

65605-8

65605-8

NO. 65605-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JARVIS GIBBS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether defendant Jarvis Gibbs's Batson¹ challenge to the State's peremptory challenge against Juror No. 1 is waived because the prosecutor offered multiple race-neutral reasons for striking the potential juror and Gibbs never disputed them below.

2. Whether the trial court acted within its discretion in rejecting Gibbs's Batson challenge to the State's peremptory challenge against Juror No. 1.

3. Whether Gibbs has not shown that he suffered prejudice due to the prosecutor's brief, erroneous rebuttal argument given that the trial court immediately provided a curative instruction to the jury.

4. Whether Gibbs has waived his claim that his constitutional right against self-incrimination was violated because, after moving for a mistrial based upon this claim of error, he affirmatively withdrew his motion.

5. Whether Gibbs cannot show that he suffered prejudice by a detective's brief comment that Gibbs did not want to talk to the

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

police because the trial court immediately struck the comment and issued a curative instruction to the jury.

B. STATEMENT OF THE CASE

On or around September 1, 2009, defendant Jarvis Gibbs, Clovelle Harvey, Michael Alexander and Sheena Blackburn were hanging out, and their conversation turned to finding victims to rob. 4RP 122-29.² Blackburn agreed to act as the driver for the three men and drove them into Seattle. 4RP 129-30.

In the early morning hours of September 1, 2009, Bradley Scott was walking home on Lake City Way when Blackburn's car pulled up in front of him. 4RP 5-12. Three men, Gibbs, Harvey and Alexander, exited the car. 4RP 13-15, 39-40, 122-35. As Scott passed them, one of the men asked him for gas money. 4RP 16-17. Scott handed over one dollar and walked away. 4RP 19-10. One man ran after Scott and told him they needed more money. 4RP 20-21. After Scott responded that he did not have

² The appellant arranged for several short transcripts of pretrial hearings that are irrelevant to the issues raised on appeal. The State adopts the following abbreviations for the trial transcripts: 1RP: May 4, 2010; 2RP: May 5, 2010; 3RP: May 6, 2010; 4RP: May 11, 2010; 5RP: May 12, 2010; 6RP: May 13, 2010; 7RP: May 21, 2010.

any more money, the three men approached and attacked him. 4RP 21-25. Scott fell to the ground, and the three men kicked and hit him. 4RP 22-23. The men took Scott's wallet, ran back to the car and drove off. 4RP 23. As a result of the mugging, Scott suffered a concussion and a broken nose. 4RP 32-34.

Later that day, Gibbs, Harvey, Alexander and Blackburn used Scott's debit card and credit card to buy cell phones, gas, cigarettes and food. 4RP 52-55, 144-54. A surveillance video at a 7-11 store recorded Gibbs and the others buying items with the stolen cards. 4RP 148-50.

One week later, Gibbs, Harvey, and Blackburn were out again looking for victims. 4RP 154-57. At about 1:00 a.m. on September 8, 2009, in the Greenlake neighborhood of Seattle, Tyler Grieb was walking home, and Gibbs and Harvey approached him. 3RP 73-74, 88; 4RP 156- 57. Both men simultaneously punched Grieb in the face. 3RP 75-76, 85-86. After Grieb fell to the ground, they kicked and hit him and demanded that he turn over his cell phone. 3RP 76-78. Grieb went into a fetal position, protecting his phone. 3RP 79, 90-91, 96. One of the men ripped off a back pocket of Grieb's jeans and took his wallet. 3RP 70-80.

The men left, and Grieb called the police. 3RP 80. Grieb suffered a concussion, contusions and a chipped tooth. 3RP 101-02.

The police subsequently obtained the 7-11 store surveillance video, which had images of Gibbs, Harvey, Alexander and Blackburn using Scott's stolen credit and debit cards. 4RP 144-50; 5RP 66. This video was publicly released, and the police received information identifying the suspects. 5RP 67. In a subsequent line-up, both Scott and Grieb identified Gibbs as one of the men involved in the robberies. 3RP 81-86; 4RP 37-40; 5RP 67-72.

The State charged Gibbs with two counts of first-degree robbery and one count of second-degree identity theft. CP 52-53. Trial began in late May of 2010.

