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No. 64467-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON,
Respondent,

v.

KIRK SAINTCALLE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT.....	12
1. THE TRIAL COURT VIOLATED MR. SAINTCALLE'S RIGHT TO EQUAL PROTECTION BY ALLOWING THE STATE TO STRIKE THE LONE AFRICAN-AMERICAN JUROR.....	12
a. The Fourteenth Amendment prohibits the State from striking a juror because of his or her race.....	12
b. In this case, the State engaged in unconstitutional discrimination by using a peremptory challenge to strike the lone black member of the venire.....	14
2. ADMISSION OF THE RECORDINGS OF JAIL TELEPHONE CONVERSATIONS BETWEEN MR. SAINTCALLE AND HIS FRIEND VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.....	19
a. Mr. Saintcalle's telephone conversations were private affairs.....	20
b. The conversations were recorded without authority of law.....	23
c. Reversal of the assault convictions is required.....	24
3. THE TO-CONVICT INSTRUCTIONS FOR THE ASSAULT COUNTS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.....	26
a. A to-convict instruction violates due process if it omits an element of the crime charged.....	26

b. The to-convict instructions on the assault counts violated Mr. Saintcalle’s right to due process because they omitted the element that the State must disprove lawful use of force	27
c. The omission prejudiced Mr. Saintcalle, requiring reversal of the assault convictions	28
4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.....	30
a. The prosecutor commits misconduct if she vouches for her witnesses, misstates the jury’s role, or infringes on the defendant’s exercise of a constitutional right.	30
b. In this case, the prosecutor vouched for her witnesses and stated her personal opinions, mischaracterized the jury’s role, and infringed on Mr. Saintcalle’s constitutional right to trial by jury.....	32
E. CONCLUSION.....	36

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	28
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	26
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990)	20, 22
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003)	27
<u>State v. Garvin</u> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	23
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	22
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	23
<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	21, 22
<u>State v. Jordan</u> , 160 Wn.2d 121, 156 P.3d 893 (2007)	21
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	20
<u>State v. Miles</u> , 160 Wn.2d 236, 156 P.3d 864 (2007).....	21
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	27
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	20
<u>State v. O’Hara</u> , 167 Wn.2d 91, 103, 217 P.3d 756 (2009).....	27
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	23
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	23
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	30, 34
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	26
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009)	20

Washington Court of Appeals Decisions

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	35
<u>State v. Cleveland</u> , 58 Wn. App. 634, 794 P.2d 547 (1990).....	30
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	31, 32
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008) ..	30, 31, 34
<u>State v. Moreno</u> , 132 Wn. App. 663, 132 P.3d 1137 (2006)....	31, 32

United States Supreme Court Decisions

<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....	passim
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	24, 29
<u>Coffin v. United States</u> , 156 U.S. 432, 15 S.Ct. 394 (1895)	30
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	26, 30
<u>Miller-El v. Dretke</u> , 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).....	passim
<u>Snyder v. Louisiana</u> , 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)	15, 16, 18
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) .	23

Constitutional Provisions

Const. art. I, § 7.....	20
U.S. Const. amend. XIV	12

Statutes

RCW 9A.16.020 27

A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Saintcalle's right to equal protection by allowing the State to strike the lone African-American member of the venire.

2. The trial court violated Mr. Saintcalle's right to privacy under article I, section 7, by allowing the State to play for the jury recordings of private conversations obtained without authority of law.

3. The trial court violated Mr. Saintcalle's right to due process by omitting the absence of defense-of-others element from the to-convict instructions for the assault counts.

4. The prosecutor committed prejudicial misconduct in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State denies a defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. In this case, the State used a peremptory challenge to strike the lone African-American venire member, stating it was striking her because she did not know how she would react to evidence of a murder given that she knew someone who had been killed recently. But the State did not strike

a white juror who knew several people who had been shot, and the African-American venire member repeatedly stated that she could fairly weigh the facts and decide the case. Did the exclusion of the lone black venire member from the jury violate equal protection?

2. Article I, section 7 of the Washington Constitution prohibits the State from invading a person's private affairs without authority of law. Did the State violate Mr. Saintcalle's constitutional right to privacy by recording his personal telephone conversations without a warrant, and playing those recordings for the jury?

3. Due process requires that the to-convict instruction include every element of the crime charged. Here, the trial court instructed the jury on defense-of-others as to the assault counts, but did not include the absence of defense-of-others as an element in the to-convict instructions. Did the to-convict instructions for the assault counts violate Mr. Saintcalle's right to due process?

