70496-6

70496-6

NO. 70496-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY DEON BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court err in finding that police officers properly arrested the defendant on an outstanding domestic violence arrest warrant and that the arrest was not a pretext to conduct a search they could not otherwise lawfully conduct?

2. Did the trial court properly find that the prosecutor's use of a peremptory challenge on juror 5 was proper, and not due to the juror's race, after the juror repeatedly said she did not trust the police and that her admitted bias would affect her deliberations in the case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with possession with intent to distribute heroin (count I) and possession with intent to distribute cocaine (count II). CP 56-57. Each count carried a school bus stop sentencing enhancement. Id.

At a pretrial CrR 3.6 hearing, the defendant moved to suppress the evidence to be used against him – the drugs, paraphernalia, cash and cell phone recovered from his motel room and his person. See CP 28-47. The trial court denied the defense

motion. CP 142-49. A jury then found the defendant guilty as charged. CP 110, 112, 113, 115.

With nine prior felony convictions, the defendant faced a standard range sentence of 84 to 144 months on each count. CP 120-44. The court imposed a prison based drug offender sentencing option (DOSA), consisting of 57 months of confinement and 57 months of community custody. Id.

2. SUBSTANTIVE FACTS AT THE CrR 3.6 HEARING

At the time of the current incident, there was an outstanding arrest warrant for the defendant's arrest on two charges – domestic violence malicious mischief and domestic violence criminal trespass. Pretrial Exhibit 4, page 3; 3/19/13 RP 62. The defendant informed the court that he was not contesting the validity of this warrant. Id. at 51.

On May 1, 2012, police officers executed the arrest warrant at a motel the defendant was staying, the Royal A Motel in Auburn. Id. at 55, 83. Upon arresting the defendant on the warrant, officers discovered evidence that was subsequently used as the basis for a search warrant of the motel room the defendant had been staying. See Pretrial Exhibit 4 (affidavit for search warrant). In executing the search warrant, the police recovered the evidence that was used to

convict him of the current VUCSA crimes. See 3/19/13 RP 91-93. The defendant informed the court that he was not contesting the validity of the search warrant *per se*, i.e., whether the affidavit contained sufficient probable cause to search the motel room. Id. at 50. Rather, the defendant claimed that the officers used the arrest warrant as a pretext to search the defendant's motel room prior to obtaining the search warrant, and therefore, any evidence obtained in that search should not have been used in obtaining the search warrant, i.e., it was "fruit of the poisonous tree." Id. at 50-51. The following facts were adduced at the CrR 3.6 hearing:

Detective Lance Pearson works for the Special Investigations Unit of the Auburn Police Department. Id. at 54-55. The unit deals with everything from guns and drugs to searching for persons wanted by different police agencies. Id. at 55.

On December 8, 2011, TS entered into a contract to work as an informant for the Special Investigations Unit after she was arrested on a drug charge. Id. at 56-57; Pretrial Exhibit 3. TS agreed that within 30 days of entering the contract, she would provide information that would lead to three felony fileable controlled substance cases. Id. In exchange, the case against her would not be filed. Id.

TS did provide information that led to the filing of one case, but because she had gotten out of the drug trade, she had trouble providing any additional information. 3/19/13 RP 57-58. Detective Pearson testified that in such situations, it is common to amend the contract to help the person fulfill their end of the bargain. Id. at 58-59. In this case, that meant that TS could provide information leading to a person's arrest on outstanding charges. Id.

TS indicated that she knew a person that she thought had an outstanding warrant and was hiding out from the police. Id. at 59. That person was the defendant, Jeffery Brown. Detective Pearson ran the name and confirmed the existence of an outstanding arrest warrant on two domestic violence offenses. Id. at 59, 62.

TS believed the defendant was staying at the Royal A Motel in Auburn, but she did not know which room. Id. at 60. TS said that she was a friend of the defendant's family. Id. at 62. TS had purchased drugs from the defendant in the past, but she had no information as to whether he was currently selling drugs. Id. at 60.