At trial, Sheena Blackburn testified and admitted that she acted as the driver and that Gibbs had committed the robberies. 4RP 122-63. Blackburn had been charged with three counts of first-degree robbery, and she testified pursuant to a plea agreement where her charges had been reduced to three counts of second-degree robbery. 4RP 161-62.

Gibbs called Clovelle Harvey as a witness. 5RP 118. Harvey also had been charged with first-degree robbery for his involvement in the robbery of Grieb and for another robbery.

5RP 118-19. Harvey pled guilty, and in his guilty plea statement, he asserted that he committed the robbery of Grieb with Gibbs and Blackburn. 5RP 123-24. However, at trial, Harvey testified that Gibbs was not involved in the robbery of Grieb. 5RP 120.

The jury found Gibbs guilty as charged. CP 77, 78, 111. Gibbs subsequently brought a motion for a new trial, which the trial court denied. 7RP 5; CP 122-26. The court imposed standard range sentences. CP 112-15. This appeal follows.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REJECTED GIBBS'S BATSON CHALLENGE TO THE STATE'S REMOVAL OF JUROR NO. 1.

Gibbs claims that the trial court erred by permitting the State to exercise a peremptory challenge against Juror No. 1. For the first time on appeal, he argues that the prosecutor's numerous race-neutral reasons for striking Juror No. 1 were pretextual. Because once the prosecutor offered his reasons for the strike, Gibbs never challenged or disputed them, this Court should hold that Gibbs's challenge is waived. Even if it is not waived, the trial court acted within its discretion in finding that Gibbs failed to prove

purposeful racial discrimination. This Court should reject Gibbs's Batson claim.

a. Relevant Facts.

During voir dire, the prosecutor exercised five peremptory challenges; one was against Juror No. 1, an African-American. 3RP 41-44, 67. Juror No. 1 initially claimed to have a hardship and was one of the few jurors who responded when the prosecutor asked who did not want to be there. 2RP 2-3, 34; 3RP 69-70. He listed his occupation as a professor on the juror form; during voir dire, he described himself as a "psycho-social nurse" and an anthropologist. 2RP 81; 3RP 69. He told defense counsel that he should be concerned whether the jurors would presume that his client was innocent. 2RP 81. When the jurors were asked whether they had an unpleasant experience with a police officer, Juror No. 1 responded and described two "unpleasant experiences" he had with police officers. 2RP 59. He described one experience, where he was stopped for 30 minutes in hot weather, as a "very unpleasant experience" that was "dangerous to his health." 2RP 59.

Defense counsel objected to the peremptory challenge against Juror No. 1. 3RP 42, 67-68. He claimed that "no clear

reason was demonstrated during voir dire that in my mind suggested a basis for challenging the juror other than his race."

3RP 68. Defense counsel acknowledged that there was another African-American juror, whom the prosecutor had not challenged, but noted that he was the designated alternate juror. 3RP 67.

The trial court, noting that the law had recently changed in this area and made it easier for the defense to show a prima facie case of discrimination, requested an explanation from the prosecutor. 3RP 68.

The prosecutor responded that the defense had not shown a pattern, noting that there was an African-American juror serving as an alternate who might deliberate on the case. 3RP 68-69. He then explained why he had exercised the peremptory challenge against Juror No. 1:

One is that he listed himself as a professor on the jury biography. When Mr. Peale asked him what he did for a living he said he was a nurse. I don't know if he intentionally was being deceptive, but those are two different fields.

He told me during voir dire that he was not excited to be here and he raised his hand. He appeared as if he wanted to leave. He presented Your Honor with a hardship telling Your Honor that he had a conflict on Monday. But for me correcting Your Honor that we do not have court on Monday Your Honor was about to let him go because of that.

He's had two bad experiences with police officers when he drives his drop-down red sports car, in his memory. He said that one was being a little aggressive. The other held him for approximately 30 minutes in the middle of downtown, and he said it was very irritating and he was annoyed. We have Seattle Police Department detectives and officers in this particular case.

He admitted to Mr. Peale that he is sensitive about the race issue, and that everyone should be sensitive about the race issue. That's not something that he needed to volunteer, but he did regardless.

And this is another reason, on three occasions that I counted, he asked a question to the Court, to counsel, when it was a period of time where only the Court and only counsel were to ask questions. He did not follow the rules, in my opinion.

