOT DENIED HIS RIGHT TO CONFRONTATION WHERE TRAVIS BRIDE RIGHTFULLY CLAIMED A FIFTH AMENDMENT PRIVILEGE AND REFUSED TO TESTIFY AS TO WHO HE SOLD HIS DRUGS TO OR WHERE HE BOUGHT HIS DRUGS FROM AND THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE BRIDE'S TESTIMONY FOLLOWING THE ASSERTION OF THIS PRIVILEGE.

Both the federal and state constitutions protect a criminal defendant's right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10); *State v. Russell*, 125 Wn.2d 24, 73, 882 P.2d 747 (1994). "The essential purpose of confrontation is cross-examination." *Pettit v. Rhay*, 62 Wn.2d 515, 521, 383 P.2d 889 (1963)(quoting *Brown v. United States*, 234 F.2d 140, 141 (6th Cir.1956)).

Notwithstanding the defendant's Sixth Amendment right to confrontation, a witness's valid assertion of the Fifth Amendment justifies the witness's refusal to testify. *State v. Levy*, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). The Fifth Amendment's privilege against self-incrimination protects the rights of witnesses to refuse to give incriminatory answers in any official proceeding. U.S. Const. amend. V; *State v. Lougin*, 50 Wn. App. 376, 380, 749 P.2d 173 (1988). When there is arguably a conflict between a witness's Fifth Amendment privilege and a defendant's Sixth Amendment right to compulsory process, such conflict is resolved in favor of the witness's right to silence. *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir.1990)(citing *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 2d 624 (1931)).

The privilege against self-incrimination applies when the witness reasonably apprehends danger resulting from a direct answer. *Levy*, 156 Wn.2d at 731-32. But the witness may not make a blanket assertion of the privilege. *Levy*, 156 Wn.2d at 732; *Lougin*, 50 Wn. App. at 381. Rather, the witness may invoke the Fifth Amendment only in response to specific questions, unless the trial court can conclude, based on its knowledge of the case and the anticipated testimony, that the witness could legitimately refuse to answer all relevant questions. *State v. Delgado*, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001); *Lougin*, 50 Wn. App. at 381.

The witness "must establish a factual predicate from which the court can, by use of 'reasonable judicial imagination' (aided by

suggestions of counsel), conceive of a sound basis for the claim” of privilege. *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995). The answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime. *Hobble*, 126 Wn.2d at 291. The danger of incrimination must be substantial and real, not merely speculative. *Hobble*, 126 Wn.2d at 291; *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980)(the danger of incrimination confronted by defendant must be confronted by substantial and real, and not merely trifling or imaginary).

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim “must be governed as much by {her} personal perception of the peculiarities of the case as by the facts actually in evidence.” *State v. Hobble*, 126 Wn.2d at 290 (quoting *Seventh Elect Church v. Rogers*, 34 Wn. App. 105, 114, 660 P.2d 280, review denied, 99 Wn.2d 1019 (1983)).

Determining the scope of the witness’s privilege is within the sound discretion of the trial court. *Lougin*, 50 Wn. App. at 382. A court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The issue before this court is the validity of Travis Bride's assertion of his Fifth Amendment privilege regarding to whom he sold drugs to and from whom he purchased drugs from. The defense further argues that even assuming the trial court properly permitted assertion of the privilege, the trial court erred in not striking Bride's testimony in its entirety following the assertion of this privilege. Although Travis Bride was a known drug dealer, and admitted to such on the stand, he did not want to testify to whom he sold drugs to or where he purchases his drugs from. These specific details, arguably could be the missing link to a successful prosecution for the crime he committed. See *Hobble*, 126 Wn.2d at 290 ("The answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime."). *Hobble*, 126 Wn.2d at 291. And it was these details the court determined he had a right to assert the privilege to. What Travis Bride had testified to up to that point regarding the sale of drugs would be insufficient to bring forth a criminal prosecution because of *corpus*⁸ issues. However, if his testimony led to specific witnesses, then arguably a successful prosecution could be mounted against him. The defendant was still allowed to attack the credibility of this witness, and still permitted to argue the logical

⁸ Corpus delicti means "body of the crime." *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006). The rule of corpus delicti provides that a trial court may not admit the defendant's incriminating statements unless the State presents independent evidence that corroborates the statements. *Brockob*, 159 Wn.2d at 328, 150 P.3d 59.

inferences from his testimony for his theory of the case (e.g. that this was a drug deal gone bad and the “real” perpetrators of the crime were those buying or selling drugs to Travis Bride). During cross-examination of Bride, WASHINGTON got Bride to admit that he had testified that he did not remember who he bought his marijuana from. RP 982, 3/22/07. Bride also gave the detail that Dalton Rasmussen was one of his buyers. RP 986, 3/22/07. The fact that Bride at least at one point testified that he “could not remember” who he purchased marijuana from, undermines defendant’s argument that there was a privilege issue at all. The defense still had in front of the jury the claim that Bride did not know who he purchased his drugs from, and this in turn would certainly call into question Bride’s credibility as argued at length in Washington’s closing. See RP 1342, 3/28/07 (defense closing, arguing “Remember the little problem we had with Travis. I don’t remember who I sold my drugs to.”).

