

80037-5

NO. 80037-5

SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE RHONE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Linda Lee, Judge

No. 03-1-02581-1

Court of Appeals No. 34063-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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

1. Should this court affirm the trial court's denial of defendant's request for a new venire because defendant failed to establish that African-Americans had been systematically excluded from the venire?
2. Should this court affirm the trial court's denial of defendant's alleged *Batson* challenge when defendant has not provided the necessary record for this court to review this issue nor has he shown the trial court's ruling to be clearly erroneous?

B. STATEMENT OF THE CASE.

After the jury was selected and sworn, defendant addressed the court as follows:

I don't mean to be facetious or disrespectful or a burden to the Court. However, I do want a jury of my peers. And I notice that Mr. Oishi [the prosecutor] took away the black, African-American, man off the jury.

Also, if I can't have – I would like to have someone that represents my culture as well as your culture. To have this the way it is to me seems unfair to me. It's not a jury of my peers. I'm – I mean, I am an African-American black male, 48 years old. I would like someone of culture, of color, that has – perhaps may have had to deal with the improprieties [sic] and so forth, to understand what's going on and what could be happening in this trial.

RP 429, 438, 439. The court asked defendant's trial counsel if there was a

motion before the court. Defendant's trial counsel replied, "Mr. Rhone is asking the Court to provide *a new jury pool.*" RP 439 (emphasis added).

The trial court considered this a *Batson* challenge. RP 451

At the outset, the trial court noted that there is no constitutional right to a jury that has a member of defendant's race. RP 451. Instead, "the 14<sup>th</sup> Amendment to the United State's Constitution prohibits the systematic exclusion of otherwise qualified jurors based solely on race." RP 451. The court then articulated the three part *Batson* test and found that defendant could not satisfy the first prong because he could not make a prima facie case of discrimination. RP 451-52. The court denied defendant's request for a new jury pool. RP 452-53.

C. ARGUMENT

1. THE COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR A NEW JURY POOL BECAUSE DEFENDANT DID NOT ESTABLISH THAT AFRICAN-AMERICANS HAD BEEN SYSTEMATICALLY EXCLUDED FROM THE VENIRE.

A defendant does not have a right to a jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L. Ed. 664 (1880). Under the sixth and fourteenth amendments to the United States Constitution, and article I, § 22 of the Washington Constitution, a criminal defendant has a right to be tried by a

jury that is representative of the community. *State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977) (citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L.Ed.2d 690 (1975)). A jury panel lacking non-Caucasian members, however, is insufficient in and of itself to show discrimination. *State v. Aleck*, 10 Wn. App. 796, 799, 520 P.2d 645 (1974). In *Taylor*, the United States Supreme Court stated: "Defendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538 (internal citations omitted).

In *State v. Sellers*, 39 Wn. App. 799, 800, 695 P.2d 1014 (1985), Sellers was convicted of killing his wife. During jury selection, and with Sellers' agreement, the only black person in the jury pool was excused for the juror's convenience. *State v. Sellers*, 39 Wn. App. 799, 801. Despite his agreement to release the sole black prospective juror, "[Sellers] challenged the panel claiming it did not represent a fair cross section of the community; specifically, he argued that blacks were underrepresented." *Sellers*, at 801. On appeal, Sellers assigned error to the trial court's rejection of his challenge. *Sellers*, at 801. In affirming his conviction, Division II of the Court of Appeals noted that Sellers had not

met his burden of proving there had been discrimination in his case. *Sellers*, at 802. The court held that a defendant is not entitled to exact proportionate racial representation in the jury pool. *Sellers*, at 802. Because a jury need not include even one member of a defendant's race, Sellers' reliance on the fact that there were no blacks on his panel was insufficient to meet his burden. *Sellers*, at 802.