3RP 68-70.

After the prosecutor summarized his reasons, the judge offered defense counsel an opportunity to respond. 3RP 70.

Defense counsel declined. Id.

The trial court found the prosecutor's reasons credible and rejected the Batson challenge:

Assuming that all that is required to make a prima facie case under a Batson challenge is a challenge to the only person of color on the panel, I'm not sure that that's met here, because the alternate is a person of color. But assuming that we're past that threshold issue, the Court finds that there are legitimate reasons, those that have been given by [the prosecutor] for his challenge. Number 1, he's

concerned that there may have been a lack of being straight forward with what No. 1's profession is.

He also said he wasn't excited to be here and he asked to be excused for hardship. It's legitimate for counsel to be then concerned how good a juror the person would be.

The fourth, bad law enforcement experiences, that was a legitimate concern for the prosecutor.

Five, saying he is sensitive about race. I don't know. Six, he asked questions, and, [the prosecutor] thinks that that was a violation of the rules. And that may be a legitimate inference to draw.

So, for all those reasons the Court finds that there are sufficient reasons given that are not race based for the challenge. So I will deny the Batson challenge.

3RP 70-71.

- b. Gibbs Waived His Claim That The Prosecutor's Reasons For Striking Juror No. 1 Were Pretextual.

The Equal Protection Clause guarantees the defendant the right to be tried by a jury selected free from racial discrimination.

Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When reviewing a Batson challenge, the trial court undertakes a three-part inquiry to determine whether the

challenged juror is being stricken based on discriminatory reasons.

State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010).

First, a defendant opposing the State's peremptory challenge of a juror must establish a *prima facie* case of purposeful discrimination. Id. Second, if the defendant establishes a *prima facie* case, then the burden shifts to the State to articulate a race-neutral explanation for challenging the juror that specifically relates to the case being tried. Id.; Batson, 476 U.S. at 98. Third, the trial court considers the State's explanation and determines whether the defendant has demonstrated purposeful discrimination. Rhone, 168 Wn.2d at 651. Although the final step involves evaluating the persuasiveness of the State's explanation, the ultimate burden of persuasion rests with the defendant. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

Here, the trial court never found that Gibbs had satisfied the first step: that he had established a *prima facie* case of racial discrimination. Rather, the judge stated that she was not sure that a *prima facie* standard was satisfied, but stated that it was "wise to

go to the second step." 3RP 68-70.³ The prosecutor then provided numerous race-neutral reasons for exercising his peremptory challenge to Juror No. 1. 3RP 68-70.

On appeal, Gibbs claims, for the first time, that the prosecutor's stated reasons for striking Juror No. 1 were pretextual. However, this argument was never made below. In response to the reasons offered by the prosecutor, defense counsel said nothing; he did not dispute them, or claim that they were pretextual. Though Gibbs later brought a motion for a new trial, alleging various errors, he did not claim a Batson violation. CP 122-26.

Consistent with courts in other jurisdictions, this Court should hold that Gibbs's claim that the prosecutor's reasons were pretextual is waived. In United States v. Rudas, 905 F.2d 38 (2nd Cir. 1990), the defendant raised a Batson challenge to the prosecutor's exercise of two peremptory challenges. After the

³ Here, the trial court erred by requiring an explanation from the prosecutor without finding that Gibbs had established a *prima facie* case of racial discrimination. Rhone, 168 Wn.2d at 656 (recognizing a trial court "should not elicit the prosecutor's race-neutral explanation *before* determining whether the defense has established a *prima facie* case" because it collapses the analysis) (quoting State v. Wright, 78 Wn. App. 93, 100-01, 896 P.2d 713 (1995)). Nonetheless, once a prosecutor has offered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a *prima facie* showing is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

prosecutor provided race-neutral explanations for striking the two prospective jurors, defense counsel said nothing more about the issue, and the trial court made no ruling. On appeal, the defendant raised the Batson issue and argued that the prosecutor's reasons were pretextual and that the court erred in failing to rule. The Second Circuit rejected this claim:

Once the Government has offered reasons for its peremptory challenges, defense counsel must expressly indicate an intention to pursue the Batson claim. Here defense counsel did nothing. She could have moved for a mistrial, moved to reinstate the excluded jurors, or otherwise indicated her continuing objection. The failure of Giraldo's counsel to make any response to the Government's explanation of its two peremptory challenges indicated to the court that she no longer disputed the propriety of the Government's challenges. By failing to dispute the Government's explanations, she appeared to acquiesce in them. As a result, there was no need for the district judge to make a ruling.

