No. 90323-9

(Court of Appeals No. 30815-4-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHEN BENNETT,

Petitioner.

PETITION FOR REVIEW
OF COURT OF APPEALS DECISION TERMINATING REVIEW

ELAINE L. WINTERS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Nathen Bennett, defendant and appellate below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Bennett seeks review of the Court of Appeals decision affirming his conviction for felony murder in the second degree. State v. Nathen Bennett, No. 69272-1-I, published in part at ___ Wn. App. ___, 322 P.3d 815 (2014).

A copy of the Court of Appeals decision, dated February 18, 2014, is attached as Appendix A. A copy of the Court of Appeals Order Granting Motion to Publish Opinion in Part, dated April 22, 2014, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. When the State alleges that a defendant exercised his preemptory challenges to prospective jurors in a manner that discriminates against an ethnic or racial group, the court may deny the challenges and seat the jurors only if the State proves a discriminatory purpose. Mr. Bennett provided racially-neutral explanations for challenges to two Hispanic jurors, but the trial court found the challenges were exercised for a discriminatory purpose.

a. Did the Court of Appeals abdicate its responsibility to review the case by deferring to the trial court's unstated factual determinations?

b. Did the trial court conflate steps two and three of the Batson test, thus relieving the State of its burden of proving purposeful discrimination?

2. Homicide is justifiable when the slayer is defending himself from a felony against his person. RCW 9A.16.050(2). Mr. Bennett testified that he stabbed Mr. Cantu because the older man was raping him, but the trial court denied his proposed jury instructions on justifiable homicide. In affirming the trial court, did the Court of Appeals incorrectly fail to consider the physical and emotional trauma caused by the violent crime of rape when it focused only on whether Mr. Bennett was in fear of death or great bodily injury?

D. STATEMENT OF THE CASE[1]

Nineteen-year-old Nathen Bennett was living with his grandmother in Granger, Washington in the fall of 2010. 4RP 685.[2] Mr. Bennett met 48-year-old Leonardo Cantu, Jr. when Mr. Canto approached Mr. Bennett and a teenage friend at a Granger store and told them he could get them any drugs they needed. 2RP 337; 4RP 686-87. Mr. Bennett obtained marijuana from Mr. Cantu that day and again a few days later. 4RP 687-89.

On November 4, Mr. Bennett met Mr. Cantu, and the two went to Mr. Cantu's home to get marijuana. 4RP 690-91. Mr. Cantu lived with his parents and an adult brother, and he directed Mr. Bennett to enter the residence through his bedroom window. 3RP 426, 427-28, 445-46, 458; 4RP 692. Once inside, Mr. Cantu forced Mr. Bennett to have sexual intercourse with him, not stopping although Mr. Bennett told him no. 4RP 692, 695. Afterwards, Mr. Cantu laughed and told Mr. Bennett he did not have any marijuana and Bennett should return the next day. 4RP 694,

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[1] A more complete statement of the underlying facts is found at the Brief of Appellant, pages 3-8. The State agreed to the appellant's presentation of the facts. Response Brief at 1.

[2] Mr. Bennett refers to the five-volume verbatim report of proceedings with the volume number provided by the court reporter:

1RP – March 5 & 6, 2012
2RP – March 7, 2012
3RP – March 8, 2012
4RP – March 12, 2012
5RP – March 13 & 14 and April 13, 2012.

699. Mr. Bennett left the Cantu residence through the bedroom window. 4RP 699.

Late in the afternoon of the next day, Mr. Cantu and Mr. Bennett met at the Cantu residence, went to another house to obtain marijuana, and returned to Mr. Cantu's house where they smoked the marijuana outside. 4RP 700-02. When Mr. Bennett announced he was leaving, Mr. Cantu tried to get Bennett to enter his bedroom. 4RP 704-05.

Mr. Bennett refused to go into the house, and Mr. Cantu began to have sexual intercourse with Mr. Bennett outside, pulling down Mr. Bennett's pants and putting his mouth on Mr. Bennett's penis. 4RP 705-06, 720. Mr. Bennett tried to push Mr. Cantu away, and told him to stop, but Mr. Cantu continued. 4RP 706-07, 708. Mr. Bennett pulled out a pocket knife and stabbed Mr. Cantu until he fell down. 4RP 706-07. Mr. Bennett felt he had no alternative because Mr. Cantu continued to rape him even though he told Mr. Cantu to stop. 4RP 708, 710, 720.

