68075-7

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COA No. 68075-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT BENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Susan J. Craighead

APPELLANT'S OPENING BRIEF

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2. The trial court exceeded its authority in imposing a combined sentence of imprisonment and community custody, in violation of RCW 9.94A.701's provision that the terms of both incarceration and supervision must each be determinate and together must not exceed the statutory maximum applicable to the offense of conviction.

3. The court failed to file findings as required by CrR 3.5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor's proffered race-neutral reasons for the peremptory excusal of the sole remaining African-American juror on the petit jury of an African-American criminal defendant cannot be accepted by the trial court performing the third and ultimate step of the Batson[1] Equal Protection analysis where the reasons for the strike are unsupported by the record, are "pretextual" because similar non-minority jurors were not excused from sitting, or are mere "proxy" reasons for racially-motivated excusal. Here, the trial court found that

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

the State's reasons for excusal of the lone remaining African-American juror bore no relation to any trial strategy of the defense, but permitted the strike because the prosecutor offered a "reason." However, the reasons offered were pretextual because like jurors were not struck, and in any event, the fact that juror 9 felt "a little" that she had been treated differently by a police officer in the past was not a proper reason to remove her, as it was merely a bald proxy for race. Should this Court find clear error in the trial court's Batson ruling?

2. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. Recently-enacted RCW 9.94A.701(9) requires that, where the combined term of community custody and confinement exceed the statutory maximum for an offense, the court must reduce the term of community custody. Where the trial court imposed a 60-month sentence of imprisonment, the maximum term for his felony conviction, and imposed a 12-month term of community custody, must this Court correct the erroneous sentence?

3. Did the court fail to file findings as required by CrR 3.5?

C. STATEMENT OF THE CASE

Dwight Benson failed to brake in time at a red light to avoid making contact with the car stopped in front of him, causing slight

discoloration to the other vehicle's finish. 11/17/11RP at 141. He was driving approximately 30 miles per hour. 12/21/11RP at 295-96. Another driver on the roadway said that Mr. Benson swerved around her, just before the accident at the light. 11/17/11RP at 211.

After police arrived on the scene, Mr. Benson was photographed from a squad car camera, as the officer put Mr. Benson through a standard series of Field Sobriety Tests (FST). Mr. Benson admitted to the officer at the scene that he had been drinking. 11/21/11RP at 263. The trial court later concluded that Mr. Benson was not in custody for purposes of Miranda when he made this statement. 11/17/11RP at 127.

Mr. Benson was charged with Felony Driving Under the Influence (Felony DUI) based on four prior DUI convictions within the previous ten years, per RCW 46.61.502 and 46.61.5055, Reckless Driving per RCW 46.61.500, and Driving While License Suspended in the First Degree per RCW 46.20.342(1)(a). CP 1-7. At trial, the arresting officer testified that Mr. Benson would not submit to testing using the Blood Alcohol Content (BAC) machine at the precinct. 11/21/11RP at 284.

Mr. Benson testified that he was injured in the Navy and had not been impaired by alcohol at the time of the incident. 11/22/11RP at

400. The defense investigator noted that the other driver who encountered the defendant at the scene did not state that Mr. Benson smelled like alcohol. 11/21/RP at 377, 379.

Mr. Benson was convicted of Felony DUI by the jury along with reckless driving and driving with a suspended license. 11/23/11RP at 530; CP 23-25. He was ordered to serve 60 months incarceration on the felony conviction, for a total of 72 months incarceration including 12 month terms on the misdemeanors, with the sentence for reckless driving suspended. 12/9/11RP at 3-26; CP 123, 132.

Mr. Benson appeals. CP 135.

D. ARGUMENT

1. THE PROSECUTOR'S PROFFERED RACE-NEUTRAL REASON FOR EXCUSAL OF JUROR 9 WAS BOTH PRETEXTUAL AND A MERE PROXY FOR RACE, DEMONSTRATING CLEAR ERROR IN THE COURT'S REJECTION OF MR. BENSON'S BATSON CHALLENGE.

a. *Batson v. Kentucky* and peremptory challenges.