Similarly, in the present case defendant requested a new jury pool because there were no African-American jurors seated on his jury. RP 439. Though the court interpreted defendant's request to be a *Batson*<sup>1</sup> challenge, the court properly denied defendant's request for a new venire because defendant had not provided any evidence that the lack of African-Americans on his panel was the result of discrimination. RP 451-53. When the trial court denied defendant's request, the court noted that there were only two African-American individuals on the entire 41 person venire. RP 452. One of the two African-Americans had been excused for cause based upon an agreement with defense. RP 452. The prosecuting attorney had used a peremptory challenge to excuse the remaining

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

African-American on the venire<sup>2</sup>. RP 453. Like Sellers, defendant's demand for a new jury venire was based solely on the fact that there were no members of his own race seated on the jury. While defendant noted in his motion that the prosecutor struck the only remaining African-American prospective juror, defendant did not allege the prosecutor had any discriminatory intent when exercising that peremptory challenge. RP 439. Instead, defendant told the trial court:

I would like to have someone that represents my culture as well as your culture. To have this the way it is to me seems unfair to me. It's not a jury of my peers. I'm – I mean, I am an African-American black male, 48 years old. I would like someone of culture, of color, that has – perhaps may have had to deal with the improprieties [sic] and so forth, to understand what's going on and what could be happening in this trial.

RP 439.

Because defendant did not allege or prove that the jury composition was the result of racial discrimination, but merely asserted a desire to have a member of his own race as part of the jury, the court properly denied defendant's request for a new venire.

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<sup>2</sup> The voir dire was not transcribed and is not part of the record on review. As a result the record is devoid of what, if any, questions were asked of the two African-American members of the venire and what, if any, responses those individuals made.

2. THE TRIAL COURT'S DENIAL OF DEFENDANT'S ALLEGED **BATSON** CHALLENGE IS ENTITLED TO GREAT DEFERENCE; IT SHOULD BE UPHELD AS DEFENDANT HAS NOT PROVIDED THE NECESSARY RECORD FOR THIS COURT TO REVIEW THIS ISSUE NOR HAS HE SHOWN THE TRIAL COURT'S RULING TO BE CLEARLY ERRONEOUS.

In *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Six years later in *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same – in all cases, the jury is subjected to open and public racial discrimination." *Id.* at 49.

*Batson* and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

*Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995).

The United States Supreme Court gave other courts some flexibility in establishing the exact procedures to follow when a *Batson* challenge is raised in a trial court. “We decline, however, to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Batson, supra*, 476 U.S. at p. 99; *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L.Ed.2d 129 (2005) (“States do have flexibility in formulating appropriate procedures to comply with *Batson*.”). This means that, to some extent, lower courts have been left with the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case.

The party raising a *Batson* challenge must first establish a prima facie case of purposeful discrimination. *State v. Evans*, 100 Wn. App. 757, 763-64, 998 P.2d (1995). A prima facie case exists if two criteria are met. *Evans*, 100 Wn. App. at 764. First, the challenge must be exercised against a member of a “constitutionally cognizable” group. *Evans*, 100 Wn. App. at 764. Second, that fact and “other relevant circumstances” must raise the inference that the challenge was based on the juror’s membership in the group. *Evans*, 100 Wn. App. at 764. If the proponent of the *Batson* challenge does not make a prima facie case, the inquiry ends

and the challenge is denied without addressing the remaining two prongs of the test. See *State v. Wright*, 78 Wn. App. 93, 100-01, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995).

One division of the Court of Appeals surveyed decisions from other jurisdictions for circumstances those courts have considered in making its determination of whether a prima facie case has been established; it found the following: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor; (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. *State v. Wright*, 78 Wn. App. 93, 99-100,; see also, *State v. Evans*, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000). This court has yet to adopt this criteria.

In the case now before the court, defendant sought review on the grounds that the decision below from Division II created a split in authority with Division I in *State v. Rhodes*, 82 Wn. App. 192, 917 P.2d 149 (1996), as to whether striking the only African-American juror in a venire panel is sufficient, by itself, to make a prima facie case of racial

discrimination. However, in *State v. Hicks*, 163 Wn.2d 477, 181 P.3d (2008), this court directly addressed this issue and found that no such split exists.

Phillip Hicks and his co-defendant Rashad Babbs were tried and convicted of the attempted murder of Jonathan Webber. *State v. Hicks*, 163 Wn.2d, 477, 488. During voir dire, counsel for both Hicks and Babbs objected when the State used a peremptory challenge to remove the last African-American juror from the venire<sup>3</sup>. *Hicks* at 484. The defense alleged that the prosecution's use of this peremptory challenge was racially motivated. *Hicks*, at 484. The trial court found, "out of an abundance of caution," that the defense had made a prima facie case of discrimination and asked the State for his reasons in excusing the juror in question. The State offered a race neutral reason and the court denied defendants' *Batson* challenge. *Hicks*, at 484-85. This court found the trial court's denial of defendants' *Batson* challenge was not clearly erroneous. *Hicks*, at 494.