4. A prosecutor commits misconduct if she comments on a defendant's exercise of a constitutional right, states her personal opinion, vouches for the credibility of her witnesses, or informs the jury that its job is to speak the truth. Here, the prosecutor stated during closing argument that Mr. Saintcalle's co-defendants were credible because they pled guilty, that it was her personal

impression that witnesses had certain characteristics, and that the jury's job was to "tell the truth of what happened." Did the prosecutor commit misconduct during closing argument?

C. STATEMENT OF THE CASE

On February 9, 2007, Kirk Saintcalle got together with his friend Narada Roberts at Narada's mother's house. 3/25/09 RP 53. Several other people were there, including Narada's brother, Roderick. 3/25/09 RP 53. Mr. Saintcalle and the Roberts brothers eventually left the house to meet a couple of other friends. 3/25/09 RP 59-68. The group was talking about New Year's Eve, when Narada had been assaulted by an unknown assailant. 3/12/09 RP 25-26; 3/26/09 RP 72. The young men wanted to figure out who had perpetrated the attack, and why no one had come to Narada's defense. 3/26/09 RP 73. Roderick Roberts was "really mad" about what happened to his brother. 3/26/09 RP 120. Another of the young men, Devon, was "in the mood to fight." 3/25/09 RP 70.

The men thought that a person by the name of Anthony Johnson knew something about the New Year's Eve assault. The group drove to Mr. Johnson's home, and Mr. Johnson let them in. 3/12/09 RP 12. Three other people were also at the house: Tammy Brown, who was Mr. Johnson's girlfriend, Latasha Ellis, and Ronald

Robinson. 3/12/09 RP 6-8. Mr. Saintcalle and Tammy Brown were friends and he had lived in her house for a few months. 3/12/09 RP 15. He called her "mom" because he liked her and she looked after him. 3/30/09 RP 43-44. His own mother had been murdered by his father when he was a boy. 3/30/09 RP 39.

After the group entered the home, the Roberts brothers forced Mr. Johnson into the bathroom and started beating him. 3/25/09 RP 78; 3/26/09 RP 90. Roderick explained that they did so in retaliation for the New Year's Eve attack on his brother. 3/25/09 RP 83. Narada Roberts was armed with an assault rifle. 3/12/09 RP 23, 114.

Another member of the group saw Ms. Brown and threatened to "skin" her, so Mr. Saintcalle ordered Ms. Brown upstairs at gunpoint. 3/12/09 RP 14; 3/26/09 RP 72 91; 3/30/09 RP 54-55. Mr. Saintcalle, who had a handgun, kept Ms. Brown, Ms. Ellis, and Mr. Robinson in the upstairs bedroom, away from the melee in the bathroom. 3/12/09 RP 20. Another member of the group joined Mr. Saintcalle upstairs at one point, but then returned to the ground floor. Ms. Brown was not afraid of Mr. Saintcalle because she knew him and trusted him not to hurt her. 3/12/09 RP 28. Ms. Ellis also stated she was not afraid of Mr. Saintcalle: "I was

able to relax a little bit because, you know, [Mr. Saintcalle] didn't give me no threat." 3/17/09 RP 79.

Eventually, one member of the group shot Mr. Johnson three times, killing him. 3/10/09 RP 152. Both Ms. Brown and Ms. Ellis told police officers that night that Mr. Saintcalle had been upstairs with them when they heard the shots. 3/12/09 RP 40; 3/16/09 RP 31; 3/17/09 RP 81. The two later changed their story and stated that Mr. Saintcalle was downstairs at the time.

Narada Roberts, Roderick Roberts, and appellant Kirk Saintcalle were all charged with one count of first-degree felony murder and three counts of second-degree assault. CP 1, 29-31. When officers arrested Roderick Roberts, they found a .45-caliber bullet on his person. 3/16/09 RP 80. Shortly before trial, the Roberts brothers pleaded guilty to second-degree murder. 3/25/09 RP 87; 3/26/09 RP 104. Mr. Saintcalle proceeded to trial.

Voir dire commenced on March 9, 2009. Over 85 potential jurors were screened. 3/9/09 p.m. RP 34. Only one was black. 3/10/09 RP 67.

The court dismissed 49 prospective jurors for hardship. 3/9/09 p.m. RP 2. 3/9/09 p.m. RP 24, 27, 35; 3/10/09 RP 68. Juror number 34, the only African American juror, did not have a hardship

issue; she checked with her employer and confirmed that she would be compensated during jury service. 3/9/09 p.m. RP 5.