A defendant challenging the State's peremptory removal of a juror of a protected class must first make a prima facie showing of discrimination by raising an inference that the strike was based on race. Batson v. Kentucky, supra, 476 U.S. at 93-94. If this is accomplished, the State must then proffer a specific and facially race-neutral reason for striking the juror. Batson, 476 U.S. at 94; Miller-El v. Dretke, 545 U.S. 231, 239, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Third and finally, the trial court must determine from all the circumstances if the proffered race-neutral reason is believable, or if the defendant has established purposeful discrimination in jury selection by the State's use of the strike. Batson, 476 U.S. at 98.

b. Jury Selection.

Voir dire. Voir dire and jury selection in Mr. Benson's criminal case was conducted on November 16 and 17, 2011. Juror 9, Ms. Graham, was one of a total of two potential African-American jurors,

along with juror 13. 11/16/11RP at 617, 620. Juror 9 was not among the potential jurors that sought excusal for hardship. 11/16/11RP at 546. Juror 9 was also not among those who felt she could not be fair in the case. 11/16/11RP at 569. Juror 9 also had a close friend or relative who was or had been a law enforcement officer. 11/16/11RP at 550.

Juror 9 was, however, among a large number of potential jurors who raised their number card when asked by the court if they had ever had an unpleasant experience with a police officer (as had jurors 16, 23, 28, 36, 37, and 41). 11/16/11RP at 550.

Juror 28 stated he was stopped by police for his driving in connection with another truck on the roadway. The police officer was "chummy" with the other driver and assumed juror 28 was at fault. The officer would not listen to juror 28's account, and did not treat him fairly. 11/16/11RP at 608-09.

Juror 9, Ms. Graham, stated that she had once been stopped by the police for having expired tabs. She explained to the officer that she had purchased the tabs, but they had not yet been put on her car. Juror 9 stated that she "felt a little" like the officer was using the stop to seek out other matters, because he looked past her into her vehicle, but she also stated the officer had treated her fairly. 11/16/11RP at 609-10.

Peremptory strikes and Batson challenge. During peremptory excusals, the State used one of its peremptory challenges to dismiss juror 13, the other African-American potential juror, who had stated in voir dire that in order to find a person guilty of drunk driving he would prefer to see scientific proof of the defendant's alcohol intoxication. 11/16/11RP at 617, see 11/16/11RP at 602-03. Mr. Benson's counsel indicated he had no objection to the State's peremptory excusal of juror 13, given that statement.[2]

However, the defense strenuously objected under Batson to the State's peremptory excusal of Juror 9. 11/16/11RP at 617. Contending that there was a prima facie case of discrimination shown, counsel argued that juror 9's excusal had left zero African-American jurors on the petit jury, in this case where the defendant Mr. Benson was also African-American. 11/16/11RP at 617, 620; see CP 128.

The trial court turned to the prosecutor, who stated that she had struck juror 9 because she had a past unpleasant experience with a police officer, because of her minority race.[3] 11/16/11RP at 621.

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[2] Interestingly, juror 13 had been the accident *victim* of a drunk driver. 11/16/11RP at 560-61.

[3] The trial court stated that this jibed with its impression of juror 9's statements. 11/16/11RP at 624.

The trial prosecutor initially offered two concerns in regard to juror 9, who the prosecutor stated she had liked during initial questioning. 11/16/11RP at 621. First, the prosecutor stated that defense counsel seemed to be making much of the fact that the juror had felt harassed by police because she was African-American, and might be planning to make something similar an issue in the present case. 11/16/11RP at 621. The prosecutor acknowledged that Mr. Benson was African-American, but stated that race was not going to be an issue in the trial, because the person who Mr. Benson allegedly hit with his car was also a racial minority.[4] 11/16/11RP at 621.