Nor did the trial court err in declining to strike Bride’s testimony. It is unclear from the assignment of error in this case whether defendant believes the error lies in failing to strike a portion of Bride’s testimony, or whether the error lies in failing to strike a portion of the testimony. See Opening Brief of Appellant at 23 (citing *United States v. Zapata*, 871 F.2d 616, 623 (7th Cir. 1989)) (“When a witness’ refusal to answer prevents [a] defendant from directly assailing the truth of the witness’ testimony, the court should strike at least the relevant portion of the testimony.”). If it is the former (a portion of his testimony) the problem for the defense at trial

was that they did not want the portion of Bridge's testimony stricken where he admitted to drug dealing. It fed into their theory of the case. Defendant cannot claim error for something never requested below. RAP 2.5; *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); W-CP 11-14 (Defendant Washington's Motion to Strike Testimony at 3-4, motion is to strike all of testimony.).

If defendant means to argue the latter, that the trial court erred in refusing to strike Bride's entire testimony, this is also an unsound choice and the trial court reasonably exercised its discretion. A trial court's decision to strike a witness's testimony after the witness invokes his privilege against self-incrimination is reviewed for abuse of discretion. *United States v. Seifert*, 648 F.2d 557, 561-62 (9th Cir.1980). Here, the evidence defendant sought to admit was collateral to the issue before the jury. The refusal to permit this line of inquiry should not result in the striking of Bride's entire trial testimony. It is unclear what the defense would gain with the striking of Bride's testimony either. At best, Bride's testimony duplicated most of the State's witnesses (Rasmussen, Dolan, Gregory, Bender, and Hoke), and did not offer any direct implication of WASHINGTON in the crime.

This case is distinguishable from *State v. Pickens*, 27 Wn. App. 97, 615, P.2d 537 (1980), where the appellate court found error in refusal to strike testimony following a witness's invocation of his Fifth Amendment privilege. In *Pickens*, the defendant was on trial for raping

his siblings. 27 Wn.App. at 98. One of the State's witnesses was the defendant's sibling, John, who testified that he saw the defendant and his sister having sexual intercourse. *Id.* at 539. The defense wanted to cross examine John concerning his possible sexual relations with his sisters to show that he might be under pressure to cooperate with the authorities. *Id.* However, John invoked his Fifth Amendment privilege and the court held he could assert this privilege and denied a defense motion to strike John's testimony. *Id.* The appellate court held that the trial court erred in its denial to strike the testimony "since the evidence sought by the defense was related to the crime charged and did not concern purely collateral criminal activity, and since there was no other basis in the record from which the defense could have argued the possible bias." 27 Wn.App. at 539-40.

Here, unlike *Pickens*, Travis Bride was not invoking the privilege to avoid testifying to matters related to his involvement or others involvement in the crime. Moreover, unlike *Pickens* there are other bases in the record from which the defense could argue its theory of the case. *See* Argument *infra* – outlining closing argument. WASHINGTON's approach was he knew who did it – SCANLAN and Blackwell, and WASHINGTON was just along for the ride. Probing into who Bride sold marijuana to would not accomplish this any further.

Defendant also holds out to this court that because the trial court made a finding of relevancy to the question posed, that the trial court

therefore erred in allowing the witness to assert his Fifth Amendment privilege. However, the privilege determination is not based on a balancing of relevancy versus incrimination potential. Instead, if any tension exists, the person holding the right to assert the privilege wins. See *United States v. Cuthel*, 903 F.2d at 1384 (11th Cir.1990)(citing *Alford v. United States*, 282 U.S. at 694).

Even if the court erred in the exercise of its discretion, defendant cannot honestly claim prejudice from this ruling. An appellate court may affirm a conviction where a defendant's Sixth Amendment confrontation right is violated if the error is shown to be harmless beyond a reasonable doubt. *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006). While Travis provided many details of the crime, the one salient fact he could not present to the jury was the identity of the assailants. Instead, the case came out through other evidence. Moreover, WASHINGTON admitted his presence on the night of the homicide. RP 1170-1198, 3/26/07. Bride's testimony was also cumulative to most of the State's witnesses (Rasmussen, Dolan, Greogry, Bender, and Hoke), and did not offer any direct implication of WASHINGTON in the crime.

Also, an examination of defendant WASHINGTON's closing argument shows that the defense was still able to strongly argue Bride's credibility. Throughout the defense closing the argument is peppered with direct attacks on Bride:

And I don't know if this gets us anywhere, and I don't mean to appeal to the passion or prejudice of the jury, but we know that poor Joshua wouldn't be dead today if it wasn't for Travis Bride. Mr. Bride has taken no responsibility whatsoever for his involvement in this tragedy. . . .