Id. at 41; see also Mack v. State, 650 So.2d 1289, 1297 (Miss. 1994) (holding that "[i]t is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court" and that "[t]he failure to do so constitutes waiver."); State v. Taylor, 944 S.W.2d 925, 934 (Mo. 1997) ("[a] defendant's failure to challenge the State's race-neutral explanation in any way

waives any future complaint that the State's reasons were racially motivated.").

This rule makes sense. Defense counsel raised the Batson challenge on the basis that the challenged juror was African-American without knowing the prosecutor's reasons for challenging the juror. After hearing the prosecutor's reasons, defense counsel did not dispute them or say anything further. Based upon the record in this case, it is entirely possible that, after hearing the prosecutor's response, defense counsel agreed that there were race-neutral reasons for the prosecutor's exercise of the strike. Given that the evaluation of the prosecutor's reasons is fact intensive and requires the trial court to consider the juror's demeanor and the prosecutor's credibility,⁴ it is inappropriate for a defendant to raise the pretextual claim for the first time on appeal. This Court should hold that Gibbs has waived his claim that the prosecutor's race-neutral reasons for striking Juror No. 1 were pretextual.

⁴ Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

c. The Trial Court Acted Within Its Discretion In Finding That Gibbs Failed To Establish Purposeful Racial Discrimination.

Even if Gibbs's Batson claim is not waived, the Court should reject his argument. On review, the trial court's Batson determination is accorded "great deference" and "upheld unless clearly erroneous." State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). The trial court plays "a pivotal role" in evaluating Batson claims because the third step of the inquiry involves evaluating the prosecutor's credibility, and the best evidence of discriminatory intent is often the demeanor of the attorney exercising the challenge. Snyder, 552 U.S. at 477. Further, race-neutral reasons that invoke a juror's demeanor, are best determined by the trial court who "must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." Id. Determinations of credibility and demeanor are "peculiarly within a trial judge's province" and must be deferred to on appeal absent exceptional circumstances. Id. (citations omitted).

The trial court found that the State's multiple race-neutral reasons for challenging Juror No. 1 were legitimate and not

pretextual. On appeal, Gibbs does not even address all of the prosecutor's reasons for striking Juror No. 1. For example, the prosecutor indicated that he was concerned because Juror No. 1 had stated that he was not excited to be there and appeared as if he wanted to leave. Commenting on this reason, the trial court held that "[i]t's legitimate for counsel to be then concerned how good a juror the person would be." 3RP 70. Gibbs has not shown that this was a pretextual reason for striking Juror No. 1.

In addition, both the prosecutor and trial court indicated that Juror No. 1 had asked questions out of turn. On appeal, Gibbs complains about this reason, insisting that "Juror No. 1's strong personality" should not have been a reason to strike him. Brief of Appellant at 14. However, Juror No. 1's "strong personality" was a race-neutral reason to exercise a peremptory challenge, and does not support a Batson claim.

The prosecutor expressed concern about Juror No. 1's inconsistent descriptions of his occupation. He listed his occupation as a professor on the juror form, but during voir dire, he described himself as a "psycho-social nurse" and an anthropologist. 2RP 81; 3RP 69. On appeal, Gibbs complains that the prosecutor did not attempt to clarify this discrepancy during voir dire.

However, Gibbs cites no authority for the notion that the prosecutor is required to exhaust all issues of concern about a juror before exercising a peremptory challenge.

The prosecutor also expressed concern about Juror No. 1's description of two prior bad experiences with police officers. For the first time on appeal, Gibbs engages in comparative juror analysis, complaining that the prosecutor did not strike Juror Nos. 20 and 21, who also described unpleasant experiences with police officers. While the prosecutor never had the opportunity below to explain the differences that he perceived in Juror Nos. 1, 20 and 21, the record clearly establishes differences between them.