Second, the prosecutor stated that she was concerned that juror 9 would have "some bad view" of the police officers in the case, since they focused their investigation of the collision on the defendant, who is African-American. 11/16/11RP at 621. The prosecutor stated that Juror 9 "seemed to have a situation where [she] felt like [she was] singled out and being picked on." 11/16/11RP at 622.[5]

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[4] The driver of the vehicle allegedly struck by Mr. Benson, as identified in the affidavit of probable cause and who testified at trial, was Abdul Hared. CP 3; 11/17/11RP at 141-42.

[5] The prosecutor was here also stating that juror 9 was like non-minority juror 28 [the juror who was stopped and believed the officer did not listen to his account]. 11/16/11RP at 622, see 11/16/11RP at 608-09. The prosecutor stated

Defense counsel responded that Ms. Graham's description of being stopped by the officer was completely innocuous and mild, and emphasized to the court that numerous other jurors had raised their hands and indicated *they* had had unpleasant experiences with police, including juror 6, who had been cited by officers, but had not raised his hand when this question was originally asked. 11/16/11RP at 621-22. Juror 6 had been involved in a single-car accident in which he lost control of his car in a construction area and was cited by the police. 11/16/11RP at 614.

***Batson* ruling.** The trial court proceeded to Batson's third step, and assessed the viability of the prosecutor's proffered reasons for peremptory excusal of the final African-American juror, juror 9.

First, the court addressed the State's contention that it was concerned that juror 9 would view the police in Mr. Benson's trial badly. The court rejected this contention, stating that although the court did not know what the defense theory of the case would be, it was clear that the case did not involve a defense that would be based on Mr. Benson being stopped unfairly by police. 11/16/11RP at 623.

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that she was "saving a strike" for non-minority juror 28 for this reason, if he had been seated in the jury box. 11/16/11RP at 622.

Second, the court considered, but then rejected, the prosecutor's related suggestion that juror 9's account of how she was treated by police had any relation to the instant case. The court concluded that juror 9's experience had nothing to do with the quality of the police investigation of Mr. Benson's alleged drunk driving. The court stated that, although the defense might allege at trial that the police investigated Mr. Benson's alleged alcohol level inadequately (there was no BAC result because the defendant refused the test), and that the prosecutor might believably claim it did not want jurors who had negative experiences with the police, juror 9's experience was common to African-Americans, and one that "not necessarily all of our other jurors have had." 11/16/11RP at 623. Specifically, the court stated:

> On the other hand, one of the things that is so troubling about excusing African Americans from a jury trial is that they have had [that] experience, but not necessarily all our other jurors have had. I am very mindful of that. In this situation, I think this is a very tough case, to be honest.

11/16/11RP at 624. The trial court then more explicitly rejected the State's attempt to make a connection between juror 9's experience and some bias going to any issue of inadequate investigation in the case, stating that nothing juror 9 said had a relationship to issues about the

quality of the police investigation of Mr. Benson. 1/16/11RP at 623-24.

In response to the court's foregoing analysis, the prosecutor protested that counsel's pre-trial motions and argument had indicated that the defense would be complaining that the police at the scene of the collision had focused their investigative efforts on "Mr. Benson, an African-American," and not the "other driver." 11/16/11RP at 624.

Ultimately, however, the trial court permitted the State's summary removal of Ms. Graham, disallowing the defense Batson challenge. The court repeated its concerns, but appeared to feel bound by case law requiring it to allow the State's peremptory strike, since the prosecutor had "articulated a reason." 11/16/11RP at 625. The court stated:

> I think I have articulated what my concern is here. But, I am also mindful that the case law is pretty much a[n] eviscerated vacuum. And the fact that [the prosecutor] Ms. Kanner has articulated a reason, it may be a reason that others disagree with. But, it is a reason, and that she has made it in good faith. She made a comparison with Juror Number 28. If I were on the Supreme Court, I might reverse myself; but I think given the case law as it stands, I will find that it is reasonable.

11/16/11RP at 625-26. The court therefore denied Mr. Benson's Batson challenge. 11/16/11RP at 626.

c. The Fourteenth Amendment prohibits the State from striking a juror because of his or her race.