A plan was then hatched to place the defendant under arrest. Detective Pearson decided to have TS lure the defendant out of his motel room where he would be placed under arrest by officers stationed nearby. Id. at 63, 111. The detective testified

that it is both easier and safer to arrest a person out in the open as opposed to trying to enter a motel room where dangers are unknown and a person can barricade themselves inside. Id. at 65, 109. In this particular situation, Detective Pearson also believed that the defendant was potentially dangerous and a potential flight risk.[1]

The details of the plan were fairly simple. TS was to call the defendant and say she was coming over with some food. Id. at 64-65, 110. When she arrived at the motel, she was to call the defendant and say that she was in the parking lot and that she was in a hurry to go someplace else, so the defendant would have to come down to the parking lot to pick up the food. Id. If things went as planned, uniformed officers would then rush in and place the defendant under arrest before he could return to his room. Id. at 110-11. Things, however, did not go exactly as planned.

Detective Pearson went out first in an unmarked vehicle to scout out the location and determine where the marked patrol vehicles and uniformed officers would be staged. Id. at 67-69. The

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[1] In December, the defendant had run from police officers who were trying to arrest him on another warrant. 3/19/13 RP 61. Officers then went to the defendant's apartment looking for him. Id. A neighbor said she would call the police if the defendant returned. Id. She did and the defendant was arrested. Id. Subsequently, a person went to the neighbor's apartment, raped and severely beat the woman, and told her "this is what you get for snitching." Id. at 61, 138.

officers and vehicles needed to be close enough to move in and make the arrest, but be staged in a location where they could not be seen from the motel parking lot. Id.

When Detective Pearson arrived and drove by the motel, he saw that the defendant was already in the parking lot talking to an unknown individual in a green car. Id. at 70. The detective tried to seize on the opportunity by calling in the arrest team officers. Id. at 70. However, the arrest team officers were not yet in place. Id. at 75.

At this same time, TS, who had already called the defendant, drove into the parking lot. Id. at 73. The green car then drove away. Id. at 75. When the car left, Detective Pearson was unable to see where the defendant went. Id. at 75. He quickly directed one of his arrest teams to stop the green car and see if the defendant was inside. Id. at 74-75, 128. Detective Pearson also called TS and asked her where the defendant had gone. Id. at 75. TS told the detective that the defendant had gone to room 28. Id. at 75, 79. The detective then waited until his arrest team units arrived, a group that included four uniformed officers and a K-9 unit in case the defendant ran. Id. at 68, 80, 113.

Three officers went to the door of room 28, while the other officers went around the building to see if there were any escape routes. Id. at 80. Detective Pearson knocked at the door and someone with a male voice responded, "who is it?" Detective Pearson yelled out, "the police, open up." Id. at 81. Despite repeating this several times, there was no further response from inside and nobody opened the door. Id. at 81.

Detective Pearson then contacted the manager who told him that the defendant had rented the room, but that he had rented the room under a different name. Id. at 82. The manager gave the detective a key to the room. Id.

Back outside the room, Detective Pearson again knocked and announced his presence and said that he had a key to the room so the defendant needed to open the door. Id. Receiving no response, Detective Pearson unlocked and opened the door. Id. at 83. None of the officers entered the room. Id. at 83. Instead, they called out two females they could see standing in the room, and then the defendant, who was sitting on the bed. Id. at 83.

Outside the room, Detective Pearson asked the two women why they did not open the door. Id. at 84. Both women appeared upset and said that the defendant would not let them. Id. at 84.

Officer Faini, who had placed the defendant under arrest, then told Detective Pearson that he found "stacked money" on the defendant's person. Id. at 85.

One of the women, KT, was acting particularly "perturbed," so Detective Pearson asked her what her problem was. Id. at 85. She asked to talk away from the others, at which time she told Detective Pearson that she had worked as a paid informant before and that the defendant was dealing drugs. Id. at 86-87. She said that the defendant had thrown a pouch of drugs to her and asked her to hold them, but instead, she left them in the bathroom. Id. Prior to the disclosure by KT, Detective Pearson testified that he was not investigating the defendant for a drug crime. Id. at 117.

Based on the information obtained, Detective Pearson went back to the station, drafted an affidavit for a search warrant, obtained judicial approval, and then executed the search warrant. Id. at 90-91; Exhibit 4. Inside the room, the officers recovered a variety of illegal drugs, paraphernalia, a cell phone and a digital scale. Id. at 92-93.

