

NO. 70993-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANTE PIGGEE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Whether the record established a *prima facie* case of purposeful discrimination where the prosecutor did not challenge two of the four African-American prospective jurors and one of the four was stricken by the defense, and whether Piggee can show that the trial court's finding that the prosecutor's race-neutral reasons for striking two prospective jurors were not a pretext for racial discrimination is clearly erroneous when it is fully supported by the record.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Dante Piggee, was charged with felony violation of a court order and malicious mischief in the third degree, both designated as domestic violence crimes, for showing up at the home of his estranged wife, Destany Piggee, while prohibited from doing so by a protection order and for damaging her barbeque grill. CP 1-8. A jury trial on these charges was held in June and July 2013 before the Honorable Andrea Darvas.

At the conclusion of *voir dire*, as the parties were exercising their peremptory challenges, Piggee's trial counsel objected to the

trial prosecutor's challenges to Juror 16 and Juror 35, both of whom were African-American women, under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). RP (6/25/13) 74-75. As will be discussed in detail in the argument section below, the trial prosecutor argued that the record did not establish a *prima facie* case of discrimination. RP (6/25/13) 77, 90-94; CP 23-26. Nonetheless, the trial court asked the prosecutor to articulate reasons for excusing Juror 16 and Juror 35 "for safety's sake and to protect the record," and then ultimately ruled that the prosecutor's articulated race-neutral reasons for excusing these prospective jurors were not a pretext for discrimination. RP (6/25/13) 96-103.

The jury convicted Piggee of felony violation of a court order as charged, and found that this was a crime of domestic violence. The jury acquitted Piggee of malicious mischief. CP 29-32; RP (7/1/13) 87-90. In a bifurcated proceeding, the jury also returned a special verdict that the violation of the court order was part of an ongoing pattern of domestic violence. CP 56.

The trial court imposed a prison-based Drug Offender Sentencing Alternative sentence. CP 92-102, 221-30.¹ Piggee now appeals. CP 198-208.

2. SUBSTANTIVE FACTS

Dante and Destany Piggee met in 2007 and were married in 2008. They have three children together. RP (6/26/13) 74-76. Their relationship ended in July 2012, and Destany petitioned for and received a temporary protection order in March 2013. RP (6/26/13) 76-77. On April 3, 2013, Destany and Piggee both attended a court hearing to address whether a permanent order should be entered; Destany asked for the temporary order to be extended, and her request was granted until July 29, 2013. RP (6/26/13) 78-79.

On April 8, 2013, Destany invited her friend Tahlonya Pipkin, her neighbor "Cree," and their children over to her apartment for a barbeque. RP (6/25/13) 123, 127; RP (6/26/13) 80-83. Destany left her apartment briefly to run an errand, and Piggee approached her in the parking lot. Destany told him to leave her alone, and he

¹ Piggee was resentenced in April 2014 with a lower offender score because one of his prior convictions was overturned on appeal. CP 209-20.

left. RP (6/26/13) 86-87. However, Piggee returned to Destany's apartment while she was cooking. RP (6/26/13) 89.

Piggee said he wanted to talk to her and see the children. RP (6/26/13) 89-90. Destany repeatedly told him to leave, but Piggee continued to argue with her about something he had seen on her Facebook page. RP (6/26/13) 90-92. Piggee followed her inside the apartment and into the kitchen, and the argument became more heated; Destany was "irate." RP (6/26/13) 94. Piggee threatened to shoot Destany; she grabbed her phone and said, "Okay, motherfucker, you're going to act like that? Fine. I'm going to invoke my restraining order." RP (6/26/13) 95. She called the police. RP (6/26/13) 96. Piggee left before the police came. RP (6/26/13) 97. As he was leaving, he flipped the barbeque grill over and onto the ground. RP (6/26/13) 136-37.

It was uncontested that Piggee had two prior convictions for violating a court order. Piggee admitted to the two prior convictions, but he testified that he did not contact Destany on April 8, 2013. RP (6/27/13) 25.

C. **ARGUMENT**

THE RECORD DOES NOT ESTABLISH A *PRIMA FACIE* CASE OF DISCRIMINATION; THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE PROSECUTOR'S RACE-NEUTRAL REASONS FOR STRIKING TWO JURORS WERE NOT A PRETEXT FOR DISCRIMINATION.

