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

REPLY BRIEF

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A. REPLY ARGUMENT

1. MR. BENSON'S BATSON CHALLENGE SHOULD HAVE BEEN SUSTAINED AND THE PEREMPTORY STRIKE OF JUROR 9 NOT PERMITTED.

In assessing the viability of the prosecutor's proffered reasons for peremptory excusal of the final African-American juror, juror 9 (Ms. Graham), the trial court made two observations.

First, the court rejected 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 because of race. 11/16/11RP at 623.

Second, the court considered whether the prosecutor's claim that the State did not want jurors who had negative experiences with the police, would result in permissible removal of an experience that was common to African-Americans, and one that "not necessarily all of our other jurors have had." 11/16/11RP at 623.

Although, ultimately, the trial court permitted the State's summary removal of Ms. Graham, disallowing the defense Batson

challenge, the court repeated its concerns, which clearly went to the question whether removal of juror's with this type of experience could be employed a "proxy" for race. 11/16/11RP at 625-26.

Comparative analysis of juror responses does not require that the appellant identify a non-minority juror whose answers were identical to the stuck juror. Respondent contends that juror 6 did not express the same negative experience with police as did the struck, minority juror, no. 9. Brief of Respondent, at pp. 21-24. However, in order to successfully contest a prosecutor's proffered race-neutral reason for peremptory excusal, see Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), the appellant is not required to show that the State retained a non-minority juror who was exactly the same as the struck juror. Miller-El v. Dretke, 545 U.S. 231, 240 n. 6, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("A *per se* rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable").

Here, Ms. Graham stated in voir dire also that the officer who stopped her treated her fairly in terms of what he asked of her. 11/16/11RP at 609. Ms. Graham also indicated that the officer refrained from citing her, and did not give her a ticket, for the violation.

11/16/11RP at 609-10. Non-minority juror no. 6 had actually been cited by police, unlike Ms. Graham. 11/16/11RP at 622. That juror was not struck by the State. Comparative juror analysis is amongst the totality of circumstances upon which the trial court is required to assess the viability of a Batson challenge and response, in order to determine the final third step of the analysis. Reed v. Quarterman, 555 F.3d 364, 373 (5th Cir. 2009) (citing Miller-El v. Dretke, 545 U.S. at 241).

The State's proffered race-neutral reason for the juror's excusal must not be a mere "proxy" for race. Respondent contends that under its view of United States v. Bishop, 959 F.2d 820, 827–828 (9th Cir.1992), Mr. Benson is complaining about removal of a juror who has experienced a negative incident with police, which criteria may have a disparate racial impact, but fails to show that removing Ms. Graham was a "proxy" for race-based removal, which is impermissible. Brief of Respondent, at pp. 16-18.

However, the circumstances of voir dire as a whole must be examined by the trial court to determine if purposeful removal of the final African-American juror, in a trial of an African-American defendant, occurred. Contrary to the Respondent's suggestion, see Brief of Respondent at p. 17, in this case the trial court's recognition

that Ms. Graham felt she had been treated unfairly by police because of her race – the court stated, "That is exactly what I thought she was saying" – was the precise recognition that causes the trial court to register its significant concerns about "proxy"- based reasons for the strike.

If every potential juror, who believes he or she was treated somewhat unfairly by police because of race, may be removed without scrutiny under Batson, the effect in an individual case is allowable, purposeful discrimination for tactical reasons. In Hernandez v. New York, 500 U.S. 352, supra, the Court stated that there is nothing impermissible in removing a juror for a reason that, when applied, has a disparate impact on minority jurors (removing Spanish-speaking jurors by peremptory challenge was permissible because they had expressed tendency to listen only to the courtroom interpreter's statements). But the Court also stated that a reason for removal that is common to minorities is a "proxy" for race where the juror's statements do not show some possibility, however slight, that the juror will be unfair to a party given the facts of the case.

> We would face a quite different case if the prosecutor had justified his peremptory challenge with the explanation that he did not want Spanish-speaking jurors.. . . [A]s we make clear, a policy of striking all

> who speak a given language without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.

Hernandez, 111 S.Ct. at 1872-73.

The Respondent's brief fails to acknowledge the degree to which the trial court rejected the trial prosecutor's claims that the defense would be making an argument of improper treatment of the defendant because of race. In any event, it makes little matter that, as the Respondent contends, there was some claim advanced by the trial prosecutor below that the defendant might possibly argue he was treated unfairly by police. Indeed, in such cases, the removal of African-Americans from the jury on this basis is even more so a plain proxy for race, based on the broad assumption that the particular juror will sympathize highly favorably with the defendant.

Turnbull v. State, 959 So.2d 275, 276 (Fla.App. 3 Dist. 2006), is on point. Each struck potential juror 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. The Respondent's attempt to distinguish Turnbull from the present case, on the basis that the questions which revealed the juror's prior experience in this case were posed by the defendant's lawyer and not the prosecution like in Turnbull, makes a distinction without a difference.

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.

2. MR. BENSON IS ENTITLED TO RE-SENTENCING UNDER STATE V. BOYD.

Mr. Benson acknowledges the Respondent's concession of error in the sentencing court's imposition of terms of incarceration and community custody exceeding the statutory maximum, per RCW 9.94A.701(9) and State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). See Brief of Respondent, at pp. 26-27; Appellant's Opening Brief, at pp. 27-30.

The remedy for a trial court's imposition of a sentence that exceeds statutory authority is re-sentencing. "The appropriate remedy when this occurs is generally to remand for resentencing." State v. Winborne, 167 Wn. App. 320, 330, 273 P.3d 454 (2012) (citing In re Sentences of Jones, 129 Wn. App. 626, 627–28, 120 P.3d 84 (2005)).

3. OFFENDER SCORING ISSUE UNDER STATE V. MORALES.

Mr. Benson[1] contended in his Supplemental Brief that his offender score was improperly calculated under RCW 9.94A.525 and State v. Morales, 168 Wn. App. 489, 278 P.3d 668 (2012).

B. CONCLUSION

Mr. Benson's judgment must be reversed where the trial court erroneously rejected appellant's Batson challenge. In addition, Mr. Benson's case must be remanded for re-sentencing.

Dated this 28 day of September, 2012.

Respectfully submitted,

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[1] Mr. Benson was incorrectly referred to as "Mr. Jacob" several times in the Appellant's Supplemental Brief; undersigned counsel regrets the error.

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DIVISION ONE

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY 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] DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2012.

X_____

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