The defendant testified and did not dispute that the officers did not enter his room prior to obtaining a search warrant. 3/20/13 RP 13-14. He admitted that he had rented the room under the

name James Bronson because he thought he had warrants out for his arrest. Id. at 24. He claimed that when he met with TS in the parking lot, she had asked him if he had any drugs and he told her that he did not. Id. at 17.

3. THE COURT'S RULING

The court denied the defendant's motion to suppress, rejecting his claim that the evidence supported his argument that arresting him on the warrant was a pretext intended to get the officers inside his room. 3/20/13 RP 58-67. The court found Detective Pearson's testimony that the plan to arrest the defendant outside was "highly credible." Id. at 63. The court said that there was ample reason to believe the defendant might flee and was a safety risk. Id. at 65. The court rejected arguments that the evidence suggested this was a pretext. For example, the defendant argued that the presence of a K-9 unit showed that the officers were looking for drugs. The court appropriately noted that there was absolutely no evidence that the K-9 unit was a drug detection dog. Id. at 67. Along with the court's oral ruling, the court entered written findings of fact and conclusions of law. CP 142-49.

4. SUBSTANTIVE FACTS

The facts adduced at the CrR 3.6 hearing were essentially the same facts as adduced at trial. Because the trial facts are not relevant to the issues raised on appeal, they will not be repeated here. The facts regarding *voir dire* are included in the section below they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM THAT THE EVIDENCE OBTAINED FROM HIS MOTEL ROOM SHOULD HAVE BEEN SUPPRESSED

The defendant claims that the trial court erred in rejecting his motion to suppress evidence that was obtained via a search warrant that allowed the officers to search his motel room. The defendant's argument should be rejected for multiple reasons. First, the defendant's pretext argument fails because, as the Supreme Court has stated, where officers already have lawful authority to enter into a location – here, the arrest warrant provided such lawful authority, a pretext argument cannot be made. Second, the trial court findings of fact are supported by substantial evidence and the trial court's legal conclusions are correct. The defendant essentially wants this court to make credibility determinations and

weigh the evidence differently than the trial court, but this is not the role of an appellate court.

a. The Standard Of Review

The defendant states that this is a case of "constitutional construction," and therefore this Court's review is entirely de novo. Def. br. at 9. This is not correct. The cases the defendant relies involve interpreting constitutional provisions, something that is not as issue here.[2] Here, the court is tasked with reviewing the results of a suppression hearing under settled law. Thus, review is as follows:

An appellate court will review only those facts to which the appellant has assigned error. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Unchallenged findings of fact are deemed verities on appeal. Id. As to challenged facts, a reviewing court determines whether the facts are supported by substantial evidence. Id. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

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[2] See State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007) (the Court was asked "to determine if a misdemeanor arrest warrant gives police the 'authority of law' to enter someone's home" under art. I, § 7); State v. Norman 145 Wn.2d 578, 40 P.3d 1161 (2002) (the Court was asked to determine the jurisdictional boundaries of the state of Washington under art. XXIV, § 1).

Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Glenn, 115 Wn. App. 540, 550, 62 P.3d 921, rev. denied, 149 Wn.2d 1007 (2003). A reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992). After all, it is the trial court that has the opportunity see the witness and to evaluate the witness's demeanor. State v. Cyrus, 66 Wn. App. 502, 506, 832 P.2d 142 (1992), rev. denied, 120 Wn.2d 1031 (1993).

After determining whether substantial evidence supports the trial court's findings of fact, a reviewing court will determine whether the findings of fact support the conclusions of law. Brockob, 159 Wn.2d at 343. An appellate court reviews *de novo* a trial court's challenged conclusions of law. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

b. A Defendant Cannot Raise A Pretext Argument Where Officers Had Preexisting Lawful Authority To Enter A Residence

The defendant does not challenge the validity of the arrest warrant that had previously been issued authorizing officers to

arrest him on a prior domestic violence case. An arrest warrant provides the "authority of law" to enter an accused person's residence and place him under arrest. Hatchie, 161 Wn.2d at 398-400. A separate search warrant is not required. Id.

