

FILED  
Court of Appeals  
Division II  
State of Washington  
7/22/2019 4:24 PM  
No. 52893-2-II

**Court of Appeals, Div. II,  
of the State of Washington**

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State of Washington,

Respondent,

v.

**James Listoe,**

Appellant.

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**Brief of Appellant**

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Kevin Hochhalter  
WSBA # 43124  
Attorney for Appellant

Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008  
kevin@olympicappeals.com

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## **1. Introduction**

James Listoe was pulled over while driving a car that was not his. Deputies allowed the female passenger of the car to leave the scene without questioning. Listoe was found with a user-size bag of methamphetamine in his pocket. A search of the car located, within multiple layers of bags within bags on the back seat floorboards, additional methamphetamine, an electronic scale, drug paraphernalia, and strips of suboxone.

The State had no evidence linking Listoe to the bags or drugs in the back seat. Nevertheless, Listoe was convicted of possession of methamphetamine with intent to deliver and possession of a controlled substance (suboxone). This Court should reverse and dismiss the charges with prejudice.

During jury selection, the State used a peremptory challenge to strike the only African American member of the jury pool. Listoe objected. The trial court read GR 37 but failed to properly apply it. Under a proper GR 37 analysis, an objective observer could have found that race or ethnicity was a factor in the use of the peremptory challenge. The trial court should have denied the challenge. The proper remedy is remand for a new trial.

## **2. Assignments of Error**

### **Assignments of Error**

1. The trial court erred in allowing the State's peremptory challenge of Juror 17.
2. The State failed to present sufficient evidence to establish constructive possession beyond a reasonable doubt.
3. The jury's verdict of guilty on Count I, possession of methamphetamine with intent to deliver, was not supported by substantial evidence.
4. The jury's verdict of guilty on County II, possession of a controlled substance (suboxone), was not supported by substantial evidence.

### **Issues Pertaining to Assignments of Error**

1. Under newly-adopted GR 37, a peremptory challenge must be denied if an objective observer could view race or ethnicity as a factor—purposeful or unconscious—in the use of the challenge. Here, the State used a challenge to strike the only African American member of the jury pool. Did the trial court err in allowing the challenge? (assignment of error 1)
2. The State bears the burden of proving the elements of each charge beyond a reasonable doubt. There was no evidence at trial establishing that Listoe had actual or constructive possession of the methamphetamine and suboxone in the back seat. Were the convictions based on insufficient evidence? (assignments of error 2-4)

### **3. Statement of the Case**

#### **3.1 Listoe was pulled over in a car that was not his own with a passenger who was allowed to leave the scene.**

Kitsap County Sheriff's Deputy Andrew Hren observed a black Pontiac parked at 7-Eleven. 2 RP 190. He ran a check on the plates, which came up as expired. 2 RP 190. The Pontiac left the parking lot, and Deputy Hren followed, activating his lights and initiating a traffic stop. 2 RP 190.

When the car stopped, Listoe, who was driving, opened his door and stepped out. 2 RP 193. Deputy Hren ordered him to sit back in the car, which Listoe did. 2 RP 193. Deputy Hren observed Listoe making furtive movements with his hands and ordered him to place his hands on the steering wheel. 2 RP 193. Listoe complied. 2 RP 193. When Deputy Hren told Listoe the reason for the stop, Listoe said the car was not his and he didn't know the registration was expired. 2 RP 234. Deputy Hren believed him that it wasn't his car. 2 RP 234.

There was a female passenger in the front seat. 2 RP 197. Deputy Hren spoke with her only briefly and told her she was free to go. 2 RP 198. She left the scene. 2 RP 198. She was never searched. 2 RP 222. Law enforcement did not try to contact her again. *See* 2 RP 226-28.

**3.2 Listoe was arrested and searched and had a bag of methamphetamine on his person.**

Deputy Hren removed Listoe from the car and placed him under arrest. 2 RP 198. In a search of Listoe incident to arrest, Deputy Hren found a plastic bag containing a white crystalline substance that appeared to be methamphetamine. 2 RP 199. The substance (Exhibit 18) was later tested by the crime lab and found to be methamphetamine. 2 RP 248. Detective Kirkwood testified that this baggie was consistent with a personal use amount of methamphetamine. 2 RP 287.