During voir dire, the prosecutor asked whether anyone felt that “there are certain segments of the population, whether it be based on wealth, poverty, race, other things, where they just feel like they may not be treated fairly by the criminal justice system?” 3/9/09 p.m. RP 64. Juror 46 discussed the fact that affluent people fare better in the justice system. 3/9/09 p.m. RP 64. The following conversation then occurred:

JUROR 72: I feel there are some areas of unfairness in our system. I am aware, for example, that a jury of their peers, yet as you look around this panel, all of the faces are white.

JUROR 34: No, not quite.

(Laughter.)

3/9/09 p.m. RP 65.

The prosecutor then asked Juror 34 about her background. 3/9/09 p.m. 65. Juror 34 stated that she worked as a middle-school counselor in the city. 3/9/09 p.m. 66. The prosecutor asked for her impressions of the criminal justice system. Juror 34 responded:

Gosh, I feel like I am on the spot here. But being a person of color, I have a lot of thoughts about the criminal system. I see – I have seen firsthand – and a couple people have already mentioned that if you

have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.

And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.

And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven't heard anything about this case, we watch the news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.

So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as they see this young man sitting up here.

3/9/09 p.m. RP 66-67.

The prosecutor then asked Juror 34 how she would handle being asked to sit in judgment of somebody. 3/9/09 p.m. RP 67.

Juror 34 stated:

I think number one, because I am a Christian, I know I can listen to the facts and, you know, follow the judge's instruction. But also it's kind of hard, and I haven't mentioned this before because none of those questions have come up for me to answer, but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here. Even though I don't know the facts of this particular case, and I would like to think

that I can be fair because I am a Christian, I did lose someone two weeks ago.

3/9/09 p.m. RP 68.

The prosecutor concluded, "You have a lot that is going through your mind currently both that would give you a lot of empathy for someone who is charged with a crime and also empathy for someone who may be a victim of a crime. In that way, you may be representative of the perfect juror." 3/9/09 p.m. RP 69.

The next day, the prosecutor asked questions of several jurors, then checked back with Juror 34, asking how she was feeling about serving on the jury. 3/10/09 RP 41-42. She responded that she did not particularly feel like serving on the jury because she knew someone who had been killed recently and did not know how she would react to hearing testimony and seeing pictures of a murder. 3/10/09 RP 42-43. However, she also emphasized that she was not normally an emotional person, and that she had the skills and knowledge to be a good juror because she could weigh the evidence fairly: "But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I guess I'm saying who

could be like me I would want me. So sometimes you have to do things that you don't want to do."¹ 3/10/09 RP 42-43.

The parties and the court ultimately agreed to dismiss several potential jurors for cause. Two were victims of violent crimes. 3/9/09 p.m. 2; 3/10/09 RP 61-65. One person's son had been convicted of drug and gun possession. 3/10/09 RP 60-64. Another answered questions by speaking gibberish. 3/10/09 RP 65. Another stated she could not follow the law if she disagreed with it. 3/9/09 p.m. RP 19; 3/10/09 RP 65-66.

The State also moved to dismiss juror 34 for cause. Mr. Saintcalle objected. 3/10/09 RP 65-66. The court denied the State's motion to dismiss her for cause, but the State then used one of its peremptory challenges to dismiss her. 3/10/09 RP 100. Mr. Saintcalle objected to the dismissal of the lone black potential juror under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). 3/10/09 RP 103-04. The State argued that it was not dismissing Juror 34 because she was black but because she was not sure how she would react to the evidence given she knew someone who had been killed. 3/10/09 RP 66, 101-02. The

¹ The transcript attributes all of the statements on this page to Juror 66, but it is clear from the context that Juror 34 is speaking.

court denied the Batson challenge and allowed the State to strike the lone African American venire member, stating:

And the reasons are as follows: Ms. Tolson stated that her friend recently was murdered, as a well known case to all counsel here at the table. Further stated that she was upset about that. That she – it was a death of a friend, and that yesterday she was not certain whether she should be a juror on that case because of the fact that looking at homicide scene photos would have on her. Today she did, in fact, say that she felt that perhaps, words to the effect of, that she had a duty to be on the jury. She stated still today that she didn't know how she would react to those photographs. But I think those are reasons that she herself articulated that are sufficient, are race neutral to allow peremptory challenge to go forward in this case.

3/10/09 RP 105-06.

After the State exercised six peremptory challenges and Mr. Saintcalle exercised five, 12 jurors and two alternates were seated.