Even though the police acted pursuant to a valid arrest warrant, the defendant claims the execution of the warrant was a pretext. To support this position, the defendant relies on State v. Ladson.[3] However, application of the Ladson pretext analysis to situations where officers already have "lawful authority" to enter the premises has been rejected by the Supreme Court. See State v. Lansden, 144 Wn.2d 654, 30 P.3d 483 (2001); see also State v. Busig, 119 Wn. App. 381, 81 P.3d 143 (2003), rev. denied, 151 Wn.2d 1037 (2004); State v. Goodin, 67 Wn. App. 623, 838 P.2d 135 (1992); State v. Davis, 35 Wn. App. 724, 669 P.2d 900 (1983), rev. denied, 100 Wn.2d 1039 (1984).

Ladson, as will be further, did not involve situations where the police had either a search warrant or an arrest warrant. Rather, Ladson involved situations wherein officers would stop vehicles for traffic infractions as a pretext for conducting searches they could not otherwise lawfully engage. In the situation where there is a

[3] 138 Wn.2d 343, 979 P.2d 833 (1999).

search or arrest warrant, the lawful authority to enter the premises already exists.

Article I, section 7 of the Washington constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A valid warrant establishes the requisite "authority of law." State v. Afana, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

Under both the federal and Washington constitutions, an arrest warrant — for a felony or for a misdemeanor, gives the police the authority to enter the residence of the accused for a brief period of time in order to effectuate the arrest. Hatchie, 161 Wn.2d at 392-93. This "authority of law" allows the police to enter a residence as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) the named person is actually present at the time of the entry. Id.

A pretext is "by definition, a false reason used to disguise a real motive." Ladson, 138 Wn.2d at 359 n.11 (citation omitted). The court will look at the totality of the circumstances, including

both the subjective intent of the officer and the objective reasonableness of the officer's behavior. Id. at 359.

In Ladson, gang unit officers were conducting traffic stops as a pretext to conduct investigations and searches they were not otherwise lawfully allowed. Ladson was a passenger in a car driven by Richard Fogle. Although Ladson was unknown to the gang officers, the officers knew Fogle was rumored to be involved in the drug trade. Fogle's reputed drug dealing motivated the officers to follow the vehicle looking for a legal justification to stop the vehicle – in this case, noticing that the license plate tabs expired five days earlier. After making the traffic stop, it was discovered that Fogle had a suspended license. Fogle was removed from the vehicle and placed under arrest. In a search of the vehicle, a handgun was found in Ladson's jacket that was left on the passenger seat. Ladson was then placed under arrest, searched, and both drugs and money found on his person.

The Supreme Court concluded that warrantless traffic stops or seizures as a pretext to dispense with the warrant requirements of the constitution are unlawful. Ladson, at 358-59. However, attempts to apply the rule of Ladson to cases involving a valid

warrant, as the defendant tries to do here, have been soundly rejected. See, e.g., Lansden, 144 Wn.2d 654.

Lansden was convicted of manufacturing and possessing methamphetamine. The evidence used against him was obtained by way of a search warrant of his property. The evidence supporting probable cause for the search warrant was obtained when law enforcement officers, participating in executing an administrative search warrant for county code violations observed evidence of illegal drug possession in plain view. Lansden claimed "that the initial warrant issued to search for code violations was a pretext to enable law enforcement personnel to search the defendant's property for evidence of drugs." Lansden, 144 Wn.2d at 662. The Court flatly rejected Lansden's argument that the rule of Ladson was applicable.

> Lansden argues that the reasoning of State v. Ladson, a pretext case in the context of a traffic stop, applies to the case before us. The Ladson court concluded that there is "a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). ***Where a valid warrant is issued, the result reached in Ladson is***

not applicable, as the search in Ladson was warrantless.

Lansden, at 662 (emphasis added).[4]

Here, the arrest warrant for the defendant was valid and has not been challenged. The police did not need a pretext to enter into the defendant's motel room. The arrest warrant gave the police the lawful authority to enter the defendant's motel room for the purposes of placing him under arrest. Anything observed in plain view in the process of executing the arrest warrant could lawfully be used to support the search warrant later obtained to search the

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[4] In State v. Busig, supra, police entered Busig's residence while executing a search warrant for a man who had two outstanding arrest warrants. Items observed in plain view were used to obtain a subsequent search warrant. Busig claimed that the original search warrant was obtained as a pretext in order to search her residence. The Court rejected this argument, holding that it is settled law, a pretext analysis cannot be applied to searches done pursuant to a valid warrant. Busig, 119 Wn. App. at 389.