Mr. Benson objected to the peremptory dismissal of the sole remaining African-American potential juror 9, Ms. Graham, under Batson v. Kentucky, supra, and the Fourteenth Amendment's equal protection clause. U.S. Const. amend. 14.[6]

"Peremptory" strikes traditionally allow a party's counsel to preclude a potential juror or jurors from sitting on the petit jury for reasons that would not justify a challenge for cause, but which the litigator believes -- on the basis of hunch, arbitrary assessment, or even "unaccountable prejudices" premised on a juror's "looks or gestures" -- may cause the juror to favor the other party, or disfavor the litigant's position. Batson, 476 U.S. at 123 (Burger, C.J., dissenting) (citing Swain v. Alabama, 380 U.S. 202, 220, 85 S.Ct. 824 (1965), and Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136 (1892)).

However, "the 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." (Emphasis added.) Batson, 476 U.S. at 85; U.S. Const. amend. 14. Importantly, Mr.

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[6] Under the federal equal protection clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1.

Benson's claim of Batson error in no way seeks to attribute racial 'animus' or hatred to the deputy prosecutor. No such animus is required to be shown in order to succeed on a Batson challenge. Rather, Batson and its progeny seek to do no more (and no less) than identify and outlaw the peremptory removal of minority jurors based on racial *categorization*, wherein a zealous attorney's legitimate goal of prevailing in a cause spurs the lawyer to dismiss a juror of a certain race because of glib assumptions that the juror's membership in that class will cause her to favor one party over the other. Such pre-judgment cannot be permitted to play any role in jury selection in cases heard in our courts of law, for doing so would condone attitudes that are rooted in historical prejudices our society seeks to eliminate, and would establish *de facto* "state-sponsored group stereotypes." See Miller-El v. Dretke, 545 U.S. at 237-38.

Therefore, under Batson's directive, the courts carefully, and unemotionally, apply a three-part analysis to determine whether a potential juror was peremptorily challenged on the basis of racial categorization. Batson, 476 U.S. at 93.

Prima Facie Showing. First, the defendant claiming juror dismissal based on race must make out a prima facie case by showing

that the totality of the relevant facts gives rise to an inference of a purpose to strike the juror for reasons of their racial class. Batson, 476 U.S. at 93-94.

Washington follows a bright-line rule whereby a prima facie case of discrimination is categorically established when the State has exercised a peremptory challenge against the sole remaining member of the defendant's racial group in the venire. 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 going forth, the rule advocated by the four dissenters would apply). Here, Mr. Benson satisfied the requirement of a prima facie showing where the trial prosecutor's striking of Ms. Graham resulted in the removal of the only remaining African-American juror. 11/16/11RP at 617, 620; see CP 128.

Of course, a trial court certainly *may* find the prima facie requirement of the first step satisfied where the State's peremptory strike removed the sole remaining African-American juror on the petit jury. State v. Hicks, 163 Wn.2d 477, 490, 181 P.3d 831 (2008). Where, as here, the trial court turned to the prosecutor to address the second step of the Batson analysis, the court is deemed to have so

found, and the question of whether or not the defendant made out a prima facie showing in the first step is not litigable by the State. 11/16/11RP at 621; Hicks, 163 Wn.2d at 492.

Race-Neutral Proffer. Next, the burden shifts to the State to proffer a race-neutral reason or reasons for peremptorily striking the juror. Batson, 476 U.S. at 94. The prosecutor must give a "clear and reasonably specific" reason, not facially predicated on race, for the strike. Miller-El v. Dretke, 545 U.S. at 239.

Purposeful Discrimination.

Under the third and final Batson step, the trial court has the duty to synthesize steps two and three, and determine if the defendant has established purposeful discrimination under the circumstances. Batson, 476 U.S. at 98.

This third step of the equal protection analysis ultimately involves the decisive question of whether the prosecutor's proffered race-neutral explanation for the peremptory challenge should be accepted. Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). In deciding the third step, the court examines *all* the circumstances – including but not limited to any patterns of peremptory challenges, any disproportionate impact of the removals,

the questions and answers of the struck juror, and all the jurors' answers, which may provide circumstantial evidence relevant to the question of discriminatory removal. Batson, 476 U.S. at 93. The prosecutor's facially race-neutral basis for excusal of the juror must be supported by the record of voir dire, and make sense in the context of that entire record. Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008).