3/10/09 RP 112-189.

At trial, the Roberts brothers testified against Mr. Saintcalle, stating that he was the one who shot Mr. Johnson. 3/25/09 RP 89; 3/26/09 RP 94-95. Mr. Saintcalle, on the other hand, testified that he was upstairs with Ms. Brown and the others when Mr. Johnson was shot. 3/30/09 RP 58-67. Narada Roberts admitted that he “saved like fifty years by pleading guilty” and “all he had to say was that Mr. Saintcalle was the shooter.” 3/26/09 RP 110.

Ms. Brown and Ms. Ellis testified that Mr. Saintcalle was downstairs when Mr. Johnson was shot, but they both acknowledged that they originally thought – and told police officers – that Mr. Saintcalle was upstairs at the time of the shooting. 3/12/09 RP 40; 3/17/09 RP 81. In fact, Ms. Brown said she told police that the one thing she could vouch for was that Mr. Saintcalle was upstairs when the gunshots were fired downstairs. 3/12/09 RP 47.

A Washington State Patrol Crime Laboratory forensic scientist testified that Mr. Saintcalle's DNA was not found on any of the 10 items tested, but that Roderick Roberts' DNA and Anthony Johnson's DNA was found. 3/17/09 RP 5-61.

Mr. Saintcalle was convicted as charged of one count of first-degree felony murder and three counts of second-degree assault. He timely appeals. CP 108-22.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. SAINTCALLE'S RIGHT TO EQUAL PROTECTION BY ALLOWING THE STATE TO STRIKE THE LONE AFRICAN-AMERICAN JUROR.

a. The Fourteenth Amendment prohibits the State from striking a juror because of his or her race. “[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.” Batson, 476 U.S. at 85; U.S. Const. amend. XIV. Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. Batson, 476 U.S. at 87.

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

Courts apply a three-part analysis to determine whether a potential juror was peremptorily challenged pursuant to discriminatory criteria. First, the defendant must make out a prima

facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Batson, 476 U.S. at 93-94. Washington follows a bright-line rule whereby a defendant establishes a prima facie case of discrimination when, as here, the State exercised a peremptory challenge against the sole remaining venire member of the defendant's racial group. State v. Rhone, 168 Wn.2d 645, 659, 229 P.3d 752 (2010) (Alexander, J., dissenting); id. at 658 (Madsen, C.J., concurring and stating that henceforth the rule advocated by the four dissenters would apply).

Second, the burden shifts to the State to explain the exclusion and demonstrate that race-neutral selection criteria and procedures "produced the monochromatic result." Batson, 476 U.S. at 94. The prosecutor must give a "clear and reasonably specific" explanation of his or her reasons for striking the relevant juror. Miller-El v. Dretke, 545 U.S. at 239.

Third and finally, the trial court has the duty to determine if the defendant has established purposeful discrimination. Batson, 476 U.S. at 98. In deciding whether the exercise of the peremptory challenge violates equal protection, the court should consider all relevant evidence, and not simply take the State's race-neutral

explanation at face value. Id. at 97-98; Miller-El v. Dretke, 545 U.S. at 240. Prosecutors' questions, patterns of peremptory challenges, and disproportionate impact may provide circumstantial evidence of discriminatory intent. Batson, 476 U.S. at 93. "For example, total or seriously disproportionate exclusion of [African Americans] from jury venires is itself such an unequal application of the law as to show intentional discrimination." Id. (internal citations omitted).

This Court reviews a trial court's Batson ruling for clear error. Rhone, 168 Wn.2d at 651. The error is structural, requiring reversal without any showing of prejudice. Batson, 476 U.S. at 100.

b. In this case, the State engaged in unconstitutional discrimination by using a peremptory challenge to strike the lone black member of the venire. Here, the State exercised a peremptory challenge to strike the sole African-American juror from the panel. Thus, Mr. Saintcalle established a prima facie case of improper discrimination. Rhone, 168 Wn.2d at 658-59. The State's proffered race-neutral reasons for the exclusion are pretextual. The trial court clearly erred in allowing the challenge.