Piggee's sole claim on appeal is that his convictions must be reversed under Batson and its progeny because the trial prosecutor engaged in purposeful racial discrimination during jury selection by exercising peremptory challenges to strike Juror 16 and Juror 35 from the venire. This claim should be rejected for two reasons. First, the record does not establish a *prima facie* case of purposeful discrimination. Second, the trial court's finding that the prosecutor's race-neutral reasons for excusing the two prospective jurors were not a pretext for discrimination is supported by the record. Piggee's convictions should be affirmed.

In Batson, the United States Supreme Court held that equal protection requires "a jury whose members are selected pursuant to nondiscriminatory criteria." Batson, 476 U.S. at 85-86. Accordingly, the Court established a three-part approach for cases involving allegations of racial discrimination in jury selection. First, a defendant who questions a prosecutor's exercise of a peremptory

challenge must establish a *prima facie* case of discrimination.

Second, if a *prima facie* case is established, the burden shifts to the prosecutor to provide a race-neutral reason for exercising the challenge. Third, the trial court determines whether the defendant has established purposeful discrimination. Batson, 476 U.S. at 96.

1. The Record Does Not Establish A *Prima Facie* Case Of Purposeful Discrimination.²

As stated above, the first step in analyzing a Batson claim is determining whether there is a *prima facie* case of purposeful discrimination. In this case, although the trial court required the trial prosecutor to articulate race-neutral reasons for excusing Juror 16 and Juror 35 “for safety’s sake and to protect the record,” the record does not establish relevant circumstances sufficient to raise an inference that these jurors were excused because of their race.

² Although the Washington Supreme Court has held that the issue of whether a *prima facie* case has been established is moot in cases where the prosecutor articulates race-neutral reasons for striking prospective jurors, that same Washington Supreme Court opinion also contains a discussion of what is required to establish a *prima facie* case and an analysis of whether a *prima facie* case was established in the case at hand. See State v. Hicks, 163 Wn.2d 477, 490-93, 181 P.3d 831 (2008). Accordingly, the case law seems inconsistent as to whether the *prima facie* case issue should be reviewed on appeal or not. Nonetheless, the State is making this argument in this case because the trial prosecutor made a record that is more than sufficient to preserve and review the issue, and because the trial court made the prosecutor articulate race-neutral reasons solely “for safety’s sake and to protect the record,” not because of a specific finding of a *prima facie* case of discrimination. RP (6/25/13) 77, 90-93.

Therefore, Piggee's claim does not meet the threshold requirement of a *prima facie* case of discrimination under the Batson test.

To establish a *prima facie* case of discrimination, a defendant "must provide evidence of any relevant circumstances that 'raise an inference' that a peremptory challenge was used to exclude a venire member from the jury on account of the venire member's race." State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010) (quoting Batson, 476 U.S. at 96). The question of whether there is a *prima facie* case of discrimination is dependent upon an examination of "all relevant circumstances," including whether "a 'pattern' of strikes against black jurors" has been established, or whether "the prosecutor's questions and statements during *voir dire*" give rise to an inference of discriminatory purpose.

Batson, 476 U.S. at 96-97. Other circumstances may include:

- (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic,
- (2) exercising a disproportionate use of strikes against a group,
- (3) the level of a group's representation in the venire as compared to the jury,
- (4) the race of the defendant and the victim,
- (5) past discriminatory use of peremptory challenges by the prosecuting attorney,
- (6) the type and manner of the prosecuting attorney's questions during *voir dire*,
- (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and
- (8) similarities between those individuals who remain on the jury and those who have been struck.

Rhone, 168 Wn.2d at 656. In short, the determination whether a *prima facie* case of discrimination has been established is highly fact-specific and must be evaluated based on the totality of the circumstances.

In this case, the record establishes that there were four African-American prospective jurors who were in the jury box at some point during *voir dire*, and thus, could have served on the jury: Juror 9, Juror 14, Juror 16, and Juror 35. Three of these prospective jurors were women (9, 16, and 35), and one (14) was a man.³ RP (6/25/13) 74-75, 77, 83-85, 92-94. Juror 14, the sole African-American man in the venire, was excused by the defense because he was a police captain; the prosecutor would not have excused him. RP (6/25/13) 75, 94. Juror 9 was not challenged by either party, and she served on the jury. RP (6/25/13) 70-74, 105-06. Therefore, the record does not establish that the trial prosecutor exercised her peremptory challenges for the purpose of removing the African-Americans from the jury.