**3.3 Deputy Hren obtained a warrant and searched the vehicle. He found a bag and other personal items containing more drugs, but found no evidence of dominion and control.**

Deputy Hren obtained a warrant to search the car for more drugs, paraphernalia, and indicia of ownership or dominion and control of the car. 2 RP 202, 246. Deputy Langlow, who assisted in the search, testified that evidence of dominion and control would include names or paperwork. 2 RP 246. The deputies searched for documentation with Listoe's name on it but found none. 2 RP 218, 246. If there was evidence tying the car to someone else, they disregarded and did not document it. 2 RP 218, 246-47. They never determined who owned the car. 2 RP 214.

Deputy Hren found a black reusable grocery bag behind the driver's seat, on the floorboard. 2 RP 203. Inside the black bag were some fruit and vegetables and a white grocery bag. 2 RP 203-04. Inside the white grocery bag was a black pouch, some liquor bottles, and a package of sublingual strips of suboxone. 2 RP 203-04, 207, 221. Inside the black pouch was a digital scale, several syringes, a Tupperware container with white residue, and a mint container that contained shards of a white crystalline substance that appeared to be methamphetamine. 2 RP 204-05. The substance (Exhibit 17) was later tested by the crime lab and found to be methamphetamine. 2 RP 248. Detective Kirkwood testified that these items were consistent with selling methamphetamine. 2 RP 275-77, 292-93. The black pouch also contained a piece of paper that said "Kelly B." with a phone number. 2 RP 205.

The backseat of the car also contained a white jacket, a black backpack, a black purse, something yellow that might have been a towel, possibly another jacket, something blue with a zipper. 2 RP 215-17. The deputies did not retain any of these items. 2 RP 217.

There was no testimony regarding who owned any of the items found in the car. The deputies did not find any evidence of dominion and control. 2 RP 218. No fingerprints were taken of any of the items in the car. 2 RP 229-30, 231-32.

Deputy Hren testified that suboxone is a pain medication that is commonly prescribed to help people quit opioids, including heroin. 2 RP 189, 223-24. Listoe did not have any heroin or syringes on his person. 2 RP 224.

**3.4 Listoe was found guilty of possession of methamphetamine with intent to deliver and possession of a controlled substance (suboxone).**

After a jury trial, Listoe was found guilty of possession of methamphetamine with intent to deliver and possession of a controlled substance (suboxone). CP 1-2, 28, 29. He was sentenced to a prison-based DOSA with a total sentence of 90 months (45 months in confinement and 45 months community custody). CP 30-31, 32.

The trial court denied Listoe's halftime motion to dismiss the charges based on the State's failure to present sufficient evidence of actual or constructive possession of the items that would support possession with intent to deliver. 2 RP 295.

The defense declined to request a jury instruction for a lesser-included offense. 2 RP 303. The defense did request, and the trial court approved, an instruction on unwitting possession. 2 RP 303-04; CP 19.

**3.5 During Jury selection, the trial court upheld the State's peremptory challenge of the only African-American in the jury pool.**

During jury selection, the State exercised a peremptory challenge on Juror 17. 1 RP 161. Juror 17 was the only African-American in the jury pool. 1 RP 164. Listoe objected. 1 RP 161.

The State explained its reason as relating to an admittedly hyperbolic example of a hypothetical law prohibiting baking, selling, or eating of cookies. 1 RP 131-32, 162. The exchange between the State and Juror 17 follows:

MR. HINES: ... Let's say there is a cookie prohibition, you know, prohibition from like a hundred years ago. So why this would be a law, I have no idea.

Let's say there is a law against making cookies, selling them, eating them. Cookies are totally prohibited in every single way, and I am charged with eating a cookie.

It's on ten different surveillance cameras. There's like a million witnesses who testify about me eating this cookie. They all see it. There's a bunch of photographs of me eating it. I don't know why there would be a bunch of photographs of that, but let's say all of that evidence is at play here. It might be called like a slam-dunk case with all that evidence.

Any problems convicting me for eating a cookie?

Juror 17, what would you do?

PROSPECTIVE JUROR: I would question the law, period, to be honest with you.