In State v. Goodin, supra, police obtained a search warrant to search Goodin's residence to look for a co-occupant who had an outstanding arrest warrant. The police suspected that they would find drugs in the residence, although they did not have probable cause to obtain a warrant to search for drugs. In executing the search warrant for the co-occupant, officers observed in plain view evidence of illegal drugs. This evidence was used to obtain a search warrant for evidence of illegal drug possession. The court rejected the argument that the original search warrant was obtained as a pretext. Even if the police had a subjective intent to search for drugs, where there is a preexisting warrant, a pretext argument cannot be made. Goodin, 67 Wn. App. at 626-27.

In State v. Davis, supra, police received a tip that Davis was flying into Seattle with the intent of delivering drugs to another man. Police discovered that Davis had a warrant out for his arrest. At the airport, he was placed under arrest on the warrant and drugs were discovered in a search incident to his arrest. The court rejected Davis' pretext argument, stating that "[w]here there is a preexisting warrant...the basis for the rule preventing use of a pretext arrest to search for evidence of another crime no longer exists." Davis, 35 Wn. App. at 727.

motel room for evidence of the commission of a drug crime.[5] Thus, the defendant's pretext argument must be rejected.

c. The Defendant's Factual Claims Lack Merit

Along with the legal barrier that the defendant must overcome as discussed above, there are also certain practical and factual issues that preclude the defendant's claim. The defendant claims that the officers used the arrest warrant as a pretext to conduct a search they could not otherwise conduct and that the evidence used from this "illegal" search was "fruit of the poisonous tree" and could not be used to support the issuance of the search warrant. This argument fails for a number of reasons.

First, in order for the defendant to rely on this chain of events, a causal link must exist between what the defendant claims was illegally obtained evidence and the subsequent issuance of the search warrant based on this illegally obtained evidence. While speaking generally that the police used a pretext to search his motel room, the defendant does not actually state what evidence

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[5] A police officer is not required to ignore items of possible evidentiary value which are in plain view. State v. Helms, 77 Wn.2d 89, 459 P.2d 392 (1969); Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968). Under the "plain view" doctrine, where a police officer is lawfully within an area he may seize without a warrant an object that is within his plain view if he has reasonable cause to believe that it is contraband. State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991).

that was used to support the issuance of the search warrant was evidence obtained by way of a pretext and how the obtaining of the evidence was illegal.

Prior to obtaining the search warrant, the officers never entered the defendant's motel room. Further, the officers neither obtained nor observed any evidence or contraband in the defendant's room prior to obtaining a search warrant. What evidence the officers did obtain prior to issuance of the search warrant consisted of the defendant's wallet and money that were located on his person in a search incident to his arrest. However, as a "search incident to arrest," an officer may lawfully search a suspect's person and the area within that person's immediate control. State v. Porter, 102 Wn. App. 327, 330-31, 6 P.3d 1245 (2000). Further, the search of the defendant's person could have lawfully occurred whether he was arrested inside his motel room or outside his motel room.

The only other "evidence" from the scene prior to issuance of the warrant consisted of statements from the two women who had been inside the room. However, the statements they made were not the result of the defendant being arrested on a warrant, rather, their discovery and statements were made because nobody

answered the door when the police knocked and announced their presence. It is only when the officers asked the two women why nobody opened the door that information of another crime was provided to the officers. This was not the result of any unlawful entry into the motel room – the officers always had the lawful authority to knock on the motel room door seeking to arrest the defendant. Without this causal link, identifying evidence that was obtained illegally that supported the issuance of the search warrant, the defendant's argument fails.

