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**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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**Reply Brief of Appellant**

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## **1. Reply Argument**

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

In his Brief of Appellant, Listoe argued that the trial court applied the wrong legal standard to the State's peremptory challenge of the only African-American member of the jury pool. Br. of App. at 9-15. Listoe contrasted the outdated *Batson* standard with the new standard under GR 37. Br. of App. at 9-12. Although the trial court reviewed GR 37 and claimed to be applying it, the standard the trial court actually applied more closely resembled *Batson* than GR 37. Br. of App. at 13-15.

The two standards are very different, and that difference is key to the trial court's error in this case. Under *Batson*, a challenge would only be rejected if the trial court determined that "the opponent of the strike has proved purposeful racial discrimination." *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). The burden was on the opponent of the strike to prove actual, purposeful discrimination.

That standard no longer applies. Under GR 37, the opponent of the strike needs only show that an objective observer, who understands that implicit or unconscious biases are just as invalid as purposeful discrimination, "could view race

or ethnicity as a factor in the use of the peremptory challenge.” GR 37(e). The new rule errs on the side of caution. The question is no longer whether a race-neutral reason might be true. The question is whether a person could infer that race might have been a contributing factor—even unconsciously—in the decision to make the challenge.

The trial court answered the first question—the *Batson* question—not the second. In doing so it applied the wrong legal standard. It makes no difference what the trial court said it was doing. What matters is what the trial court actually did. After hearing argument from both sides, the trial court allowed the challenge, stating, “[The juror’s] comments concerning his inability to follow the law in the example of the hypothetical ... could lead an objective observer to view that that would be the reason [for] the peremptory [challenge], rather than race or ethnicity...” 1 RP 164. In other words, the trial court concluded that the race-neutral reason given by the prosecutor was the real reason. This is a *Batson* analysis and is error under GR 37.

The State is wrong when it argues that the trial court determined that an objective observer could not view race as a factor. The trial court did not say that. It appears the trial court did not consider that multiple factors could have affected the decision to make the challenge. Instead the trial court tried to determine what the one, real reason for the challenge was.

Although this was the trial court's purpose under *Batson*, it is the wrong approach under GR 37.

It also appears the trial court did not consider implicit or unconscious bias. By their nature, implicit and unconscious bias exist simultaneously with race-neutral justifications. The person making the challenge can honestly believe that they are making the challenge for a race-neutral reason, even when their decision has actually been affected by unconscious bias. It is unhelpful to determine whether a race-neutral justification was the "real," conscious reason in the challenger's mind. In order to more effectively root out implicit or unconscious discrimination, GR 37 rejects any challenge that **may have been affected** by implicit or unconscious bias.

Here, an objective observer who is aware of implicit and unconscious bias could view race as having been a factor in the use of the challenge. Juror 17 never actually expressed an inability or unwillingness to follow the law in Listoe's case. When asked what he would do as a juror in the hypothetical cookie case, Juror 17 said, "Take it all into account. **I mean, you have to because of the law**, but I would still question that [cookie] law." 1 RP 132 (emphasis added). When asked again, Juror 17 said, "I would have to take all the evidence in, **because there's obviously a law**. I would still question that [cookie] law, just period." 1 RP 132. Although Juror 17 felt the need to

personally question a law that was patently unreasonable (even the prosecutor admitted the question was hyperbole), he actually expressed a willingness—even a sense of duty—to follow that law as a juror. “I mean, you have to because of the law.” 1 RP 132.

The prosecutor then asked if Juror 17 if he would “have any problems convicting me for eating the cookie.” 1 RP 133. Juror 17 responded that he would have problems, because of the absurdity of the law. 1 RP 133. But saying he would personally “have problems” convicting is not the same as saying that he wouldn’t convict. It appears from Juror 17’s complete statements that although he would have personal heartburn over having to convict a person under an absurd law, he still would do his duty as a juror and convict. “I mean, you have to because of the law.” 1 RP 132.