Mr. Cantu died as the result of the loss of blood caused by stab wounds to his neck and chest. 2RP 316-17, 323-24, 328, 333.

Mr. Cantu's sister, Irene Torres, told the police that she had seen Mr. Cantu and Mr. Bennett together earlier that evening. 3RP 454-55, 481. Law enforcement officers arrested Mr. Bennett at his grandmother's home. 3RP 482; 4RP 615. Mr. Bennett told the officers, "He tried to rape

me so I stabbed him." 3RP 485; 4RP 616, 710. During a video-taped interview at the police station in Yakima, Mr. Bennett told the detective that he stabbed a man because the man was raping him. 4RP 644, 5RP 784; Exs. 60, 61, 64.

During jury selection, the parties questioned the jury about their views of homosexuality and did not address race. 1RP 38-40, 52-52, 113-14, 169-73. The prosecutor objected to four of Mr. Bennett's peremptory challenges of Hispanic jurors, asserting they were racially discriminatory because the victim was Hispanic and Mr. Bennett was Caucasian. 1RP 219-20. Mr. Bennett's counsel immediately offered race-neutral explanations for his peremptory challenges. 1RP 220-22. Without explaining its reasoning, the trial court found two of the challenges were based upon non-discriminatory reasons and two were discriminatory. 2RP 225. The second two jurors therefore sat on the jury, and one was the jury foreman. CP 78-79, 120.

Mr. Bennett requested that the jury be instructed on self-defense and justifiable homicide. CP 25-29, 51-54, 55-57. The trial court refused to give any of the defendant's proposed instructions, concluding that Mr. Bennett could not use deadly force to resist a rape because he did not fear death or serious bodily harm. 4RP 806-11.

Mr. Bennett was convicted of second degree felony murder based upon the underlying crime second degree assault with a special finding that he was armed with a deadly weapon. CP 48-49, 78-79. The Court of Appeals affirmed the conviction, and he now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals refused to review the trial court's questionable finding that Mr. Bennett had engaged in purposeful discrimination is jury selection, and the trial court conflated the second two steps of the Batson test, thus relieving the State of its burden of proof.**

When a party alleges that the opposing party used peremptory challenges in a discriminatory manner, the trial court uses a three-part test to determine if the challenges were made for a discriminatory purpose. Batson v. Kentucky, 476 U.S. 79, 95-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The appellate courts apply a deferential standard of review of the trial court's resolution of the issue, but the reviewing court must reverse if the record shows that a mistake was made. The Court of Appeals acknowledged that Mr. Bennett's attorney provided race-neutral explanations for his peremptory challenges to Hispanic jurors, but refused to determine if the trial court's findings were supported by the evidence, citing the deferential standard of review. In addition, the trial court's brief ruling appears to have conflated the second two parts to the Batson test, thus relieving the State of its ultimate burden of proof. This Court should

accept review of the important constitutional issues raised in this case and to provide guidance to the lower courts. RAP 13.4(b)(3), (4).

The Batson Court set forth a three-part test for reviewing a party's challenge to an opponent's use of peremptory challenges on the grounds of racial discrimination. Batson, 476 U.S. at 95-98. Where the State challenges a defendant's use of preemptory challenges, the test consists of the following steps:

> (1) The State must demonstrate a prima facie case of racial discrimination based upon the circumstances of the case;
>
> (2) The burden then shifts to the defendant to articulate a racially-neutral explanation for challenging the jurors in question;
>
> (3) The court must then determine if the State has proven purposeful discrimination.

Id; Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); State v. Vreen, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001). In the present case, the trial court conflated the second and third steps.

During the second step, the burden shifts to the defendant to offer an explanation for a peremptory challenge. Batson, 476 U.S. at 97-98. The explanation must be race-neutral, but need not be persuasive or even plausible. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 1995). Instead, it is deemed race-neutral unless discriminatory intent is inherent in the proponent's explanation. Id; Hernandez v. New

York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); Vreen, 143 Wn.2d at 927. "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror." Hernandez, 500 U.S. at 360.

In the third step of the Batson analysis, the trial court reviews the information obtained in the first two steps to determine if the State met its burden of proving purposeful discrimination. Batson, 476 U.S. at 98. Mr. Bennett's attorney offered race-neutral reasons for all four of his peremptory challenges, but the trial court only accepted two as racially neutral. 1RP 220-22; 2RP 225, 239. The trial court instead "rejected" the defendant's reasons for two of the jurors and found that those peremptory challenges were exercised for a discriminatory purpose. 2RP 225, 240.