The trial court credited the State's explanation that Ms. Tolson did not know what effect the photographs of the victim in

this case would have on her, given that an acquaintance of hers had been killed two weeks prior. 3/10/09 RP 105-06. But this is a selective recollection of voir dire. At the same time Ms. Tolson made that statement, she said she did not tend to be an emotional person. She further stated that she was the right type of person to serve as a juror because she would fairly consider all of the facts. 3/10/09 RP 42-43. This was consistent with her statement of the previous day: "I know I can listen to the facts and, you know, follow the judge's instruction." 3/9/09 p.m. RP 68. Thus, she considered it her duty to serve as a juror regardless of what had happened to her friend. 3/10/09 RP 42-43. All of these statements must be considered in addressing the Batson challenge. Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted"). The State's attestation that it was afraid the court might "lose" Ms. Tolson because she would not be able to handle seeing the photographs was highly speculative, and cannot support the strike. See id. at 482 (prosecutor's "highly speculative" claim that juror might find defendant guilty of a lesser-included offense in order to be finished

earlier and return to his job was not a sufficient race-neutral reason for striking the juror).

The real reason the prosecutor struck Ms. Tolson is probably that she had earlier provided – at the prosecutor’s urging – her perspective as a person of color. 3/9/09 p.m. RP 66-67. But black jurors may not be excluded based on an assumption that they will be unable to impartially consider the State’s case against a black defendant. Batson, 476 U.S. at 89.

If the fact that Ms. Tolson knew a shooting victim were the real reason for her dismissal, the State would also have dismissed Juror 33, who was acquainted with multiple individuals who had been shot. 3/10/09 RP 15. But number 33, who was white, served on the jury, and number 34, who was black, did not. 3/10/09 RP 113-14. Thus, the proffered reason for the strike of Ms. Tolson fails. See Snyder, 552 U.S. at 479-83 (State’s proffered reason for striking juror – his student-teaching obligation – failed because other members of the venire also had conflicting obligations but they were not struck); Miller-El v. Dretke, 545 U.S. at 241 (“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to

serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step”).

That the stated race-neutral reasons are pretextual is further borne out by the fact that the prosecution did not challenge white jurors who espoused defense-friendly positions. Juror 49, for example, stated in no uncertain terms that he or she did not believe the law of accomplice liability was fair. 3/9/09 p.m. RP 75.

I don't believe it's fair. I think the person that actually did the killing is the guilty person for murder, and I think the other one should be charged with a different crime, but not – unless they are hanging on the person or somehow involved physically and, you know, holding them down or something along those lines.

3/9/09 p.m. RP 75. Juror 49 served on the jury, but Ms. Tolson, who would have had empathy for the victims because of her friend's recent death, was struck. 3/10/09 RP 113-14, 123.

Jurors 23 and 24 expressed a stricter understanding of the “beyond a reasonable doubt” standard than their fellow jurors. The prosecutor asked whether the fact that a person drove to a gas station and pulled their car up to a gas pump was enough to prove that their intent was to fill their tank with gas. 3/10/09 RP 50.

Several jurors said yes, while others said they would need to hear the person say they were “low on gas.” 3/10/09 RP 51-53. But

Juror 24 would not find they intended to get gas until they actually “went to get the gas or opened their gas can.” 3/10/09 RP 52. Juror 23 agreed that the “tipping point” was when they “open the tank.” 3/10/09 RP 53. Despite their defense-friendly view of the standard of proof, the State did not strike numbers 23 and 24; they served on the jury, while Ms. Tolson did not. 3/10/09 RP 111, 113-14.

Another circumstance that must be considered in reviewing the Batson ruling is the fact that the State also tried to strike the only other non-white venire member, Mexican-American juror number 10, Melissa Premone. 3/10/09 RP 115. The court denied the challenge, but the fact that the State tried for a monochromatic panel is further evidence of racial animosity. See Snyder, 552 U.S. at 478 (explaining that court would consider strike of a second non-white juror in analyzing whether strike of the first juror was race-based). In Miller-EI, the Court found it significant that “prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members.” Miller-EI v. Dretke, 545 U.S. at 241. Here, prosecutors used their peremptory strikes to exclude **100%** of the eligible African-American venire members, and tried to exclude

100% of the non-white members. 3/10/09 RP 113-15.

“Happenstance is unlikely to produce this disparity.” Id.

The prosecutor acknowledged during voir dire that because Ms. Tolson empathized with both victims and defendants, she “may be representative of the perfect juror.” 3/9/09 p.m. RP 69. The prosecutor struck her anyway, and the evidence indicates that the strike was based on race. See Miller-El v. Dretke, 545 U.S. at 247 (“Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors’ explanations for the strike cannot reasonably be accepted”). The trial court erred in allowing the State to dismiss the lone African-American juror. This Court should reverse Mr. Saintcalle’s convictions, and remand for a new trial.