Second, for the defendant's argument to be successful, he asks this Court to weigh the evidence and make credibility determinations that are contrary to the trial court's findings. That is not the role of an appellate court. Essentially the defendant asks this Court to find that Detective Pearson lied when he testified that the plan was to arrest the defendant in the motel parking lot. The trial court, however, found Detective Pearson's testimony credible. The defendant does not point to a misapplication of any evidence, or evidence not considered by the court, he merely asks this court to weigh the evidence differently and to draw different conclusions for the evidence than the trial court did. This is not the role of an appellate court. Camarillo, 115 Wn.2d at 71; Glenn, 115 Wn. App.

at 550; Walton, 64 Wn. App. at 415-16. Therefore, the defendant's argument fails.

2. THE PROSECUTOR'S PEREMPTORY CHALLENGE TO JUROR 5 WAS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES – THE EXERCISE OF THE CHALLENGE WAS NOT BASED ON RACE

Juror 5 told the prosecutor and defense counsel, in no uncertain terms, that she was biased against the police, that she did not trust any of them, and that it would affect her deliberations in this case. Only upon being cajoled by the judge did juror 5 reluctantly relent and say that she could be fair. Like any reasonable attorney, the State exercised a peremptory challenge to juror 5 based on her admitted bias, and the trial court agreed this was a proper exercise of a peremptory challenge, just as it would be, the court said, if the juror had expressed a bias in favor of the police and then been excused by the defense.[6] The court found no evidence of intentional discrimination. On appeal, the defendant has failed to show that the trial court's ruling was "clearly erroneous" as required to overturn his conviction.

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[6] Juror 5 was one of two Black jurors in the *venire*. The court excused the other Black juror due to hardship. 3/21/13 RP 37.

a. Batson And Claims Of Purposeful Discrimination

In Batson v. Kentucky,[7] the Supreme Court addressed the ability and limitations of the trial court in interjecting itself into the jury selection process where there is an allegation of purposeful racial discrimination. The Court recognized that the peremptory challenge system is a necessary and important part of trial by jury, and that peremptory challenges were historically exercised by the parties free from any judicial control and interference.[8] Batson, 476 U.S. at 91 n.15, (citing Swain v. Arizona, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). However, where there is evidence of purposeful discrimination in the jury selection process, the Court recognized that under the Equal Protection Clause, a trial court must intervene. Id. The Court announced a three-part test that sought to balance the "historical privilege of peremptory challenge free of judicial control," with the Equal Protection Clause that forbids either party from "challeng[ing] potential jurors solely on account of their race." Id. at 89, 91. The Court started with the

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[7] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[8] In Washington, the right to exercise a peremptory challenge free from judicial control is also codified by statute. A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror." RCW 4.44.140; see also RCW 4.44.210.

acknowledgement that "[a]s in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the *venire* to prove the existence of purposeful discrimination." Id. at 93.

First, a party raising such a challenge must make a *prima facie* showing of purposeful discrimination. Id. at 96. To make such a showing, a party must provide evidence that raises an "inference" that a peremptory challenge was used to exclude a *venire* member on account of the member's race. Id. An inference, the Court would later note, "is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them." Johnson v. California, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (citing Black's Law Dictionary 781 (7th ed. 1999)). An inference is not simply an allegation or a guess.

Second, if, and only if, a party raises an inference of purposeful discrimination, then the burden shifts to the opposing party to provide a race-neutral explanation for challenging the *venire* member. Batson, at 97. Importantly, the reasons given need not rise to the level justifying the exercise of a challenge for cause. Id.

Third, the trial court must then determine whether the challenging party has established purposeful discrimination, i.e., that the exercise of the peremptory challenge was racially motivated. Id. at 98.

b. The Defendant Bears The Burden Of Proving That The Trial Court's Ruling Was Clearly Erroneous

In this case, even though the defendant never attempted to make a *prima facie* showing of purposeful discrimination, the prosecutor offered race-neutral reasons on his own accord, thus, the only issue necessary for this Court to decide pertains to step number three, the trial court's finding that there were race-neutral reasons to allow the State to exercise a peremptory challenge and that there was no evidence of purposeful discrimination. See State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (if the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary *prima facie* case is unnecessary) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of

the juror and the attorney. Batson, at 98 n.21; Hernandez, 500 U.S. at 365. The defendant carries the burden of proving the existence of purposeful discrimination. Batson, at 93. The determination of the trial judge is "accorded great deference on appeal," and will be upheld unless proven by the defendant to be "clearly erroneous." Hernandez, at 364.

c. The Facts

Prior to the attorneys conducting *voir dire*, the judge asked a number of general questions of the *venire*. The judge asked if any juror knew of a reason why he or she would find it hard to concentrate and do their best job as a juror. Juror 5 responded that she would have a tough time because she has a "[h]istory of alcohol abuse." 3/20/13 RP 108-09. Juror 5 added later that when she heard the case involved "controlled substances," she thought "this is the wrong case for me." Id. at 103-04. She said that she had been around drugs all her life. Id. at 170.