The trial court appears to have conflated the second and third steps by denying Mr. Bennett's challenges to two juror without explanation. The reasons provided by defense counsel for his challenges were not based upon the race or ethnic background of the jurors or stereotypes about their race. By rejecting the racially-neutral reasons for the two challenges, the trial court excused the State from meeting its burden of proof of showing deliberate discrimination. See Puckett, 514 U.S. at 768.

The Court of Appeals agreed that the explanations offered by defense counsel "appear race-neutral and would have supported a

conclusion that they were race-neutral," but held it could not overturn the trial court's conclusion to the contrary. Slip Op. at 7 (citing Hernandez, 500 U.S. at 367). The Court of Appeals earlier noted, "it is not the providence of an appellate court to overturn what is primarily a factual determination – a party's motive for removing a member of the venire." Slip Op. at 4.

The Court of Appeals is incorrect. Despite the deferential standard of review, the appellate court must still reverse a trial court's Batson ruling if clearly erroneous. Hernandez, 476 U.S. at 364. Moreover, "deference does not imply abandonment or abdication of judicial review" or "preclude relief." Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (Miller-El I) (discussing the deferential review of state court proceedings on habeas corpus review of Batson challenge and holding that district court should not have accepted without question state's court's evaluation of demeanor of jurors and participants). By accepting the trial court's determination in the absence of evidence that Mr. Bennett's challenges were racially motivated, the Court of Appeals abrogated its responsibility to review the trial court's decision.

A trial court's decisions in interpreting Batson are not unreviewable as the Court of Appeals suggests. The United States Supreme Court has reversed trial court decisions in two cases, Snyder v.

Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 l. Ed. 2d 175 (2008) and Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Miller-El II).

The Snyder Court addressed a trial court's decision to reject the defendant's Batson objection to the prosecutor's peremptory challenge of an African American juror.[3] Snyder, 552 U.S. at 477-78. The juror was a college senior with student-teaching requirements. Id. at 478. The prosecutor explained that he challenged the juror because he "looked very nervous" and was likely to want to return a verdict on a lesser-included offense because he was worried about missing classes. Id. Defense counsel disputed both explanations, but the trial court allowed the prosecutor's challenge to the juror without explanation. Id. at 478-79.

Because there was no indication that the judge's decision was based upon the juror's nervousness, the Supreme Court refused to assume that the court agreed that the juror appeared nervous. Snyder, 552 U.S. at 479. The Supreme Court also found that the second reason was not supported by the record. The court's bailiff had contacted the juror's dean and confirmed that the juror could make up his observation time later in the semester, and the juror did not express any further concern about

[3] The case involved challenges to two black jurors, but the Court did not consider the second juror in light of its decision that the trial court had committed clear error in overruling the Batson challenge as to the first juror. Snyder, 552 U.S. at 578.

serving on the jury. Id. at 481. Logically, even if the juror was motivated to return a verdict quickly, that did not necessarily translate into voting for a lesser-included offense. Id. at 482. Moreover, the prosecutor had anticipated that the trial would be short, and it only lasted two additional days. Id. at 482-83. Finally, the Court noted that the prosecutor had not excused white jurors with equally if not more serious scheduling conflicts. Id. at 483-84. In contrast with the trial court, the Supreme Court concluded the prosecutor's explanation was pretextual, giving rise to the inference of a discriminatory intent. Id. at 484-85. The conviction was therefore reversed. Id. at 486.

Mr. Bennett's case deserves the same careful review of the trial court's determination provided in Snyder. Like the trial court in Snyder, the judge in this case did not provide the reasons for concluding that two of Mr. Bennett's challenges were racially discriminatory. Also, a review of the entire record shows that the reasons provided by defense counsel for the challenges were not based upon the jurors' race or ethnicity and that the trial court's decision to the contrary is not supported by the record.

Juror 21, the eventual jury foreman, was a grade school teacher who participated in his children's education and shared the gospel with the homeless at the Union Gospel Mission in his spare time. 1RP 123. Juror 21 actively participated in the jury selection process. 1RP 154-55, 187-88,

207-08. When the prosecutor asked questions about deciding the case based upon evidence and determining witness credibility, Juror 21 explained that he wanted to hear the witnesses' "testimonials." 1RP 154. Based upon his experience as a grade school teacher, the potential juror posited that when people are lying, their story changes. 1RP 154-56.