When asked about bad experiences with police officers, Juror No. 1 gave the most detailed and dramatic account of his bad experiences. He stated that he had two bad experiences with police officers, and he described one with the Seattle Police as a "very unpleasant experience" and "dangerous to his health." 2RP 59. In contrast, Juror No. 20 described the experience as not particularly bad and stated that it had occurred out of state and "a lot of years ago." 2RP 58. Juror No. 21 listed only one experience: being pulled over by a nasty and agitated police officer due to a problem with the car registration. 2RP 60.

Furthermore, Gibbs's comparative juror analysis ignores that Juror Nos. 20 and 21 made other statements that made them potentially attractive jurors to the prosecutor. Both jurors had experiences with stolen credit cards. Juror No. 20's credit card was stolen and the juror was quite angry about it. 3RP 6. Juror No. 21 described an incident where the juror's parents had their gas cards stolen and used. 3RP 13.

As one appellate court has observed, comparative juror analysis, raised for the first time on appeal, is inherently limited and can result in flawed conclusions:

There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. Even an inflection in the voice can make a difference in the meaning. . . .

For example, two panelists may each state he or she was arrested for driving under the influence of alcohol and pled guilty. In response to questions by the prosecutor, each may state he or she harbors no ill feeling against the police as a result of the incident and will not hold that experience against the prosecution. One panelist may deliver that answer in a way that conveys embarrassment, remorse and authenticity of response. The other panelist may answer with a tone of voice, gesture, expression or hesitation that conveys strong negative feelings about

the experience and belies the truthfulness of the answer. A transcript will show that the panelists gave similar answers; it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror.

People v. Lenix, 187 P.3d 946, 961, 80 Cal. Rptr. 3d 98 (2008).

Left with the cold transcript and deprived of any first-hand observations of the various prospective jurors' facial expression, tone, or demeanor, it is difficult if not impossible, to conclude that the State's decision to challenge Juror No. 1 and accept Juror Nos. 20 and 21, reflects a discriminatory purpose.

The trial court's decision to credit the State's race-neutral reason for challenging Juror No. 1 is afforded great deference on appeal. Gibbs has not established that the court erred in concluding that there was insufficient indication of purposeful discrimination.

2. GIBBS HAS NOT SHOWN THAT HE IS ENTITLED TO A NEW TRIAL DUE TO THE PROSECUTOR'S REBUTTAL ARGUMENT.

Gibbs argues that he is entitled to a new trial because of the prosecutor's discussion of the presumption of innocence during rebuttal argument. While the prosecutor's brief remarks were an

incorrect statement of the law, the trial court immediately provided a curative instruction to the jury, and the court repeatedly read to the jury a proper instruction about the presumption of innocence. Given these facts, Gibbs cannot show that he suffered prejudice justifying a new trial.

During rebuttal argument, the prosecutor made the following argument:

PROSECUTOR: [Defense counsel]'s right with one thing. The defendant is presumed innocent. Not right now though. He was presumed innocent at the beginning of this trial. And you owe that to him. But the minute the State started producing evidence, the minute that Tyler [Grieb] came in on a Thursday morning and testified, he was guilty.

DEFENSE COUNSEL: Your Honor, I'll object to the suggestion made as to (inaudible) instruct disregard and counsel cautioned.

PROSECUTOR: Basis?

THE COURT: All right. Jurors, as I instructed you earlier, a defendant is presumed innocent. This presumption continues throughout the entire trial, unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt. The State has the burden of proving that a reasonable doubt exists.

6RP 53-54.

The law governing Gibb's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of

establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

The State acknowledges that the prosecutor's brief rebuttal argument suggesting that the presumption of innocence began to disappear after the State presented evidence is incorrect and inconsistent with Washington law. See State v. Tharp, 27 Wn. App. 198, 211-13, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). In fact, the same prosecutor proposed and the court gave a correct instruction about the presumption of innocence. CP 85; Supp. CP ___ (Sub No. 93). This instruction stated that the

presumption “continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.” Id.

Though the prosecutor's statement was inaccurate, this Court should reverse only if Gibbs can show prejudice. Prejudice exists where there is a substantial likelihood that the prosecutorial misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The Supreme Court's decision in Warren is instructive. In Warren, the prosecutor repeatedly told jurors in closing that the defendant was not entitled to “the benefit of the doubt.” 165 Wn.2d at 24-25. Defense counsel objected each time, and the trial court interrupted the argument and gave an “appropriate and effective curative instruction.” Id. at 28. Although the Supreme Court held that the prosecutor's remarks were improper and flagrant, the court held that the curative instruction cured any error. Id. The Court explained:

In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Had the trial judge not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a

prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction.