In *Hicks*, this court specifically noted that *State v. Rhodes*, *State v. Evans*, and *State v. Wright* all articulate the same standard regarding the

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<sup>3</sup> The venire had originally included three African-American jurors, however, one became ill and failed to return for jury service, and the second was excused for cause when he admitted that he knew many of the witnesses and believed this knowledge would impact his assessment of their credibility. *Hicks*, at 484.

dismissal of the only African-American juror on the venire: “trial courts are not *required* to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances.” *Hicks*, at 490 (emphasis in original).

Here, relying upon *Rhodes*, defendant asserts there is a split in authority between the divisions. *Hicks* clearly resolves this issue and finds no such split. The first step of the *Batson* process requires: 1) a peremptory challenge exercised against a member of a constitutionally cognizable group and 2) other relevant circumstances which, taken together, raises an inference that the challenge was based on the juror’s membership in the group. *Rhodes*, 82 Wn. App. at 196; Opinion below at p.13. It is also clear that the party raising a *Batson* challenge is not required to show more than one peremptory strike against a member of a constitutionally cognizable group before it can make the prima facie showing required in the first step. *Johnson v. California*, 545 U.S. at 169, n. 5. But the United State Supreme Court has always discussed the prima facie case of discrimination as being the “sum of the proffered facts.” *See, Johnson v. California*, 545 U.S. at 169, *citing Batson*, 476 U.S. at 94. Under *Hicks*, the trial court may, but need not, find a prima facie case in such instances. This is what Division II held in the opinion below. The

decision below is not a departure from the holdings of Division I, or of the United State Supreme Court.

In the present case, both the trial court and the court of appeals treated defendant's pro se challenge to the jury venire as a *Batson* challenge. However, at no point does defendant ever assert that the prosecutor exercised his peremptory challenge for a discriminatory purpose. Instead, defendant notes that the prosecutor used his peremptory challenge to excuse the last African-American juror from the venire and requested a new jury pool so he could have someone of his own race or a person of color on his jury. RP 438. While defendant asserts that it is unfair that the jury does not have an African-American seated on it, this assertion does not rise to the level of a *Batson* challenge.

Assuming, *arguendo*, this court were to find that defendant's pro se objection was a *Batson* challenge, defendant's argument still fails because it was not timely, the record on review is insufficient for this court to reach the merits of the issue, and the court properly exercised its discretion in finding that defendant had not made a prima facie case of discrimination.

a. Defendant's challenge was not timely.

Although *Batson* does not address the timeliness issue, *i.e.*, when an objection to the jury selection process must be raised, the courts which

have considered the issue have concluded that a *Batson* motion is timely when made at any time before the jury is sworn. In *Ford v. Georgia*, 498 U.S. 411, 422, 111 S. Ct. 850, 856, 112 L.Ed.2d 935 (1991), the Supreme Court explained, “The requirement that any *Batson* claim be raised not only before the trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule.” *Id.* The court noted that “local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases” and therefore left it to state courts to implement *Batson*. The court acknowledged that a state could adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected. *Ford*, 111 S. Ct. 857.

Although no Washington case addresses the timeliness requirement for a *Batson* motion, Washington law is clear that challenges to jurors must be made during jury selection. CrR 6.4. Sound reasoning supports such a practice because the trial court’s ability to grant relief is very limited after the jury is sworn. Indeed, after the jury is sworn and the other members of the venire are released, the trial court has little, if any, ability to restore an excused juror to service in a particular case.

In the present case, defendant’s pro se challenge came after the jury was empanelled and, presumably, the remainder of the venire was

excused. RP 429, 438-39. Therefore, defendant's challenge was untimely and this court should so find.

- b. The record on review is insufficient for this court to reach the merits of defendant's challenge because voir dire was not transcribed.