Mr. Bennett's attorney explained that he sought to excuse Juror 21 because of his religious orientation and work with the Union Gospel Mission, his employment as a teacher, and because of what he said in jury selection, including his discussion of "testimonials."[4] 1RP 221.

The neutrality of a party's challenge to a juror is viewed in light of the facts of the individual case. Juror 21's discussion of how he determined witness credibility based in part upon whether the person's story changed was of great importance in this case. Mr. Bennett's statement to the police was admitted at trial. Ex. 60. In it, Mr. Bennett refused to answer some questions, and his trial testimony revealed details not included in the statement. Ex. 64 at 6-7, 23-24; 4RP 716; 738-39, 5RP 755, 785-86.

Moreover, Juror 21 appeared to be a person who was confident in his own view point and inclined to recruit others to his position, as seen by

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[4] Juror 21 was not stricken because he gave religious testimonials, as the Court of Appeals stated. Slip Op. at 2; 1RP 123.

his participation in voire dire and his work sharing the gospel with the homeless. Juror 21 thus had the potential to be an advocate for the prosecution in deliberation if he expressed his views about determining if someone was lying and persuaded others of its validity.[5]

Defense counsel's explanation that he was motivated by the juror's religious activities was also not racially discriminatory. Vreen, 143 Wn.2d at 926-27. Mr. Bennett's counsel offered race-neutral reasons for excusing Juror 21 that were tied to the facts of the individual case, not the juror's ethnic background as required by Batson, 476 U.S. 97-98.

The trial court also denied Mr. Bennett's peremptory challenge of Juror 4, a stay-at-home mom with three children. 1RP 118. Juror 4 did not volunteer to answer any questions during voire dire, and her answer to the only question posed her was that she agreed with what other jurors, including Juror 21, had said. 1RP 157. Defense counsel explained that he excused Juror 4 because she was not vocal and appeared intimidated or disinterested; he therefore believed she would not be a good juror in this case.[6] 1RP 221; 2RP 230-40. He also noted that Juror 4 was "looking

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[5] In fact, Juror 21 was the jury foreman, showing concerns about his potential to lead the jury to convict were correct. CP 78-79.

[6] The prosecutor also excused jurors who had not been vocal in jury selection. CP 106 (Jurors 3, 20, 30)

down all of the time," and the trial court did not contradict his view. 2RP 225, 239-40.

Challenging a juror because she appeared passive, intimidated, or disinterested is not racially discriminatory. A juror's appearance or body language may constitute a valid basis for exercising a preemptory challenge. Rice v. Collins, 546 U.S. 333, 336-37, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (denying habeas because prosecutor's challenge could be based upon juror's demeanor if not her youth); State v. Luvene, 127 Wn.2d 690, 700, 903 P.2d 960 (1995) (prosecutor asserted juror's body language showed he was trying to avoid questions about the death penalty); State v. Ashcraft, 71 Wn. App. 444, 460, 859 P.2d 60 (1993) (prospective juror "nervous and evasive"); State v. Morales, 53 Wn. App. 681, 769 P.2d 878 (juror appeared extremely uncomfortable, did not make eye contact, and the prosecutor feared she would be a weak and indecisive juror) rev. denied, 112 Wn.2d 1028 (1989). This racially neutral explanation for the preemptory challenge to Juror 4 did not provide the needed evidence for the court's conclusion that the challenge was discriminatory.

The Court of Appeals adopted a hands-off approach to the trial court's ruling even though its conclusion that the peremptory challenges were discriminatory is not supported by the record. This Court should

accept review of this important constitutional issue. RAP 13.4(b)(3). In addition, few Washington cases address Batson challenges raised by the State. See Slip Op. at 6 ("Our case law does not clearly address the situation."); Vreen, 143 Wn.2d at 947 (State conceded that defendant's peremptory strike was wrongly denied). An opinion from this Court will thus provide guidance to the lower courts. RAP 13.4(b)(4).

2. **This Court should accept review to address when self-defense is available to the victim of a violent crime such as rape.**

Mr. Bennett testified that he assaulted Mr. Cantu because the older man was raping him, and he defended on the ground that he acted in self-defense. The absence of self-defense is an essential element of felony murder based upon assault that the State must prove beyond a reasonable doubt, but the trial court refused to instruct the jury on self-defense or justifiable homicide. The Court of Appeals nonetheless affirmed the trial court's decision not to instruct the jury on self-defense, reasoning that Mr. Bennett was not entitled to defend against a rape with deadly force. Slip Op. at 10-11. This Court should accept review to address when a person may use force to repel a rape.