At one point, juror 5 talked about how in any particular case, a police officer may testify and be lying, and a drug addict may testify and be telling the truth – certainly a true statement. Id. at 200-02. However, juror 5 added that she was biased against police officers, admitting that, "I do have a bias there." When asked to

explain further, juror 5 said that she had been in trouble before and had had bad experiences with the police. Id. at 202. Asked directly if this would affect her ability to deliberate in this case, she openly responded, "I think so because I honestly don't trust them." Id. at 203. Sensing a challenge for cause, the judge then interjected and asked if defense counsel wanted to follow up on the prosecutor's questions. Id. Defense counsel then unsuccessfully attempted to rehabilitate the juror:

> Defense counsel: ***Do you feel that way about all police officers***?
>
> Juror 5: ***Yes***. . .I still look at this case for what it is. I can still follow the Washington state laws and take the evidence and put that against the laws and determine whether he's guilty or innocent. My personal opinion is I don't like the cops, I don't trust the cops, and I'm going to listen to what they say, ***I'm going to take it for what I think it's worth. I can't – I can't change my personal opinion about them, which is what we're asking here***.

Id. at 204 (emphasis added). Defense counsel asked if this was her personal opinion and she responded, "yes." Id.

The judge then decided to give it a try:

> The court: Okay. I'll just ask a few questions. Again, they're not magic questions or answers. If this was a case and you said I don't trust any doctors or I had a bad experience with a nurse. I know they're not all bad, but I don't trust them – do you have confidence that you could then just listen to the case and should

– this doctor might be telling the truth, this doctor might have done a good job, this nurse might have – do you think those are consistent, or do you feel like of course I'm a fair person, but I don't like a category of people, but I can still decide the case fairly?

Juror 5: Yes, the later.

The court: Do all of these things work together?

Juror 5: Yes.

The court: Okay. So you're saying you think you can be fair, but you're just letting us know –

Juror 5: Yes.

The court: -- that because of a negative experience or two or more, that when the officer[s] come in, you don't think gee, everything they say is wonderful and of course I know you're a wonderful person.

Juror 5: Correct.

The court: Right, because if you had said, oh, I really like police officers because I have six in my family, we'd also have a concern – right? -- because that really doesn't have anything to do with whoever you're going to hear from.

Juror 5: Right.

The court: So you're going to plan to be fair?

Juror 5: Yes.

> The court: You're going to treat all witnesses, whether you like them or not, and listen to their testimony carefully?
>
> Juror 5: Yes.

Id. at 204-06.

After this colloquy, no motion was made to excuse juror 5 for cause. Later, juror 5 told defense counsel that one of the reasons a defendant would not want to testify is because "he [referring to the prosecutor] could manipulate" what was said. 3/21/13 RP 13.

At the conclusion of *voir dire*, when the parties were exercising their peremptory challenges, the prosecutor informed the court that he intended to exercise a peremptory challenge on juror 5. Id. at 32. While defense counsel expressed his desire to have juror 5 on the jury because of the views she possessed and the information she could provide, defense counsel *never* claimed that the prosecutor's exercise of a peremptory challenge on juror 5 was racially motivated.

Despite the fact that the defense had not made a *prima facie* showing of purposeful discrimination, the prosecutor voluntarily put his race-neutral reasons for exercising a challenge on the record. Specifically, the challenge was exercised as a direct result of juror 5's admitted bias against the police. Id. at 33-35. The

prosecutor also reminded the court that this was not a challenge "for cause"; it was a peremptory challenge and there was a valid nondiscriminatory reason for exercising the challenge. Id. at 34. The court agreed and noted that if a juror had expressed a similar bias in favor of the police, the defense would have sought to excuse the juror and the court would have been faced with the exact same issue. Finding no evidence of purposeful discrimination, the court allowed the challenge. Id.

d. The Defendant's Claim Is Not Supported By The Record

Before the trial court, there was no suggestion, allegation, proof or finding that the challenge as to juror 5 was exercised because of the juror's race. The State provided a race-neutral reason for exercising a peremptory challenge, and the court's finding that the defendant failed to meet his burden of proving purposeful discrimination was sound and should be affirmed.