Id. at 28 (citation omitted).

Here, as in Warren, the trial court's instructions in this case cured the error. The court repeatedly instructed the jury that the presumption of innocence continued throughout the trial. At the very beginning of trial, the court instructed the jury that, "the "presumption [of innocence] continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." 2RP 14. Again, prior to closing argument, the court read the same instruction to the jury. 6RP 7; CP 85. Immediately after the prosecutor made the challenged argument, the court corrected him and again properly instructed the jury. 6RP 54. When reviewing similar incorrect arguments about the presumption of innocence, federal courts have concluded that new trials were not warranted when the trial court properly instructed the jury as to the presumption of innocence.

United States v. Crumley, 528 F.3d 1053, 1065-66 (8th Cir. 2008);

Kellogg v. Skon, 176 F.3d 447, 451 (8th Cir. 1999).⁵

Here, the prosecutor did not repeat the argument, and at trial Gibbs did not perceive the prosecutor's remarks to be incurably prejudicial. After the verdict he moved for a new trial and complained about some of the prosecutor's comments during closing argument. CP 122-26. However, his motion did not mention the argument challenged on appeal. Id.

Given these facts this Court should conclude, as in Warren, that the trial court's instructions cured the error.

**3. GIBBS IS NOT ENTITLED TO A NEW TRIAL
BASED UPON HIS CLAIM THAT HIS RIGHT
AGAINST SELF-INCRIMINATION WAS VIOLATED.**

Gibbs argues that his constitutional right against self-incrimination was violated when the case detective mentioned during cross-examination that Gibbs was not willing to talk about the robberies. Gibbs waived this claim because after he raised this

⁵ In contrast, in one of the federal cases cited by Gibbs, Mahoney v. Wallman, 917 F.2d 469 (10th Cir. 1990), the court reversed based upon the prosecutor's argument that the presumption no longer existed by the time of closing argument. However, in that case, the trial court had overruled the defense objection to this argument, and the Court of Appeals held that, by doing so, the trial court placed its "official imprimatur" on "the prosecution's misstatements of law." Id. at 473.

issue at trial, he affirmatively withdrew his motion for a mistrial. Even if the error is not waived, this Court should hold that Gibbs has failed to show prejudice justifying reversal given the brief nature of the comment and the fact that the trial court immediately struck the comment and issued a curative instruction to the jury.

a. Relevant Facts.

During cross-examination of the investigation detective, Jerome Craig, defense counsel asked a series of questions about the detective's style when questioning suspects. During the course of these questions, the detective mentioned that Gibbs was not willing to talk about the robbery:

DEFENSE COUNSEL: In your training, you, as a detective, have been taught techniques in how to ask questions of suspects, have you not?

DETECTIVE: I've been taught how to detect deception, in suspects.

DEFENSE COUNSEL: Well, that's a whole different thing than learning how to ask a question, isn't it?

DETECTIVE: Every interview is different and every person is different, so we approach every interview a little bit differently.

DEFENSE COUNSEL: I'm sure you do. But don't you have a style and a technique of asking questions that is standard amongst detectives?

DETECTIVE: No, not necessarily. You obviously want to advise them of their rights and make sure they are clear on those before you get started. But, everybody kind of has their own style on interview techniques. We've all developed those over the years by interviewing many people. And, so, everybody has their own unique styles. I'd hate to lump us all into one group like that.

DEFENSE COUNSEL: Excellent. But you have a style?

DETECTIVE: Yes.

DEFENSE COUNSEL: And your style is based upon your experience and your training?

DETECTIVE: Yes. And the case and people involved, yes.

DEFENSE COUNSEL: And you modify the tone of your voice, the phrasing of questions and how you present yourself, and what opportunities you give the speaker to speak depending on the case and individual, fair enough?

DETECTIVE: Well, no, it's not painting a picture, that's not really - - actually, I'm just honest with people and let them know what I've got and try to find out what they want to tell me. Some people, in this particular case like Mr. Gibbs, didn't want to talk to us about the robbery.

THE COURT: Ask another question.