Mr. Bride has gotten away with serious offenses. . . .

. . . [S]omebody set Mr. Bride up for a robbery, somebody who knew there was marijuana there, somebody who knew there were substantial amounts of money there, someone who knew that there were safes there, probably somebody who knew there was an AK 47 leaning against the wall.
(RP 1315-1316, 3/28/07)

Something that's clearly obvious in this case is, Chris never thought that Travis would report this incident. Can I say that again? It's so obvious. Drug dealers who rip-off other drug dealers do it for one reason, get money, eliminate competition, take money, take drugs, but they know that the drug dealer is not going to report it. We know that was Chris's intent in this case. You have to know that. Now, what happened was, unfortunately, Joshua May was killed. And Travis Bride, what's he going to do? He has a dead young man in his house. He has to call the police.
(RP 1319, 3/28/07)

If you are a police officer in this case and Travis Bride talks to you about why Joshua May is dead, you are going to be a little suspicious about why did these people come into your house if you are not a drug dealer and if you don't have a lot of money and if you don't have a safe? So Travis lies through his teeth to them. He didn't want to reveal that he was a drug dealer. He didn't want to reveal his sources because he didn't want to reveal who his purchasers were because we know it was an inside job.
(RP 1322, 3/28/07).

Just think about Travis for a minute. Remember the little problem we had with Travis. I don't remember who I sold

my drugs to. Then you didn't see him for a few days. Do you believe that? He is lying. All Travis Bride cares about is Travis Bride. He doesn't have one ounce of remorse for what happened. . . .
(RP 1342, 3/28/07)

Given this strong attack against Bride during WASHINGTON'S closing argument, it appears that Bride's evasiveness helped the defense attack Bride's credibility, rather than hindered it. The defense was still able to make the link that it was Blackwell who was the mastermind behind this robbery and Bride the drug dealer was his target.

Given the overwhelming evidence of guilt and the defense ability to attack Bride's credibility, any error in the limitation of Travis Bride's testimony was harmless beyond a reasonable doubt.

3. THE INFORMATION PROPERLY CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CURRENT BURGLARY STATUTE AND DEFENDANT'S RELIANCE ON LAW FROM 1938 (*State v. Klein*) IS MISGUIDED.

A charging document must allege facts that support every element of the crime and must adequately identify the crime charged so that the accused can prepare an adequate defense. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When a challenge is raised to the sufficiency of the charging document for the first time on appeal, a court must liberally construe the document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The test for sufficiency of the charging document when the issue is first raised on appeal is "(1) do

the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the in artful language which caused a lack of notice?” *Kjorsvik*, 117 Wn.2d at 105-06.

“A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime ... assaults any person.” RCW 9A.52.020(1)(b).

The information charging first degree burglary in this case alleged in pertinent part:

That GEORGE WILLIAM SCANLAN, . . . , did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building, located at 122717 115th Avenue Court East, Puyallup, WASHINGTON . . .

S-CP 1-6.

Defendant SCANLAN argues that under *State v. Klein*, occupancy is an essential element of burglary if ownership is not alleged. Klein held that an information that failed to allege ownership, but named the building's occupant, was sufficient to charge burglary under the criminal code at that time. 195 Wash. 338, 80 P.2d 825 (1938). *Klein* and other Washington cases have held that ownership is not an essential element of burglary. *Klein*, 195 Wash. at 343; *State v. Knizek*, 192 Wash. 351, 355,

73 P.2d 731 (1937); *State v. Franklin*, 124 Wash. 620, 624, 215 P. 29 (1923).

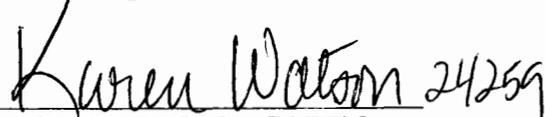
Defendant's argument is unsound because under the current statute, unlawfully entering or remaining in a building is an essential element of burglary. RCW 9A.52.020. While ownership or occupancy may be necessary to prove that entry was unlawful, neither ownership nor occupancy is an essential element of burglary. The information as charged in this case contains all of the essential elements.

D. CONCLUSION.

For the foregoing reasons the State requests this court affirm the convictions of both WASHINGTON and SCANLAN.

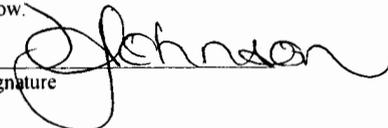
DATED: February 24, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of WASHINGTON. Signed at Tacoma, WASHINGTON, on the date below.

2/25/09 
Date Signature

FILED
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DIVISION II
09 FEB 25 PM 4:30
STATE OF WASHINGTON
BY DEPUTY