The defendant relies on two cases, United States v Bishop,[9] and Turnbull v. State,[10] for the general proposition that minority jurors may not be excused simply because they do not think highly of the police. He then asserts that is all that existed here. The

[9] 959 F.2d 820 (9th Cir. 1992).

[10] 959 So.2d 275 (Fla. Ct. App. 2006), rev. denied, 969 So.2d 1015 (2007).

defendant is incorrect. The situation here is not similar to the situations that existed in Bishop or Turnbull.

Bishop was convicted of six counts of assaulting federal officers and a drug charge. During *voir dire*, the prosecutor excused a Black juror because the juror lived in Compton in South Central L.A., a predominantly low-income Black neighborhood, because, the prosecutor explained, the juror was likely to take the side of individuals having a tough time, people who are not middle class. Bishop, at 821-22. The Court reversed Bishop's conviction, finding that an "assumption" as to the sympathies a juror may hold based on where the juror lives is akin to stating that all Black jurors who live in a certain neighborhood cannot be fair. Id. Importantly, unlike this case, there was no evidence in the Bishop case that the individual juror ever expressed, directly or indirectly, that she was biased in any way.

In Turnbull, the prosecutor excused four Black jurors based on their beliefs, elicited through questions by the prosecutor, that racial profiling was prevalent in the community. The Court reversed Turnbull's conviction. The Court noted that racial profiling was not an issue in the case and that the "manner the State asked the

questions," showed that the questioning was merely a "subterfuge" used to strike Black jurors. Turnbull, 959 So.2d at 276.

Here, there was no "assumptions" made based on any trait juror 5 possessed. Further, there was no subterfuge based on questioning unrelated to the case or improper *voir dire*. Rather, juror 5 very directly stated that she did not trust any police officer and that her personal and admitted bias would affect the way she deliberated in this case. She also candidly admitted that she could not change her personal opinion. While she was later cajoled by the judge into stating she could be fair, any reasonable attorney -- whether a defense attorney or prosecutor, would likely exercise a peremptory challenge on any juror who steadfastly proclaimed they were biased in a manner that could unfairly affect the case. State v. Vreen,[11] is a case more akin to the situation here.

In Vreen, the defendant tried to exercise a peremptory challenge against the only Black juror on the *venire*. Vreen argued that he should have been permitted to use the peremptory challenge because the juror was a pastor, a retired military veteran, and he believed the juror's authoritarian background would lead the juror to favor the State. The trial court found this was insufficient to

[11] 99 Wn. App. 662, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923 (2001).

overcome a *prima facie* case of a racial discrimination. The court of appeals disagreed, finding that Vreen had provided a valid "race-neutral explanation for the peremptory challenge." Vreen, 99 Wn. App. at 667. The reasons provided in the case at bar for excusing juror 5 are far more obvious and direct than the reasons upheld in Vreen.

There is no place for purposeful discrimination in selecting a jury. There is also no place for trying to create racially motived reasons where none exist. None exist here. The defendant simply cannot show that the trial court's decision to allow the State to exercise a peremptory challenge was clearly erroneous.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 26 day of March, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: _____
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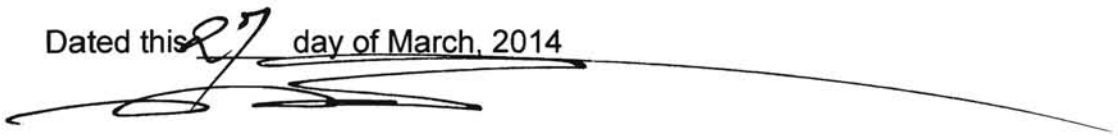
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kathleen Shea, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BROWN, Cause No. 70496-6 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 27 day of March, 2014



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Name
Done in Seattle, Washington