Acting in self-defense negates the necessary mental element of the crimes of murder and assault. State v. Acosta, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984) (second degree assault); State v. McCullum, 98

Wn.2d 484, 491-97, 656 P.2d 1064 (1983) (first degree murder). The State must therefore prove the absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16; McCullum, 98 Wn.2d at 493-94. The trial court is thus required to instruct the jury on self-defense if there is some evidence from any source to support the instruction. State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997); McCullum, 98 Wn.2d at 488.

RCW 9A.16.050(2) further permits a person to use deadly force to defend himself against "a felony" or to prevent "great personal injury." RCW 9A.16.050 reads:

> Homicide is justifiable when committed either:
>
> (1) In the lawful defense of the slayer . . . when there is a reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished.
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

RCW 9A.16.050. Subsection (a) addresses justifiable homicide where the person killed is about to commit a felony, and subsection (b) addresses the situation when the defendant acted in resistance to a felony that is being committed. State v. Brightman, 155 Wn.2d 506, 520-21, 122 P.3d 150 (2005).

In Brightman, this Court held that justifiable homicide instructions may only be given when the use of deadly force was "necessary under the circumstances." Brightman, 155 Wn.2d at 523. This Court therefore concluded that justifiable homicide instructions based upon RCW 9A.16.050(2) were not appropriate where the defendant shot and killed someone who he asserted was trying to rob him of $20, but the defendant admitted he was not afraid of the victim. Id. at 522, 524. "[A] trial court may conclude, as a matter of law, that the use of deadly force was unreasonable where the defendant was attempting to recover a small amount of money from someone whom the defendant did not fear." Id. at 524 (citing State v. Madry, 12 Wn. App. 178, 181, 529 P.2d 463 (1974)). Each case, however, must be reviewed based upon its individual circumstances. Id. at 523.

This Court has also ruled that deadly force may not be used to resist non-violent crimes such as adultery or trespass. State v. Griffith, 91 Wn.2d 572, 576, 589 P.2d 799 (1979) (trespass); State v. Nyland, 47 Wn.2d 240, 242, 287 P.2d 345 (1955) (adultery). Rape, however, is a violent felony that may justify deadly force. Nyland, 47 Wn.2d at 242-44.

> The class of crimes in prevention of which a man may, if necessary exercises his nature right to repel force by force to the taking of the life of the aggressor, are felonies which are committed by violence and surprise; such as murder,

> robbery, burglary , arson, breaking a house in the daytime with intent to rob, sodomy and rape.

Id. at 242 (internal quotation marks and emphasis omitted) (emphasis added).

The trial court and Court of Appeals did not examine the harm caused by rape, focusing instead on whether Mr. Bennett reasonably feared great bodily injury or death. Slip Op. at 10-11; 5RP 811. The damage caused by a rape, however, may be psychological and therefore constitute the "great personal injury" required by RCW 9A.16.050. See, Bridget A. Clarke, Making the Women's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California, 39 UCLA L. Rev. 251, 256-59 (1991) (describing Rape Trauma Syndrome, a cluster of emotional and psychological symptoms suffered by a woman who has experienced a sexual encounter as rape)

Washington public policy shows that rape is considered a great personal injury, with laws that severely punish sex offenders while supporting and protecting their victims. See e.g. Community Protection Act of 1990, Laws of 1990 ch. 3 (provisions include the first sex offender registration requirements in the nation; civil commitment for sexually violent predators, increased statutory maximum terms for sex offense, increased punishment for crimes committed with sexual motivation,

reduced good time for sex offenders); Two Strikes Law 1996, Laws of 1996 ch. 289. Washington also has special legislation protecting the victims of sexual assault. 70.125 RCW (Victims of Sexual Assault Act); 7.90 RCW (sexual assault protection orders). Public policy in Washington supports Mr. Bennett's position that he was entitled to use self-defense to protect himself from a rape even when the rapist is not about to kill or cause serious bodily injury.

Mr. Bennett was entitled to defend himself against the great personal injury inherent in a rape. This Court should accept review to address in what circumstances a rape victim may use deadly force to repel his or her attacker. RAP 13.4(b)(3), (4).