MR. HINES: Like I said, why this is a law, I have no idea. But the law is the law. That's the law. The evidence is what I said. You know, it's on ten different surveillance cameras, a bunch of photographs, a million witnesses.

What do you do as a juror?

PROSPECTIVE JUROR: Take it all into account. I mean, you have to because of the law, but I would still question that law. Like you're just eating a cookie. Why is it even a law?

MR. HINES: Good question for your politicians; right? So you said -- what would you say you would do?

PROSPECTIVE JUROR: I would have to take all the evidence in, because there's obviously a law. I would still question that law, just period.

MR. HINES: Would you have any problems convicting me for eating the cookie?

PROSPECTIVE JUROR: Yes.

MR. HINES: Because of the law?

PROSPECTIVE JUROR: Yes.

MR. HINES: Okay. So the law is -- I will say -- I mean, it's kind of a like hyperbolic. It's a ridiculous sounding law, to make a point. So the law -- if you disagree with the law, would you have problems following it?

PROSPECTIVE JUROR: Yeah.

1 RP 131-33.

The State argued that it challenged Juror 17 on the basis that he would have difficulty convicting someone under that law.

1 RP 162. Listoe argued that Juror 17 had not indicated any unwillingness to follow court procedures in the real world regarding real laws. 1 RP 162. Listoe also pointed out that there was a new legal standard for peremptory challenges where race could be a factor. 1 RP 162.

The trial court recognized that Listoe was arguing under GR 37. 1 RP 162-63. The trial court concluded that an objective observer could conclude that the cookie hypothetical was the true reason for the challenge, rather than race or ethnicity. 1 RP 164. The trial court allowed the challenge. 1 RP 164.

## **4. Argument**

### **4.1 The trial court erred in applying the wrong legal standard to the State's peremptory challenge.**

Prior to the adoption of GR 37 by the Washington Supreme Court, effective April 24, 2018, peremptory challenges that implicated race were analyzed under the *Batson* test. *See State v. Jefferson*, 192 Wn.2d 225, 243-45, 429 P.3d 467 (2018). *Batson* provided a three-part test to determine whether a peremptory challenge should be denied as impermissibly racially motivated. *Jefferson*, 192 Wn.2d at 231 (*citing, e.g., Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)).

Under *Batson*, the defendant had the initial burden of making a prima facie case giving rise to an inference of

discriminatory purpose. *City of Seattle v. Erickson*, 188 Wn.2d 721, 726, 398 P.3d 1124 (2017). Then the burden would shift to the prosecutor to provide an adequate, race-neutral justification. *Id.* at 727. Finally, if a race-neutral explanation was provided, the court would weigh all relevant circumstances and decide if the strike was motivated by racial animus. *Id.*

In *Erickson*, the Washington Supreme Court modified the *Batson* standard, establishing a bright-line rule that the prima facie case in step one of the *Batson* analysis is established *per se* when the State strikes the sole member of a racially cognizable group. *Erickson*, 188 Wn.2d at 734.

The Supreme Court has continued to express frustration with *Batson*. “Looking back over the last 50 years, it is clear that *Batson* has failed to eliminate race discrimination in jury selection. ... [T]here is a growing body of evidence showing that *Batson* has done very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges.” *Jefferson*, 192 Wn.2d at 240. “Our case law has reviewed the history and failures of *Batson* in depth. And we have ‘long discussed a change to the *Batson* framework’ to address these remaining problems.” *Id.*

Yet until the adoption of GR 37, the court had still not addressed “the ongoing concerns of unconscious bias expressed in *Meredith* or the best way to approach *Batson*’s third step.”

*Jefferson*, 192 Wn.2d at 241. Without some greater change, *Batson* 1) made it difficult for defendants to prove purposeful discrimination even where it almost certainly existed, and 2) failed to address peremptory strikes resulting from implicit or unconscious bias. *Id.* at 242.

The Supreme Court addressed these two problems by adopting GR 37. *See Jefferson*, 192 Wn.2d at 243. “The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” GR 37. The rule replaces the three-step *Batson* analysis with a more streamlined process.

Under GR 37 there is no requirement of a prima facie showing; simple objection is enough. A party or the court may object to a peremptory challenge to raise the issue of improper bias simply by citation to the rule. GR 37(c). Objection triggers the requirement of a response. “Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.” GR 37(d).