DEFENSE COUNSEL: Your Honor, I will reserve a motion, and I'd ask the Court to instruct the jury to disregard the last remark.

THE COURT: The jury is instructed to disregard the last comment.

5RP 99-101.

Outside the presence of the jury, Gibbs moved for a mistrial, arguing the detective's reference to Gibbs not answering questions was improper. 5RP 101-02. The court deferred ruling on the motion. 5RP 103. Defense counsel drafted a curative instruction, and, when the jurors returned, the court read it to them. 5RP 104-05.

Jurors, I have an important instruction to give to you, please be attentive.

The jury is reminded that a defendant in a criminal case is not required to answer a question asked by a police officer or to give evidence in a criminal case. Disregard any inference to the contrary derived from the last question and answer by this witness.

5RP 105.

The next day, defense counsel stated that he had conferred with Gibbs and that Gibbs had instructed him to withdraw the motion for a mistrial. 6RP 2.

b. Gibbs Has Waived This Claim By Withdrawing His Motion For A Mistrial.

Gibbs argues that he is entitled to a new trial based upon the detective's passing reference that Gibbs did not want to talk to the police. However, Gibbs is barred from raising this issue on appeal because he affirmatively abandoned it at trial.

In State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983), the defendant brought a motion to exclude evidence seized during a warrantless search, and he then affirmatively withdrew the motion. On appeal, he assigned error to the trial court's failure to suppress the evidence, and argued that he could properly raise the issue for the first time on appeal because it was of constitutional magnitude. Id. at 671. The Supreme Court refused to consider the issue: "The constitutional challenge having been waived or abandoned, we will not consider it further." Id. at 672.

Here, it is clear from the record that Gibbs recognized the existence of the constitutional issue that he now seeks to raise for the first time on appeal. He moved for a mistrial based upon the detective's comment and complained that it infringed upon his right to remain silent. Upon reflection, he affirmatively withdrew his

motion for a mistrial. By doing so, he waived this issue and cannot raise it on appeal.

c. Gibbs Is Not Entitled To A New Trial Given The Passing Nature Of The Detective's Comment And The Trial Court's Curative Instruction.

Even if this claim is not waived, the court should hold that it has no merit. Given the passing nature of the comment and the court's actions in striking the remark and providing a curative instruction, Gibbs cannot show that he suffered prejudice.

It is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). However, it is not a constitutional error for a police witness to make an indirect reference to the defendant's silence absent further comment from either the witness or the State. Id. at 706-07. Such a reference is not reversible error unless the defendant can show resulting prejudice. State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999); Lewis, 130 Wn.2d at 706-07.

In Sweet, a police officer testified that he asked the defendant if he would provide a written statement, and the defendant "said that he would do that after he had discussed the

matter with his attorney." 138 Wn.2d at 480. The court concluded that the testimony was "at best" a mere reference to silence, and was not reversible error absent a showing of prejudice. Id. at 481.

Similarly, here, during cross-examination, the jury heard a brief reference that Gibbs did not want to talk to the police. The court immediately struck the comment and provided a curative instruction to the jury. The jury is presumed to have followed the court's instructions. State v. Sivins, 138 Wn. App. 52, 61, 155 P.3d 982 (2007). The State did not elicit the remark, did not comment on it, or otherwise seek to take advantage of it. Gibbs has failed to establish that he suffered prejudice justifying reversal.

In contrast, in the case primarily relied upon by Gibbs, State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), the State elicited the detective's testimony about the defendant's pre-arrest silence, and the detective explained it by characterizing Easter as a "smart drunk." In closing argument, the prosecutor repeatedly referred to Easter's pre-arrest silence. Id. at 233-34. The court held that Easter's right to silence was violated and that the State compounded the error by emphasizing Easter's pre-arrest silence many times in closing argument. Id. at 241-42. Unlike Easter, here, the offending testimony was stricken, and the prosecutor

never mentioned the subject again. Accordingly, the facts in this case are more similar to Sweet.

Gibbs has not shown that he suffered prejudice by the detective's brief, stricken comment. This Court should affirm.

D. CONCLUSION

This Court should affirm Gibbs's convictions and sentence.

DATED this 20th day of April, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JARVIS GIBBS, Cause No. 65605-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct



Name
Done in Seattle, Washington

04-21-11
Date