It is of note that the prosecutor never asked Juror 17 what he thought about drug laws. Cookies are one thing, but is the prohibition against possessing methamphetamine with intent to sell also an absurd law? Would Juror 17 “have any problems” convicting a person who sells meth? We don’t know. All we know is that Juror 17 thinks cookie prohibition is ridiculous.

The prosecutor misinterpreted Juror 17’s statements and incorrectly concluded that Juror 17 was unable or unwilling to

follow the law in the real world. This was the prosecutor's stated reason for exercising a peremptory challenge. But an objective observer who understands implicit and unconscious bias could view Juror 17's race as having been a factor in the prosecutor's misunderstanding of Juror 17's views about the law and his role as a juror. If unconscious bias led the prosecutor to the wrong conclusion about Juror 17, it was a factor in the decision, and the peremptory challenge must be denied.

An objective observer could view race as having been at least a factor in the use of the challenge. As a result of systemic bias, there was only one African-American member of the jury pool. As a result of implicit or unconscious bias, the prosecutor misinterpreted Juror 17's answers to his hypothetical questions and incorrectly believed that Juror 17 was unable or unwilling to follow the law. Making the peremptory challenge eliminated the only member of a cognizable ethnic group from the jury panel. Because race was at least one factor in the decision to exercise the challenge, GR 37 required that the challenge "shall be denied."

This Court should reverse and remand for a new trial.

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

Listoe's brief also argued that the State failed to present sufficient evidence to support the convictions. Br. of App. at 15-18. The reasonable doubt standard is part of the sufficiency of the evidence analysis. Br. of App. at 15 (citing *State v. Vasquez*, 178 Wn.2d 1, 6, 209 P.3d 318 (2013)). Only **reasonable** inferences can be drawn in the State's favor, not speculative ones. Br. of App. at 15-16 (citing *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)). If the evidence is insufficient to prove an element beyond a reasonable doubt, the conviction must be reversed and the case dismissed with prejudice. Br. of App. at 16 (citing *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

Listoe argued that the evidence was insufficient to establish **beyond reasonable doubt** that he had dominion and control over the drugs found in the backseat of a car that was not his. Br. of App. at 17-18. If he did not constructively possess those drugs, he could not be convicted of possession of suboxone. Br. of App. at 17-18. If he did not constructively possess those drugs, the dealer-amount of meth found there could not be used to support conviction of possession with intent to deliver.

Listoe argued that the user-amount of meth in his pocket was insufficient to establish **beyond reasonable doubt** that he possessed with intent to deliver. Br. of App. at 18 ("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.”).

There was no evidence that the car belonged to Listoe. There was no evidence that the drugs found behind the driver's seat within layers of bags had ever been actually possessed by Listoe. No fingerprints were taken. Nothing in any of the bags connected them to Listoe. No documentation of ownership, possession, or dominion and control was ever found.

Contrary to the State's argument, Listoe was not “moving around in the car.” Rather, Deputy Hren testified that Listoe made “furtive movements” in his lap area as though he were trying to hide something. 2 RP 193, 237. The only reasonable inference from this is that Listoe was trying to hide the user-amount of meth that was later discovered in his pocket. He could not have been doing anything with the drugs found behind his seat simply by making “furtive movements” in his lap area.

The only evidence in favor of the verdict is that Listoe was driving a car in which drugs were found and that Listoe had some of the same drug in his pocket that was also found in the back seat footwell. This is simply not sufficient to reasonably

conclude **beyond a reasonable doubt** that Listoe possessed the drugs with intent to deliver.

The State's own witnesses testified that the meth in Listoe's pocket was a user amount. 2 RP 287. That amount would not by itself support a conviction of possession with intent to deliver. *See* 2 RP 287. The evidence was insufficient to find Listoe guilty beyond a reasonable doubt. This Court should reverse the convictions and dismiss the charges with prejudice.

## **2. Conclusion**

The evidence presented by the State was insufficient to support the convictions 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 convictions 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 25<sup>th</sup> day of October, 2019.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on October 25, 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.

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