³ Piggee's brief asserts that "the State used peremptory challenges to strike two of the three African-Americans in the venire, and the only two African-American women." Brief of Appellant, at 3. This is incorrect; there were four African-Americans, three of whom were women.

In addition, although Piggee is African-American, the victim and civilian witness in this case are African-American as well. RP (6/25/13) 91. The trial prosecutor identified herself as an Asian-American woman, and she noted that there were members of other races on the jury. RP (6/25/13) 91-93. Piggee has identified no evidence of a discriminatory purpose in the trial prosecutor's questions and statements during *voir dire*, and indeed, there is none. RP (6/24/13) 101-24; RP (6/25/13) 6-30. There is also no evidence that this prosecutor has used peremptory challenges in a discriminatory manner in any other cases.

In sum, this record is insufficient to establish a *prima facie* case of purposeful discrimination. The trial prosecutor did not challenge all or even most of the African-American prospective jurors, one of the African-Americans (the only man) was excused by the defense, and an African-American woman served on the jury. In addition, the trial prosecutor identified herself as a member of a non-Caucasian racial group, the victim and witness in this case were themselves African-American, and there is no evidence in the prosecutor's statements or questions in this case or from past cases that she was exercising her peremptory challenges for

discriminatory purposes. Piggee's Batson claim should be rejected on this basis alone.

But if this Court finds either that the record is sufficient to show a *prima facie* case of discrimination or that the issue is moot because the trial court required the prosecutor to articulate her reasons for excusing Juror 16 and Juror 35, the trial court's finding that the prosecutor's race-neutral reasons were not a pretext for discrimination is supported by the record, and thus, Piggee cannot show that that finding is clearly erroneous.

2. The Trial Court's Finding That The Prosecutor's Race-neutral Reasons For Excusing The Two Prospective Jurors Were Not A Pretext For Discrimination Is Supported By The Record.

The final step in analyzing a Batson claim is to determine whether the defendant has shown purposeful discrimination. On appeal, the defendant must show that the trial court's finding that the prosecutor's stated reasons for exercising peremptory challenges were not a pretext for discrimination is clearly erroneous. Piggee's claim does not meet that standard, and it should be rejected for this reason as well.

In reviewing a trial court's determination that the prosecutor's reason for excusing a prospective juror was not a pretext for discrimination, "[t]he determination of the trial judge is 'accorded great deference on appeal,' and will be upheld unless clearly erroneous." State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Great deference is given to the trial court's determination because the trial court's evaluation of the prosecutors' reason for excusing a prospective juror necessarily involves a credibility determination. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). Demeanor, body language, and overall context are critical to any lawyer's decision whether to excuse a prospective juror, and such considerations are impossible to review on appeal. Hicks, 163 Wn.2d at 493. Appellate courts cannot observe the demeanor of either the prosecutor or the prospective jurors. Id. Thus, the trial court's ruling will be upheld on appeal if there is evidence in the record to support it; in other words, it will be upheld unless shown to be clearly erroneous. State v. Branch, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996).

In this case, the trial prosecutor articulated race-neutral reasons for excusing Juror 16 and Juror 35. As to Juror 35, the

prosecutor correctly stated that she was the protected party in a no-contact order that was issued as the result of a felony domestic violence case, and that she had asked to have the order lifted because she and her abuser have a child in common and she did not want the no-contact order. RP (6/24/13) 135-37; RP (6/25/13) 97-98. The prosecutor also correctly observed that Juror 35 said that her abuser violated the order by contacting their child at a daycare center, but she did not report the violation because neither she nor the child had been physically harmed. RP (6/24/13) 137; RP (6/25/13) 97-98. As the prosecutor noted, no one was physically harmed in Piggee's case, either; therefore, the prosecutor concluded that Juror 35 was not "a good fit" for this case. RP (6/25/13) 98. These reasons for excusing Juror 35 are race-neutral and fully supported by the record. Accordingly, Piggee cannot show that the trial court's denial of the Batson challenge is clearly erroneous.

As to Juror 16, the trial prosecutor explained that her reasons for excusing her had more "nuance[.]" RP (6/25/13) 99. First, the prosecutor explained that Juror 16's answers to questions during *voir dire* in general seemed nonresponsive. Also, the prosecutor observed that Juror 16 expressed the view that spouses

take unfair advantage of court orders. RP (6/25/13) 99. This gave the trial prosecutor concern because Destany Piggee had allowed Piggee to violate the protection order on prior occasions and could be seen as using the order "as a sword" in this case. RP (6/25/13) 100. These observations regarding Juror 16 are also fully supported by the record.