F. CONCLUSION

Nathen Bennett asks this Court to accept review of the Court of Appeals affirming his conviction for second degree felony murder.

DATED this 22nd day of May 2014.

Respectfully submitted,

Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

February 18, 2014

FILED
FEB 18, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 30815-4-III
v.	)	
NATHEN LEE BENNETT, Appellant.	)	UNPUBLISHED OPINION

KORSMO, C.J. — Nathen Bennett's appeal challenges the trial court's denial of two of his peremptory challenges on *Batson*[1] grounds and the refusal to allow a self-defense instruction. We affirm his conviction for second degree felony murder.

FACTS

The relevant procedural and historical facts of this case are not in dispute. Mr. Bennett, then 19, stabbed 48 year old Leonard Cantu 26 times in the neck, chest, back, fingers, and arms, killing him. Mr. Bennett told investigators that the older man was performing oral sex on him against his will. The two men had had a sexual encounter the evening before the fatal encounter.

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

The matter proceeded to jury trial in the Yakima County Superior Court. During jury selection, defense counsel exercised all six peremptory challenges; four of those challenges were used against Hispanic[2] jurors. The prosecutor objected on *Batson* grounds, arguing that the four strikes were racially motivated since they removed the only Hispanic members of the venire who were high enough in the draw to serve on the panel. The prosecutor noted that Mr. Cantu was Hispanic while Mr. Bennett was Caucasian.

Defense counsel denied that the four challenged strikes were racially motivated or that a prima facie case of discrimination had been established. The trial court directed defense counsel to explain his reasons for striking the four jurors. Counsel explained that juror 4, a mother of several young children, did not appear interested in the proceedings. Juror 10 was a United States probation officer. Juror 21 was stricken because he was a teacher who gave religious testimonials and volunteered at the Union Gospel Mission. Juror 31 was challenged because his work schedule at a warehouse might interfere with the trial.

The challenges came at the end of the first day of trial and the court directed all jurors to return the next day. The next morning the court found that defense counsel had presented valid reasons for striking jurors 10 and 31, but determined that juror 4 and juror 21 were stricken because of their race. Because the delay in jury selection suggested that

[2] The parties use the term "Hispanic" instead of "Latino," and we will follow their approach in this opinion.

the trial would not end as early as the jurors had originally been told, the court reopened voir dire for the purpose of determining if the lengthier trial period would create any hardships. Juror 31 was excused for cause when he indicated that the trial would create hardship for him at work.

The parties then exercised their peremptory challenges anew. The defense was given the opportunity to explain additional reasons for striking jurors 4 and 21, but had no additional reasons to articulate for the court. The defense again used all six peremptory challenges—three against juror 10 and the other two jurors it had attempted to strike the day before, and three against additional members of the venire. The prosecutor, who had stricken six the previous day, struck only three members of the venire.

Trial commenced. Mr. Bennett took the stand in his own behalf and described his encounters with Mr. Cantu. He told jurors that he acted in self-defense because he feared that he would be raped if he did not act. After hearing argument, the court declined to instruct the jury on self-defense, reasoning that deadly force was not appropriate because there was no evidence Mr. Bennett feared imminent bodily harm and that stabbing the victim 26 times was not necessary.

The jury, with juror 21 serving as foreperson, convicted Mr. Bennett as charged. The trial court imposed a standard range sentence. Mr. Bennett then timely appealed to this court.

ANALYSIS

This appeal challenges the court's denial of two defense peremptory challenges and the refusal to instruct on self-defense. We address first the *Batson* claim and then the instructional argument.

Batson

Mr. Bennett strenuously argues that the trial court erred in not accepting his race-neutral explanations for challenging jurors 4 and 21. However, it is not the province of an appellate court to overturn what is primarily a factual determination—a party's motive for removing a member of the venire.

In *Batson v. Kentucky*, 476 U.S. 79, 83, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court faced a situation where the prosecutor had used peremptory challenges to remove all four black jurors from the venire. The court concluded that the practice of removing all minority jurors violated both the defendant's and the jurors' right to equal protection of the law. *Id.* at 86-87. The court then set forth a three part test for evaluating allegations of discrimination in jury selection: (1) the defendant must make a prima facie showing of discriminatory action; (2) upon finding a prima facie case, the court must require the prosecutor to provide any race-neutral explanation for the challenges; and (3) the court must then determine in light of the proffered explanation if the defendant has made a showing of purposeful discrimination. *Id.* at 96-98.