The party seeking review has the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue. RAP 9.2(b). *Allemeier v. University of Washington*, 42 Wn. App. 465, 472, 712 P.2d 306 (1985). An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. *Marriage of Ochsner*, 47 Wn. App. 520, 528, 736 P.2d 292 (1987). While the Rules of Appellate Procedure allow for the court to correct or supplement the record, they do not impose a mandatory obligation upon the appellate court to order preparation of the record in order to substantiate a party's assignment of error. *Heilman v. Wentworth*, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). In *Heilman*, the appellant assigned error to the trial court's decision to deny his request for a continuance in order to obtain some medical testimony, but did not provide the relevant report of proceedings. The appellate court refused to consider the assignment of error stating:

We decline the implied invitation to search through an incomplete record, order that which should be obvious to

support an assignment of error, and then make a decision.

*Heilman*, 18 Wn. App. at 754. An appellate court errs when it decides an issue on the merits when the necessary record for review is missing. *State v. Wade*, 138 Wn.2d 460, 979 P.2d 850 (1999).

In the present case, defendant assigned error to the trial court's denial of his motion for a new jury pool, which defendant has framed as a *Batson* challenge. Petition of Appellant at 7. Assuming, without conceding, that defendant made a *Batson* challenge to the prosecutor's use of a peremptory challenge to excuse an African-American prospective juror, the record on review does not contain the verbatim report of proceedings for voir dire when this alleged *Batson* violation occurred. Instead, the record on review consists of defendant's motion for a new venire, which was made after the jury was empanelled, and the court's ruling on that motion. RP 429, 438-39, 450-53.

This court does not have the necessary record to review the court's decision denying defendant's motion. In the absence of the necessary record, this court must presume that the trial court acted properly in denying defendant's motion. If this court does review this issue, the review must be limited to whether the record on review shows that the trial court erred in denying defendant's alleged *Batson* challenge. Based upon the record before this court, which does not include the verbatim

report of proceedings for voir dire, the original jury panel selection list (which would show how many prospective jurors were excused for cause and how many peremptory challenges were used), or the peremptory challenge sheet (which would show how many peremptory challenges were used by the State and how many were used by defendant), this court cannot find that the trial court erred when it denied defendant's alleged *Batson* challenge.

- c. The trial court properly determined that defendant had not made a prima facie case of discrimination.

A trial court's determination of whether there was a discriminatory purpose behind the State's use of its peremptory challenges "will not be set aside unless clearly erroneous." *State v. Burch*, 65 Wn. App. 828, 841, 830 P.2d 357 (1992). "This same standard applies when reviewing the trial court's determination of whether a prima facie case has been made." *State v. Wright*, 78 Wn. App. 93, 99, 896 P.2d 713 (1995).

Broad deference is given to the trial court's ruling because the judge has observed voir dire first hand. *United States v. Vasquez-Lopez*, 22 F.3d 900, 901 (9<sup>th</sup> Cir. 1994). The United States Supreme Court noted that "deference to trial court findings on the issue of discriminatory intent

makes particular sense in this context because...the finding 'largely will turn on evaluation of credibility.' *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 18859, 114 L.Ed.2d 395 (1991).

The record on review in this case is meager because the defendant failed to have voir dire transcribed. The only record of whether the State had a discriminatory purpose is contained within the court's ruling and, inferentially, by the fact that defendant, though represented by counsel, raised the jury pool issue pro se. RP 438, 450-53. As noted in the lower court's decision, clearly defendant's trial counsel did not perceive a discriminatory purpose in the composition of the jury pool or the prosecutor's use of his peremptory challenges as defendant raised this issue pro se. Opinion below at p. 14. Similarly, the trial court noted defendant had not provided the court with any evidence of circumstances raising an inference of discrimination by the prosecution. RP 452. Instead, "[t]he defendant merely makes a bare assertion that there are no African Americans on this jury....The mere fact that State [sic] exercised its preemptory [sic] on that African American, without more, is insufficient to establish a prima facie case of discrimination." RP 452-53.

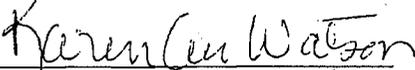
The trial court found no improper motive, and that determination is to be given great deference on appeal. Defendants have failed to meet their burden of showing that this ruling was clearly erroneous.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgments and sentences entered below. Alternatively, the State asks this court to remand this case to the Court of Appeals to consider in light of this courts recent opinion in *State v. Hicks*, which squarely addresses the issues presented in this petition

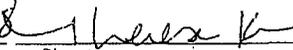
DATED: October 3, 2008.

GERALD A. HORNE  
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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.

10-3-08   
Date Signature

**FILED AS  
ATTACHMENT TO EMAIL**