In response to questioning from defense counsel about knowing someone who had been assaulted, Juror 16 stated that her maternal aunt and the mother of one of her friends had been in physically abusive relationships, and that "those two situations were bad." RP (6/24/13) 146-47. Juror 16 then offered the following information, which was unsolicited and not in response to a question posed by either party:

I mean I've heard of like other situations in which the wife or the other spouse, such as like, for instance, divorce cases where it would be like the wife cheating on the husband, which happened recently to one of my sister's best friends. And what happened was her brother divorced his wife, who cheated on him, and basically he gave all the money to her because of the court, of what went down in the court. So basically had to give away the car, just all the financial assets were basically given to her, which find like [sic] very unfair. And so he now has – and they had two kids together, too, and he has more the parent role of raising the kids; so he has the kids basically, like most weekdays if there's school in session, while she just

has them on the weekends. So I mean it kind of varies from situation to situation, so –

[DEFENSE COUNSEL]: Okay. I see you work for Group Health. What do you do for Group Health?

[JUROR 16]: So I do administrative stuff as well as like scheduling patients. So yeah.

[DEFENSE COUNSEL]: Okay. Juror No. 38, you had also answered that question about being assaulted. Is that the situation you told us about before?

RP (6/24/13) 147-48.

This portion of the record illustrates both points made by the trial prosecutor. First, Juror 16 went on a nonresponsive tangent and offered unsolicited information about her sister's friend's brother's divorce case, which ended only when defense counsel redirected her with a question about her job. This exchange supports the prosecutor's statement that Juror 16's answers were nonresponsive. Second, Juror 16 expressed the view that spouses can exploit court proceedings to gain an unfair advantage. This supports the trial prosecutor's concern that Juror 16 could be skeptical of Destany Piggee's motives in this case.

In sum, the trial court's determination that the trial prosecutor's race-neutral reasons for excusing Juror 16 and Juror 35 were not a pretext for discrimination is supported by

evidence in the record. Accordingly, Piggee cannot show that the trial court's ruling is clearly erroneous, and his claim fails.

Nonetheless, Piggee contends that Juror 16 expressed views that were similar to Juror 30 and Juror 37, who were not excused.⁴ But these prospective jurors answered questions differently, and in any event, this single factor is not dispositive.

Defense counsel asked Juror 37 directly about being the subject of a court order. RP (6/24/13) 143. Juror 37 explained that his ex-wife sought a restraining order against him during their acrimonious divorce in order to gain a tactical advantage. RP (6/24/13) 143-44. Although Juror 37 expressed views that in some ways resemble those expressed by Juror 16, he did so in direct response to questioning in a matter-of-fact way. Similarly, Juror 30 stated that his or her sister's husband's ex-wife had sought a restraining order against the sister "out of spite," and that the order was thrown out. RP (6/24/13) 145. Again, this prospective juror was matter-of-fact and responsive to direct questions. Accordingly, the prosecutor's observation that Juror 16 was nonresponsive to questioning differentiates Juror 16 from the other

⁴ However, Juror 30 was excused by the defense, and thus, did not serve on the jury. RP (6/25/13) 105.

two prospective jurors. Moreover, every other relevant circumstance apparent in the record supports the prosecutor's representation that she exercised her peremptory challenges in a nondiscriminatory manner.

In sum, Piggee has not shown that the trial court's denial of his Batson challenges were clearly erroneous, because the trial court's rulings are supported by evidence in the record.

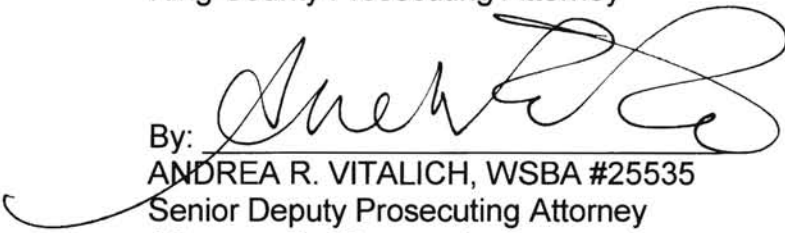
D. CONCLUSION

For the reasons set forth above, this Court should affirm Piggee's convictions for felony violation of a court order and malicious mischief in the third degree.

DATED this 16th day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DANTE PIGGEE, Cause No. 70993-3-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

06/17/14
Date