In this case the prosecutor began by mischaracterizing juror 9's statements as extreme distrust of police conduct. 11/16/11RP at 621. Juror 9 expressed concerns – elicited by questioning – that the police officer who stopped her car might have been looking through the windows to see if he could detect anything else, as he conversed with her. 11/16/11RP at 609. However, juror 9 specifically stated that the officer had stopped her justifiably, since her tabs were expired. 11/16/11RP at 609. She also added that the officer treated her fairly in terms of what he asked of her. 11/16/11RP at 609. Indeed, Ms. Graham indicated that the officer in fact refrained from citing her, and did not give her a ticket, for the violation.[7] 11/16/11RP at 609-10.

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[7] A traffic stop for "expired tabs" is lawful, see, e.g., State v. Minh Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), review denied, 142 Wn.2d

Defense counsel properly characterized juror 9 as having related an innocuous incident. 11/16/11RP at 625. Furthermore, counsel particularly pointed out that another juror, juror 6, had actually been cited by police, unlike Ms. Graham. 11/16/11RP at 622. A court in a Batson case must perform a comparative juror analysis to ascertain whether the State's proffered reasons for striking an African-American juror were pretextual. Reed v. Quarterman, 555 F.3d 364, 373 (5th Cir. 2009) (citing Miller-El v. Dretke, 545 U.S. at 241). Here, numerous other jurors indicated that they had an "extremely unpleasant" experience with a police officer (jurors 16, 23, 28, 36, 37, and 41). 11/16/11RP at 550. But Jurors 6 and 16 were not challenged for cause during for-cause challenges, and were seated in the jury box to complete the jury, either originally or to replace jurors that were removed. 11/16/11RP at 616-18.

In these circumstances, the State's initial claim given for removal of juror 9 is not viable. A proffered reason for excusing a juror may be deemed merely "pretextual" (and thus likely not race-neutral) if non-minority jurors made similar statements or were similar

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1027 (2001), and normally a citation follows, see RCW 46.08.070; RCW 46.55.113; Seattle Municipal Code 11.72.145.

in fitness to serve -- but were not peremptorily dismissed. Reed v. Quarterman, 555 F.3d at 373; Miller-El, 545 U.S. at 241. It

Notably, in this comparative analysis, the defendant is not required to show that the State retained a non-minority juror who was exactly the same as the struck juror: "A *per se* rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable." Miller-El, 545 U.S. at 240 n. 6. In this case, the prosecutor's determination to not strike jurors who made similar statements as Ms. Graham tends to indicate that this basis offered for her removal was pretextual.

In addition, the trial court properly rejected the State's claims that it was concerned that juror 9 would view the police in Mr. Benson's trial badly because the defense would be arguing that he became the focus of the police investigation of the collision (rather than the other driver) because of his race. See 11/16/11RP at 621. The court stated that it was clear that the case did not involve a defense that would be based on Mr. Benson being stopped or targeted unfairly by police. 11/16/11RP at 623. The court also stated that juror 9's experience of her incident had no relation to the quality of the police investigation of Mr. Benson's alleged drunk driving.

> Juror Number 9 was, I think, uncomfortable about the way she was treated by the police. It doesn't go to the quality of their investigation.

1/16/11RP at 623-24.

In fact, contrary to the State's protestations, nothing in the pre-trial motions indicated that the defense would be complaining that the police unfairly focused their investigative efforts on Mr. Benson, an African-American, and not the other driver. 11/16/11RP at 624, see 621. Pre-trial, counsel sought suppression under Miranda of Mr. Benson's statements to the officer at the scene, and moved to exclude the results of the Field Sobriety Tests and the police-car recording. CP 15-19. Defense counsel, nowhere in questioning of witnesses called for those motions, 11/15/11RP at 38-48, or in argument on the motions, 54-59, 69-73, 79-82, indicated any intent to make race or inadequate investigation an issue in the case.