After hearing the reasons for the peremptory challenge, the trial court shall evaluate the reasons given in light of the totality of circumstances. GR 37(e). The analysis is straightforward: “If the court determines that an objective observer could view race or ethnicity as a factor in the use of the

peremptory challenge, then the peremptory challenge shall be denied.” GR 37(e).

In conducting this analysis, the court must keep in mind that “an objective observer,” for purposes of this analysis, “is aware that implicit, institutional, and unconscious biases” are equally improper reasons for using a peremptory challenge. GR 37(f). In other words, if an objective observer could conclude that implicit, institutional, or unconscious bias was a factor in a party’s use of a peremptory challenge, the challenge “shall be denied.” *See Jefferson*, 192 Wn.2d at 250-51 (applying the analysis and finding that the facts in that case “‘could’ support an inference of implicit bias,” requiring reversal).

The end result appears to be that what used to be only the first step in the *Batson* analysis—the prima facie case—is now the only requirement under GR 37. Under this new framework, a party brings an objection, both parties express their reasoning, and the court determines whether the facts “could support” an inference of either purposeful discrimination or implicit bias. If there is enough to support an inference, the challenge “shall be denied.” GR 37(e).

The Washington Supreme Court explained in *Jefferson* that this is an objective inquiry subject to de novo review. *Jefferson*, 192 Wn.2d at 249-50.<sup>1</sup>

Here, the trial court failed to conduct a proper GR 37 analysis. Instead of asking whether the facts supported an inference of either purposeful discrimination or implicit bias, the trial court applied a *Batson*-style analysis, finding that an objective observer could conclude that the race-neutral reasons given by the State were the real motivation for the peremptory challenge. 1 RP 164.

The trial court turned the GR 37 analysis on its head, reading the rule in light of the now-outdated *Batson* analysis. The question for trial courts is no longer whether the race-neutral reasons given by the State are persuasive. Such an analysis fails to combat the implicit bias that GR 37 was designed to eliminate. The GR 37 analysis does not ask whether the race-neutral reasons are persuasive.

The GR 37 analysis does not ask, as the trial court did here, whether an objective observer could believe that the race-neutral reasons were the true motivation for the challenge.

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<sup>1</sup> Although the court in *Jefferson* did not directly interpret GR 37, it modified the *Batson* analysis to match the language and purpose of GR 37(e). It then interpreted and applied this modified *Batson* analysis. The end result is the same. The analysis under GR 37 is an objective test subject to de novo review.

Rather, the GR 37 analysis asks whether an objective observer could find that race was **a factor** in the use of the challenge.

This is a very low hurdle in comparison to the old *Batson* analysis. Purposeful discrimination is not required. The real reason for the challenge does not need to be discerned. In order to more fully combat implicit bias, all the rule requires is that an objective observer could infer that race was one factor, perhaps among many, perhaps entirely unconscious on the part of the party exercising the peremptory challenge. If race could have been a factor in the use of the challenge, the challenge “shall be denied.” GR 37(e).

Here, an objective observer could easily infer that race was a factor in the State’s use of the challenge. The State challenged the only African-American member of the jury pool. The inference of at least implicit bias in this challenge is so clear that the Washington Supreme Court made it a bright-line rule under the old *Batson* analysis. *See Erickson*, 188 Wn.2d at 734. As that court expressed, “it is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African American member proves the prosecutor’s strike was not racially motivated.” *Id.* at 733.

Under the GR 37 analysis, an objective observer could view race or ethnicity as a factor in use of a peremptory challenge to strike from the jury the sole member of a racially

cognizable group. The trial court erred in allowing the challenge. The proper remedy for the trial court's error is remand for a new trial. *Jefferson*, 192 Wn.2d at 251; *Erickson*, 188 Wn.2d at 735.

#### **4.2 The State failed to present sufficient evidence to support the convictions.**

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Whether the evidence presented at trial was sufficient to meet the State's burden is a question of constitutional magnitude that may be raised for the first time on appeal. *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). This Court reviews a challenge to the sufficiency of the evidence de novo. *Rich*, 184 Wn.2d at 903.