2. ADMISSION OF THE RECORDINGS OF JAIL TELEPHONE CONVERSATIONS BETWEEN MR. SAINTCALLE AND HIS FRIEND VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Over Mr. Saintcalle’s objections, the trial court allowed the State to play recordings of telephone conversations between Mr. Saintcalle and his friend, Anna Hall. 3/30/09 RP 122. The King County Jail had recorded the calls, and Mr. Saintcalle objected to their admission on constitutional grounds. CP 35-37. Because the

conversations were private affairs seized without authority of law, the trial court violated Mr. Saintcalle's rights under article I, section 7 by allowing the State to play recordings of the conversations for the jury.

a. Mr. Saintcalle's telephone conversations were private affairs. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law.

Const. art. I, § 7. The state constitutional protection "is explicitly broader than that of the Fourth Amendment." State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). It "clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." Id. In short, "Article I, section 7 is a jealous protector of privacy." State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (quoting State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984)). "[W]hether advanced technology leads to diminished subjective expectations of privacy does to resolve whether use of that technology without a

warrant violates article I, section 7.” State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003). Unlike the Fourth Amendment, the question is “whether the ‘private affairs’ of an individual have been unreasonably violated rather than whether a person’s expectation of privacy is reasonable.” Boland, 115 Wn.2d at 580.

In determining whether something is a “private affair” subject to the protection of the state constitution, “a central consideration is the nature of the information sought – that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person’s life.” State v. Jordan, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). For example, in Miles, banking records were held to be a private affair because:

The information sought here potentially reveals sensitive personal information. Private bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more.

State v. Miles, 160 Wn.2d 236, 246-47, 156 P.3d 864 (2007). “Little doubt exists that banking records, because of the type of information contained, are within a person’s private affairs.” Id. at 247.

Similarly, in Boland, garbage was held to be a “private affair” because the items in the trash, like “bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person’s activities, associations, and beliefs.” Boland, 115 Wn.2d at 578. In Jackson, the Court held police may not install a GPS device on a car without a warrant because “vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles.” Jackson, 150 Wn.2d at 262.

In Gunwall, the numbers people dialed on their telephones were held to be private affairs, even though the conversations themselves were not recorded. State v. Gunwall, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986). If mere numbers dialed are private affairs, it stands to reason that the actual conversations – which reveal far more intimate details – are also private affairs.

In sum, given that banking records, motel registry information, location, telephone records, and even garbage are private affairs protected by article I, section 7, it is clear that the telephone conversations Mr. Saintcalle had with his friend are also “private affairs” under our state constitution.

b. The conversations were recorded without authority of law.

Because Mr. Saintcalle's telephone conversations are private affairs, they may not be invaded absent "authority of law"— i.e., a warrant or one of the narrowly drawn exceptions to the warrant requirement. Const. art. I, § 7; State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

A warrantless search or seizure is per se unreasonable unless it falls under one of Washington's recognized exceptions. Hendrickson, 129 Wn.2d at 70-71. The exceptions are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry² investigative stops. Id. at 71. Exceptions to the warrant requirement must be "jealously and carefully drawn." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). They "are not devices to undermine the warrant requirement." State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Exceptions to the warrant requirement are narrower under Washington's "authority of law" clause than under the Fourth Amendment. State v. O'Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003). "The State bears a heavy burden to show the search falls

² Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

within one of the 'narrowly drawn' exceptions." Garvin, 166 Wn.2d at 250 (citation omitted).

Here, the State did not have a warrant to record Mr. Saintcalle's telephone conversations, and no exception applies. The State may argue that because the King County Jail warns callers that their conversations will be recorded, the parties impliedly consented to the recording. But notice does not equal consent. A contrary conclusion would create an insurmountable bootstrapping problem – a governmental entity could render their illegal conduct legal merely by preannouncing it. Here, although the county notified the callers that their conversation would be recorded, the parties had no choice in the matter. Thus, they did not consent. In sum, because the State recorded Mr. Saintcalle's private telephone calls without authority of law, the calls should have been suppressed rather than played for the jury.

c. Reversal of the assault convictions is required. A constitutional error requires reversal unless the State can prove beyond a reasonable doubt that the error did not affect the verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This Court should reverse the assault

convictions because the introduction of the illegally recorded calls prejudiced Mr. Saintcalle's defense on those counts.