Counsel did ask the arresting officer, SPD Officer Christopher Caron, about whether he checked for damage to the car Mr. Benson had rear-ended, and for damage to Mr. Benson's vehicle, but this was not phrased to suggest the officer had done the former but not the latter, much less was it a suggestion of a defense that the police failed to investigate the driver of the rear-ended car. 11/15/11RP at 43-44.

Notably, in arguing the Miranda issue and the question whether Mr. Benson was in custody at the scene, the prosecutor contended that the *defense* was frivolously arguing that Mr. Benson should have been arrested immediately upon police arrival at the collision. 11/15/11RP at 66-67.

It is true that the court may consider factors such as the nexus between the prosecutor's explanation for the peremptory strike, and matters of trial strategy. See Miller-El v. Cockrell, 537 U.S. 322, 339-40, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). But here, the trial court, although it ultimately felt constrained to deny the Batson challenge because the State gave a "reason," properly rejected the State's claims of trial-strategy bases to exclude juror 9. And from an overall standpoint, the State's claim, that the defense would be arguing that the police acted unfairly in ultimately focusing their investigation on the driver of the car that rear-ended another vehicle which was stopped at a red light, is simply untenable.

Finally, the State's proffered race-neutral reason for the juror's excusal must not be a mere "proxy" for race. Of course, African-American jurors may not be excluded based on a broadly-stated assumption that they will be unable to impartially consider the State's

case against an African-American defendant. Batson, 476 U.S. at 89; cf. United States v. Fike, 82 F.3d 1315, 1319–20 (5th Cir. 1996) (a juror who expresses general beliefs that the justice system is unfair, may be removed by peremptory challenge, even if they are of a racial minority).

But more specifically, a party does not offer an ultimately credible race-neutral reason for a peremptory strike by stating a matter which merely substitutes covertly for race.[8]

Thus for example, in United States v. Bishop, 959 F.2d 820, 827–828 (9th Cir.1992), it was noted that a potential juror's place of residence can act "as an ethnic badge" and a proxy for race-based removal. There, the prosecutor stated that he did not challenge the juror in question because she was African-American, but because she lived in Compton, a poor and violent community whose residents (the prosecutor stated) might be "more likely to think that the police probably used excessive force." Bishop, 959 F.2d at 825. The United States Court of Appeals concluded that this reason failed as race-

[8] For example, under a rule that prohibits excusal of jurors based on gender, a party's proffered reason for excusal of a female juror, that the juror is the primary childcare provider in her marriage and may be distracted by being away from the responsibilities of the home, would simply be too much of a bald proxy for gender to be ultimately acceptable at Batson's step three.

neutral, because it stood as a mere proxy for race. Bishop, at 827. Critically, the Court noted that the juror had not made any statements specifically indicating any experience of violence, much less any resulting tendency to believe that police use excessive force in response to it. Bishop, at 825. Rather, the juror's residence was a facially race-neutral explanation, which ultimately could not survive the three-step Batson analysis. Bishop, at 825-27.

The present case involves a drunk-driving defendant who was investigated and arrested after police viewed a scene indicating he had rear-ended a vehicle idling legally at a red light. As the court below noted, it did not involve a defendant who was stopped by police, much less any circumstances suggesting such a stop was potentially motivated by race. As the court below also noted, nothing said by juror 9 had any logical relation to any defense apparently ready to be raised at trial. And Ms. Graham certainly did not indicate any overall belief that black defendants cannot receive a fair trial by the justice system.

In these circumstances, Ms. Graham's statement that she felt "a little" that the police officer who stopped her lawfully was looking into her car for something else as they talked, showed no specific concern that she would conclude that the defendant Mr. Benson had been

unfairly treated or was being unfairly prosecuted. Rather, her experience, which the court below deemed relatively common to African-Americans, stood merely as a proxy criteria for race when employed by the prosecutor as the basis for a peremptory strike. As the Bishop Court stated:

> It is the difference between a criterion having a discriminatory racial impact, and one acting as a discriminatory racial proxy. It is, in short, the difference between what the Constitution permits, and what it does not.