This new limitation on the use of peremptory challenges resulted in an explosion of litigation and eventual refinement of the *Batson* rule. Over time the original *Batson* standard was modified in recognition that it was the *juror's* rights, rather than those of a party, that were being violated by discriminatory peremptory challenges. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). That ruling then led to the recognition that either party to litigation had the standing to challenge the alleged violation of the juror's rights and that *Batson*'s rule also applied in civil cases. *Id.* at 415; *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (State could challenge criminal defendant's discriminatory peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) (discriminatory peremptory challenges in civil litigation). Subsequently, the freedom from discriminatory exercise of peremptory challenges was expanded to include gender in addition to race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). What began in *Batson* as recognition that a minority criminal defendant should not have members of his race excluded from jury service evolved into recognition that all jurors have the right to be free from race or gender discrimination in jury selection.

Washington's experience on these issues has mirrored the federal experience, with early cases addressing similar issues. *E.g.*, *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001) (prosecutor challenging defendant's peremptory challenge); *State v. Evans*, 100 Wn. App. 757, 998 P.2d 373 (2000) (judge may raise *Batson* issue sua sponte, but must follow

three prong test); *State v. Burch*, 65 Wn. App. 828, 830 P.2d 357 (1992) (gender discrimination). Recent cases have addressed whether or not a prima facie case of discrimination was established or whether the race-neutral explanation accepted by the trial court was borne out in the record of the case. *E.g.*, *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) (prima facie case), *cert. denied*, 134 S. Ct. 831 (2013); *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008) (sufficiency of explanation).

As with other recent cases, this case turns on the trial court's assessment of the three part *Batson* test. However, this case raises the rarer issue of an appellant challenging the trial judge's refusal to accept his stated reasons for exercising the peremptory challenge. Our case law does clearly address the situation.

Batson itself noted that the existence of discrimination is a factual finding and, thus, "will turn on evaluation of credibility," requiring the reviewing court to "give those findings great deference." 476 U.S. at 98 n.21; *Accord*, *Hicks*, 163 Wn.2d at 493; *Evans*, 100 Wn. App. at 764. This standard also applies to the trial court's decision on whether the race-neutral explanations are credible. *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When a trial court accepts the proffered explanation for exercising a peremptory challenge, "we fail to see how the appellate court nevertheless could find discrimination." *Hernandez v. New York*, 500 U.S. 352, 367, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). This is because the credibility determination concerning the explanation "goes to the heart of the equal protection analysis, and once that has been

settled, there seems nothing left to review." *Id.* This standard is consistent with Washington appellate review standards. Our appellate courts do not weigh evidence and do not find facts. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). We similarly do not substitute our judgment for that of the trier of fact. *Hesperian*, 54 Wn.2d at 575. Whether the facts are as the parties allege is for the trial judge to determine, not this court. *Id.*

Mr. Bennett argues strenuously that he did provide race-neutral reasons for his remaining challenges and the trial court erred in concluding otherwise. His arguments, however, run up against a solid wall of federal and state appellate deference to this type of fact finding. Although we agree that his proffered explanations appear race-neutral and would have supported a conclusion that they were race-neutral, we cannot overturn the trial court's contrary evaluation. *Hernandez*, 500 U.S. at 367. As we once described our role in a different setting, an appellate court simply is not in a position to find persuasive that evidence which the trier of fact found to be unpersuasive. *Quinn*, 153 Wn. App. at 717. We must defer here to the trial judge's contrary factual determinations. The trial judge, not this court, had the opportunity to observe counsel, hear his explanation, and consider it in the context of this case and other cases counsel has presented over the years.

Trial counsel took personal offense, understandably, at the trial judge's ruling. There should be few things more odious in these times than to be judicially labeled as racist or

discriminatory. For a lawyer, it also constitutes professional misconduct. RPC 8.4(g), (h).[3] An attorney is unlikely to casually make an allegation of discriminatory conduct against another member of the bar, and we are convinced that trial judges likewise proceed cautiously with such accusations. Racial discrimination remains a problem in our society and, although we like to hope lawyers will not act on such a basis in the performance of their duties, we likewise cannot turn our heads from or disavow a trial judge's ruling that counsel did act in a discriminatory manner. *Batson* is a blunt tool for dealing with a continuing problem that is more subtly expressed than in days of old. We share the concerns expressed in several of the opinions filed in *Saintcalle* concerning the efficacy of *Batson*.