Mr. Saintcalle argued that he was trying to protect the three roommates upstairs from suffering the same fate as Anthony Johnson. 3/30/09 RP 35; 3/31/09 RP 69-71. The court instructed the jury on this defense. CP 84. Mr. Saintcalle and Ms. Brown testified that they had been friends and roommates, that Ms. Brown was not afraid of Mr. Saintcalle that evening, and that Mr. Saintcalle referred to Ms. Brown as "Mom" because he respected her and she looked out for him. 3/12/09 RP 15, 63; 3/30/09 RP 43-44. But the State played recordings of telephone calls in which Mr. Saintcalle referred to Ms. Brown as a "bitch, tweaker, and meth head." The State emphasized these statements in closing argument. 3/31/09 RP 99. The State cannot prove beyond a reasonable doubt that without the admission of the unconstitutionally recorded phone calls the jury would have convicted Mr. Saintcalle of assault. Thus, the convictions on the assault counts should be reversed, and the case remanded for a new trial at which the telephone calls will be suppressed.

3. THE TO-CONVICT INSTRUCTIONS FOR THE ASSAULT COUNTS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

a. A to-convict instruction violates due process if it omits an element of the crime charged. The “to convict” instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be

raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction “obviously affect[s] a defendant’s constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The to-convict instructions on the assault counts violated Mr. Saintcalle’s right to due process because they omitted the element that the State must disprove lawful use of force. Here, the court provided the jury with an instruction on lawful use of force in defense of others, but this element was not included in the to-convict instructions for the assault counts. CP 80-84. The omission violated due process.

The use or attempted use of force upon another is not unlawful when used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person. RCW 9A.16.020(3). In Washington, when the issue of lawful use of force in self-defense or defense of others is raised, the unlawful use of force becomes an

essential element the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 616-17, 683 P.2d 1069 (1984). In other words, the absence of self-defense or defense-of-others is an element the State must prove. Id.

In Acosta, the Supreme Court held the jury instructions were inadequate where “the jury was not told in the ‘to convict’ instruction that the force used must be unlawful, wrongful, or without justification or excuse.” Id. at 623. Similarly here, although the court did provide a separate instruction on the lawful use of force in defense of others, the “to convict” instruction did not include this element. The instruction listed only two elements:

- (1) That on or about February 9, 2007, the defendant – as principal or an accomplice – assaulted Tammy Brown with a deadly weapon; and
- (2) That the acts occurred in the state of Washington.

CP 80; see also CP 81-82 (similar to-convict instructions for counts 3 and 4). In sum, the to-convict instructions on the assault counts were constitutionally deficient because they omitted the element of absence of defense of others.

c. The omission prejudiced Mr. Saintcalle, requiring reversal of the assault convictions. As explained above, a constitutional error requires reversal unless the State can prove beyond a

reasonable doubt that the error did not affect the verdict obtained. Chapman, 386 U.S. at 24. This Court should reverse the assault convictions because the omission of the defense-of-others instruction from the to-convict instruction prejudiced Mr. Saintcalle's defense on those counts.

Again, Mr. Saintcalle argued that he was trying to protect the three roommates upstairs from suffering the same fate as Anthony Johnson, and therefore he was not guilty of assaulting them. 3/31/09 RP 69-71. The defense was plausible because Mr. Saintcalle was a friend and former roommate of Ms. Brown, both Ms. Brown and Ms. Ellis testified that they were not afraid of Mr. Saintcalle that evening, and Mr. Saintcalle even called Ms. Brown "Mom" because he respected her and she looked out for him. 3/12/09 RP 15, 63; 3/30/09 RP 43-44. But the to-convict instructions did not indicate that any of this was relevant, let alone that it went to an element of the crime. The State cannot prove beyond a reasonable doubt that the verdicts would have been the same had the element been included in the to-convict instructions. Thus, the convictions on the assault counts should be reversed, and the case remanded for a new trial.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

a. The prosecutor commits misconduct if she vouches for her witnesses, misstates the jury's role, or infringes on the defendant's exercise of a constitutional right. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. Winship, 397 U.S. at 364.

It is also misconduct for a prosecutor to assert his or her personal opinion as to the credibility of a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Finally, a prosecutor may not encourage the jury to draw adverse inferences from the defendant's exercise of a constitutional right. State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (prosecutor committed misconduct by commenting in closing argument about the defendant's exercise of his constitutional right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor improperly infringed upon defendants' election to remain silent by stating in closing, "you would hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence").