Bishop, at 826.

Significantly, even if it *were* true in the present case that the defense had planned on arguing that Mr. Benson was unfairly targeted by police, this would still not render the State's reason for excusing juror 9 a valid one for purposes of the ultimate question of discrimination in Batson's step 3.

Simply put, if the State may peremptorily strike jurors in criminal cases who relate an experience in voir dire regarding some incident of unequal treatment by the police because of their minority race, then the State is granted the right to entirely circumvent Batson and its constitutional dictate.

Thus, for further example, in Turnbull v. State, 959 So.2d 275, 276 (Fla.App. 3 Dist. 2006), a prosecutor sought to peremptorily remove several African-American jurors in the defendant's trial for being a habitual traffic offender. Each of these potential jurors had stated during voir dire that they had experienced racial profiling by the police. Turnbull, 959 So. 2d at 276. The appellate court concluded that using this reason as a basis for summary removal of the jurors effectively constituted a "subterfuge to the constitutional principles" of Batson. Turnbull, 959 So. 2d at 276-77. The court also noted that "racial profiling did not bear any relevance to the case." Turnbull, 959 So. 2d at 277.

The same is true here – removing juror 9 because she felt differently treated by a police officer on account of race was effectively the same as removing her from the jury because of her race, and in the circumstances of the case, there was not even an arguable relationship between profiling and the expected trial facts – even if that could somehow justify the removal.

A prosecutor's reliance for a strike on a reason asserted by the defendant to be a proxy for race may be permissible, if there is a specific link between the stated reason and the basis for the challenge.

See Boyde v. Brown, 404 F.3d 1159, 1171 n. 10 (9th Cir. 2005) (struck juror's place of residence may not be an improper proxy for race if prosecutor can "tie it to the facts of the case" such as by showing juror lived near important witnesses); but see United State v. Wells, ___ F.3d ___ (N.D.Okla., August 29, 2011) (NO. CR 10-116 BDB) (2011 WL 3843685) (Slip. Op. at p. 1) (explanation for strike that black juror lived on the north side of Tulsa where some of the incidents involved actually occurred, was not credible and was mere proxy for race).

But in this case, and certainly absent some particular connection between juror 9's experience and the facts of the case or the known defense strategy (neither of which connection existed here, as argued supra), striking an African-American juror because that person feels she has experienced an instance of unfair treatment by a police officer because of her race was merely a proxy for striking Ms. Graham on account of her race. See 11/16/11RP at 624.

d. Reversal is mandated.

This Court should determine that the trial court erred in denying Mr. Benson's Batson challenge. The trial court ultimately felt constrained to deny Mr. Benson's Batson challenge because the State gave a "reason." 11/16/11RP at 625.

But it is well understood that the mere proffer of a reason that is facially couched in terms other than race in no way ends the Batson analysis. Miller-El v. Dretke, 545 U.S. at 240 ("If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much").

The appellate courts review a trial court's Batson ruling for clear error. Rhone, 168 Wn.2d at 651; Turnbull v. State, 959 So. 2d at 277. However, the deference required on appeal to be accorded the trial court under standards of review that require a showing of an abuse of discretion, is not a rubber stamp. The United States Supreme Court has emphasized this caveat in Batson cases. See, e.g., Miller-El, 545 U.S. at 240 (deference does not preclude relief). Relief should be granted here.

Batson error is structural, and requires reversal without any showing of prejudice. Batson, 476 U.S. at 100. Mr. Benson's judgment must be reversed.

2. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING INCARCERATION AND A TERM OF COMMUNITY CUSTODY THAT EXCEEDED MR. BENSON'S STATUTORY MAXIMUM.

The trial court imposed a 60 month term of incarceration on Mr. Benson for the Felony DUI conviction, which is the statutory maximum. CP 123; 12/9/11RP at 25; see RCW 46.61.502(1), (6); RCW 9A.20.021(1)(c).[9]

The court at sentencing stated it was imposing "a period of community custody of 12 months, or whatever is up to the maximum of the earned early release time." 12/9/11RP at 26.