Here the record supports the trial judge. The defense excused the only Hispanic jurors in the portion of the jury pool who had a mathematical chance of serving.[4] Given that this crime involved a defendant and victim of different races, we agree that the exclusion of all the jurors of the same race as the victim provided strong support for the trial judge's conclusion that the challenges were discriminatory.

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[3] RPC 8.4 provides in part, that, "It is professional misconduct for a lawyer to . . . (g) commit a discriminatory act prohibited by state law on the basis of sex, race,. . . ; (h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward . . . jurors . . . that a reasonable person would interpret as manifesting prejudice or bias on the basis of . . . race."

[4] This evidence, of course, is ambiguous because a trial attorney is unlikely to waste a challenge on someone who cannot rise to the top of the jury list.

The trial court did not err in sustaining the *Batson* challenge to the two jurors.

Self-Defense

Mr. Bennett also argues that the court erred in denying his request for a self-defense instruction. We agree with the trial court that the instruction was not available under the facts of this case.

Under our statutes, self-defense is available when, inter alia, it is needed "by a party about to be injured, or . . . in preventing or attempting to prevent an offense against his or her person." RCW 9A.16.020(3). In addition, homicide is justified only "when committed in the actual resistance of an attempt to commit a felony upon the slayer." RCW 9A.16.050(2) (partial). The statutory scheme also dictates that an action is "necessary" when "no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended." RCW 9A.16.010(1).

The decision to decline to instruct on self-defense is reviewed for abuse of discretion when it is based on factual reasons, but is reviewed de novo if based on a legal reason. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Both standards are implicated here.

As the trial court correctly concluded, the analysis in *Brightman* governs this case. There the defendant testified that he accidentally killed the victim by striking him with a gun while resisting a robbery. 155 Wn.2d at 510. In reviewing RCW 9A.16.050(2), the court concluded that deadly force was only justified when it was necessary. *Brightman*, 155 Wn.2d at 521. Older case authority construing the statute likewise had concluded that even when a serious felony such as robbery was in progress, use of deadly force to repel the offense was not justified unless the defendant was threatened with death or great bodily injury. *Id.* at 522. The trial court could conclude as a matter of law that deadly force was not necessary under the facts of *Brightman*. *Id.* at 523-24.

The trial court concluded here that Mr. Bennett was in the same position as the defendant in *Brightman*. We agree. While rape is a crime that can be resisted with deadly force, that degree of force was unnecessary under these facts because the defendant did not show that he was in danger of great bodily injury. Mr. Cantu was not armed with any weapon nor had he threatened to inflict great bodily injury on Mr. Bennett. While Mr. Bennett was entitled to use force to repel the unwanted sexual contact, he was not entitled to kill Mr. Cantu. He also did not present an evidentiary basis for justifying why he needed to stab Mr. Cantu 26 times. There was no indication that Mr. Cantu persisted in attempting sexual contact after he was first stabbed or that he threatened additional harm to Mr. Bennett from that point. Even if one or two stab

wounds could be justified (or at least present a jury question), 26 such wounds could not be justified.

For both reasons—there was no showing of a need for using deadly force and there was no showing that 26 stabs were necessary to repel the assault—the trial court did not err in denying the self-defense instructions.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, C.J.

WE CONCUR:

Brown, J.

Siddoway, J.

APPENDIX B

ORDER GRANTING MOTION TO PUBLISH IN PART

April 22, 2014

FILED
APRIL 22, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHEN LEE BENNETT, Appellant.	)	No. 30815-4-III ORDER GRANTING MOTION TO PUBLISH OPINION IN PART

THE COURT has considered the respondent's motion to publish the court's opinion of February 18, 2014, and the record and file herein, and is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED, the motion to publish is granted in part. The opinion filed by the court on February 18, 2014, shall be modified as follows:

(1) On page 1 to designate it is an opinion published in part.

(2) After the first sentence on page 9 add the following language:

> Affirmed.
> The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions RCW 2.06.040.

(3) On page 11 by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

DATED: April 22, 2014

PANEL: Judges Siddoway, Brown, Korsmo

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHEN BENNETT, Petitioner.	)	COA NO. 30815-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MAY, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES HAGARTY, DPA [James.Hagarty@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DAVID TREFRY [TrefryLaw@WeGoWireless.com] ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] NATHEN BENNETT 357326 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF MAY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710