To determine whether the evidence was sufficient to support a conviction, the Court considers whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Rich*, 184 Wn.2d at 903. By incorporating the State's burden of proof beyond a reasonable doubt, the sufficiency of the evidence standard is more exacting than a simple "substantial evidence" analysis. *State v. Vasquez*, 178 Wn.2d 1, 6, 209 P.3d 318 (2013). Although the Court is to draw inferences from the evidence in favor of the State, those

inferences must be reasonable, and cannot be based on speculation. *Rich*, 184 Wn.2d at 903.

If the evidence is insufficient to prove an element beyond a reasonable doubt, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Possession of a controlled substance may be actual or constructive. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Actual possession requires physical custody of the controlled substance. *Id.* Constructive possession means having dominion and control over either the drugs or the premises on which the drugs were found. *Id.* In either case, the custody or control must be actual control, not merely a momentary handling. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Mere proximity to drugs is insufficient to prove constructive possession. *George*, 146 Wn. App. at 920. Although an individual's sole occupancy of a vehicle and possession of the keys has been held sufficient to find dominion and control over the vehicle's contents, *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010), the same is not necessarily true when there are multiple occupants in the vehicle.

Here there simply was not enough evidence to establish constructive possession of the drugs beyond a reasonable doubt.

Although Listoe was driving the car, it was not his. The deputies believed Listoe and were unable to find any evidence showing that Listoe owned, possessed, or had dominion and control over the car or its contents. There is a significant possibility that the car belonged to the female passenger who was let go. If so, she would have had dominion and control over the vehicle and its contents, not Listoe.

There was no evidence that Listoe at any time had actual possession of the bags in the backseat or their contents. There was no evidence that Listoe even knew the contents of the bags. No fingerprints were taken.

The only evidence linking Listoe to the drugs that were found within layers of containers on the back seat floorboards was the fact that Listoe was driving the car, which did not belong to him, and that he was found with similar drugs in his pocket. The fact that he was driving the car is not enough to establish constructive possession beyond a reasonable doubt when the car did not belong to him and there was a passenger who could have been the true possessor of the items. The drugs in Listoe's pocket are not enough to establish constructive possession of the drugs in the backseat. In fact, it is more likely that the drugs in the backseat belonged to the female passenger, from whom Listoe had just purchased the "personal use" amount that was found in his pocket.

The evidence was insufficient to establish that Listoe possessed the dealer-amount of methamphetamine or the suboxone. The user-amount of methamphetamine in Listoe's pocket was insufficient to establish that Listoe possessed it with intent to deliver. Because there was no charge or instruction for a lesser-included offense, the drugs in Listoe's pocket cannot support a conviction.

Because the evidence does not support constructive possession of the drugs in the backseat, Listoe's convictions must be reversed and the charges dismissed with prejudice.

## **5. Conclusion**

The evidence presented by the State was insufficient to support the element of constructive possession beyond a reasonable doubt. The jury could only have speculated that Listoe had dominion and control over the drugs in the backseat. This Court should reverse the conviction and dismiss the charges with prejudice.

In the alternative, this Court should reverse and remand for a new trial because the trial court failed to conduct a proper GR 37 analysis of the State's peremptory challenge of the only African American member of the jury pool. Under de novo review, the challenge should have been denied. The proper remedy is a new trial.

Respectfully submitted this 22<sup>nd</sup> day of July, 2019.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
kevin@olympicappeals.com  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on July 22, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Randall Avery Sutton  
Kitsap County Prosecutor's Office  
614 Division St  
Port Orchard, WA 98366-4614  
rsutton@co.kitsap.wa.us  
KCPA@co.kitsap.wa.us

I further certify that on July 22, 2019, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, James Listoe, by depositing a copy in the U.S. mail, postage paid, to the following address:

James H. Listoe DOC #855572  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

SIGNED at Lacey, Washington, this 22<sup>nd</sup> day of July, 2019.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
kevin@olympicappeals.com  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

# OLYMPIC APPEALS PLLC

July 22, 2019 - 4:24 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52893-2  
**Appellate Court Case Title:** State of Washington, Respondent v. James H. Listoe, Appellant  
**Superior Court Case Number:** 18-1-00696-0

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