On the judgment and sentence, the court checked the box for 12 months "community custody," but struck out "12 months" and instead interlineated:

> for the period of earned release up to 12 months. Note: Total time of incarceration and community custody shall not exceed the statutory maximum of 60 months.

CP 127. This was error.

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[9] Mr. Benson's standard range on the conviction, which was for a category V offense, was 72-96 months. CP 123; see RCW 9.94A.599.

a. <u>The SRA requires that a sentencing court impose a determinate sentence in which the combined terms of incarceration and community custody do not exceed the statutory maximum for the crime.</u>

The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; <u>In re Pers. Restraint of Brooks</u>, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). A term of community custody must be authorized by the legislature. RCW 9A.20.021. The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. <u>Id.</u>; RCW 9.94A.701(9). Specifically, RCW 9.94A.701(9) provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9). Pursuant to recent authority construing RCW 9.94A.701(9), the trial court was required to reduce the term of community custody imposed, as required by RCW 9.94A.701(9), in order that the combined terms of incarceration and community custody did not exceed the statutory maximum of 60 months. <u>State v. Boyd</u>, ___ Wn.2d ___, ___ P.3d ___ (Supreme Court No. 86709-7, May 3,

2012); State v. Winborne, ___ Wn. App. ___, ___, 273 P.3d 454, ___ (Wash.App. Div. 3, March 20, 2012).

Given that Mr. Benson's five-year term of incarceration was the statutory maximum, the trial court was required under RCW 9.94A.701(9) to reduce his term of community custody to zero. State v. Winborne, ___ Wn. App. at ___; State v. Boyd, ___ Wn.2d at ___. Mr. Benson, whose alleged crime was committed April 2, 2011, was sentenced December 9, 2011. CP 123. The new 2009 statute unquestionably applied to his sentencing. See State v. Boyd, ___ Wn.2d ___.[10]

The trial court's sentence and its interlineation regarding the combined terms of imprisonment and community custody, although intended in good faith to ensure that Mr. Benson did not serve terms amounting to a total sentence in excess of the statutory maximum, was in excess of its authority under the SRA.

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[10] The Boyd Court stated of the appellant in that case:

> Boyd was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. See Laws of 2009, ch. 375, § 5. Thus, the trial court, not the Department of Corrections, was required to reduce Boyd's term of community custody to avoid a sentence in excess of the statutory maximum.

State v. Boyd, ___ Wn.2d at ___.

b. This Court must correct Mr. Benson's sentence.

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). This Court reviews *de novo* whether a sentence is legally erroneous. Brooks, 166 Wn.2d at 667.

Here, where the sentence was legally erroneous, this Court has "the duty and power to correct [the] erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The SRA limits the sentencing court's authority in this case to a combined total sentence of 60 months. Mr. Benson respectfully asks this Court to remand for imposition of a sentence that is in accord with RCW 9.94A.701(9).

3. THE COURT FAILED TO FILE CRR 3.5 FINDINGS OF FACT.

The trial court denied Mr. Benson's CrR 3.5 motion, finding that the defendant was not subjected to custodial interrogation. 11/17/11RP at 126-27. However, the court failed to file written findings of fact as required by CrR 3.5(c). State v. Williams, 137 Wn.2d 746, 975 P.2d 963 (1999). The Court erred.

E. CONCLUSION

Mr. Benson's judgment must be reversed where the trial court erroneously rejected Mr. Benson's Batson challenge and permitted the prosecutor to peremptorily strike the lone remaining African-American juror on the defendant's petit jury.

Additionally, the court imposed a sentence for the Felony DUI conviction that was in excess of its statutory authority, and the sentence for that conviction must be vacated and the case remanded for resentencing.

Dated this 29 day of May, 2011.

Respectfully submitted,

Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68075-7-I
v.	)	
	)	
DWIGHT BENSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DWIGHT BENSON BA: 211011021 KING COUNTY JAIL-SEATTLE 500 5TH AVE SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MAY, 2012.

X_____

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