Where a prosecutor commits misconduct, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct affected the jury's verdict. Jackson, 150 Wn. App. at 883. Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a curative instruction could not have remedied. Jones, 144 Wn. App. at 290. Where a prosecutor's improper comment refers to a separate constitutional right, it is subject to the constitutional standard of prejudice. In other words, the court must reverse

unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt.

Moreno, 132 Wn. App. at 671-72.

b. In this case, the prosecutor vouched for her witnesses and stated her personal opinions, mischaracterized the jury's role, and infringed on Mr. Saintcalle's constitutional right to trial by jury.

During closing argument in this case, the prosecutor discussed the credibility of Roderick and Narada Roberts by stating:

And I want to talk to you about the testimony of these two co-defendants at this time that came in and testified to you. ... what we know is they took responsibility. They indicated a willingness to take the responsibility.

3/31/09 RP 39. Mr. Saintcalle objected, but the court overruled the objection. The prosecutor continued, "They pled guilty." 3/31/09 RP 39. Mr. Saintcalle again objected on the basis that the statements invaded the province of the jury and violated Mr. Saintcalle's due process rights. 3/31/09 RP 39. The court again overruled the objection. But the objection should have been sustained because the prosecutor may not state or imply that a person who pleads guilty is more credible than a person who exercises his constitutional right to trial by jury. See Moreno, 132 Wn. App. at 672-73; Fleming, 83 Wn. App. at 214.

The State cannot show that this misconduct was harmless beyond a reasonable doubt. The testimony of the co-defendants was essential to the State's case. They both testified that Mr. Saintcalle shot Mr. Johnson. But Mr. Saintcalle testified that he was upstairs with the other three inhabitants while someone else shot Mr. Johnson, and that he did not know anyone planned to shoot him. Furthermore, both Tammy Brown and Latasha Ellis originally told police officers the same thing – that Mr. Saintcalle was upstairs with them when the shots rang out. 3/12/09 RP 40; 3/16/09 RP 31. In fact, Ms. Brown said she told police that the one thing she could vouch for was that Mr. Saintcalle was upstairs when the gunshots were fired downstairs. 3/12/09 RP 47. Both complainants admitted to the jury that their stories had changed since the event. No DNA evidence tied Mr. Saintcalle to the murder. 3/17/09 RP 131.

Accordingly, the testimony of the co-defendants against Mr. Saintcalle was absolutely critical. The State cannot prove beyond a reasonable doubt that the jury would have believed the codefendants absent the prosecutor's statement that people who plead guilty are credible. The conviction on the murder count should be reversed and the case remanded for a new trial.

The prosecutor's improper comments discussed above were exacerbated by her later vouching for the same witnesses. She stated:

And here's my impression. That Mr. Roderick Roberts has a tendency to minimize his own involvement. He has a tendency to minimize his understanding of what was going on. And Narada Roberts doesn't do that.

3/31/09 RP 91 (emphasis added). The prosecutor similarly presented her personal opinion as to the credibility of Tammy Brown:

We have never tried to hide the fact that Tammy Brown was confused, and that's my impression. She is genuinely confused about where Mr. Saintcalle was at the time the shots are fired. Her belief currently, and I think she's honestly trying to tell you the truth.

3/31/09 RP 89. Mr. Saintcalle objected to the prosecution's bolstering of its witness, but the objection was overruled. 3/31/09 RP 90. As with the previous objections, this objection should have been sustained. The prosecutor committed misconduct in expressing her personal opinions about her witnesses and vouching for their credibility. Reed, 102 Wn.2d at 145; Jones, 144 Wn. App. at 293. For the reasons discussed above, there is a substantial likelihood that the improper personal opinions and

witness-bolstering affected the verdict on the murder count, requiring reversal of that conviction.

Finally, the prosecutor mischaracterized the jury's role by stating:

[O]ur mission here in this trial and throughout this trial has been to present you with evidence that will let you tell the truth of what happened.

3/31/09 RP 89 (emphasis added). This Court has held that statements similar to the above are improper and constitute misconduct. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). In Anderson, the prosecutor stated, "by your verdict in this case, you will declare the truth about what happened." Id. at 424. He later argued, "Folks, the truth of what happened is the only thing that really matters in this case." Id. at 425. This Court held, "The prosecutor's repeated requests that the jury 'declare the truth' ... were improper" because the "jury's job is not to 'solve' a case," but "to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id. at 429. For this reason, too, this Court should hold that the prosecutor committed misconduct, requiring reversal of at least the murder conviction.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Saintcalle's convictions and remand for a new trial.

DATED this 17th day of September, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lila J. Silverstein', written over a horizontal line.

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