91332-3

No.
COA No. 70993-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANTE URREL PIGGEE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvis

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitione-r

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

WASHINGTON CONSTITUTIONAL PROVISIONS

FEDERAL CASES

WASHINGTON CASES

RULES

A. IDENTITY OF PETITIONER

Dante Piggee asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Dante Urrell Piggee*, No. 70993-3-I (January 12, 2015). A copy of the decision is in the Appendix at pages A-1 to A-11.

C. ISSUES PRESENTED FOR REVIEW

1. A party's use of race as a basis to exercise a peremptory challenge violates the Fourteenth Amendment and article I, section 21's guarantees of equal protection and due process. Here, over Mr. Piggee's objection, the State used peremptory challenges to strike two of the three African-Americans in the jury *venire* based upon the jurors' responses to questioning during *voir dire*, responses that were remarkably similar to responses given by non-African American jurors who were not struck. Is a significant issue of law under the United States and Washington Constitutions involved where Mr. Piggee's right to due process and equal protection was violated when the State's jury

venire strikes were racially based and the rationale asserted by the State was pretextual?

2. Once the circumstances show some evidence of racial discrimination in jury selection, a prosecutor's reasons for challenging an African-American juror must be closely scrutinized to determine if they are supported by the record and are legitimately race-neutral. The reasons the prosecutor gave for striking Juror 16 and Jurors 35 were based upon views that applied equally to comparable jurors who were seated. Did the prosecutor's reasons that were not supported by the record show the challenges were substantially motivated by the jurors' race?

D. STATEMENT OF THE CASE

Dante Piggee was charged with a single count of felony violation of a court order and a single count of malicious mischief in the third degree for contacting his wife where a court order barred such contact. CP 7-8. During jury selection, over Mr. Piggee's objection, the State used peremptory challenges to strike two of the three African-

Americans in the *venire*, and the only two African-American women, jurors 16 and 35.[1] RP 6/25/2013RP 72, 74.

The prosecutor was convinced juror 35 would not be a good juror because of the juror's experience with domestic violence, and the prosecutor's belief that the juror would not follow the law in light of her reaction to her ex-spouse's violation of a court order. 6/25/2013RP 97-98.

In questioning by Mr. Piggee, Juror 35 stated she was the victim of domestic violence and, as part of the criminal case against her former spouse, a no-contact order was imposed, one she did not request. Juror 35's spouse violated the no-contact order by appearing at their child's daycare; something juror 35 did not find out about until the daycare told her. Juror 35 did not contact the police regarding the violation, because she saw no harm resulting from the violation; she and her former spouse are the parents of the child and her spouse had visited the daycare in violation of the court order to visit his son. 6/24/2013RP 137.

---

[1] Mr. Piggee did not originally object to the strike of juror 16, but objected to the prosecutor's strikes when juror 35 was subsequently stricken. 6/25/2013RP 72-74. Mr. Piggee used a peremptory challenge to strike the only African-American man, who was a police captain and had formerly been in the department's domestic violence unit. 6/25/2013RP 75.

The prosecutor followed up on this disclosure by juror 35, who explained that she did not call the police because her spouse had stopped at the daycare, dropped off a gift, hugged his son, and left. 6/25/2013RP 11. The prosecutor never asked juror 35 if she could follow the law or whether her experiences with the no-contact order would affect her judgment in this case. Mr. Piggee asked juror 35 if she could be fair and impartial in light of her experience and she replied affirmatively. 6/24/2013RP 136.

Further, one of the reasons shared by juror 35 for not calling the police for the potential court order violation was her belief that a person who really wanted to harm the protected party could. 6/25/2013RP 12. Under questioning by the prosecutor, juror 35 noted this was her only experience with a no-contact order and whether it worked was totally dependent on the cooperation of the people involved. 6/25/2013RP 12. This was a view also shared by non-African-American jurors 15 and 34. Juror 15 even went further and noted that no-contact orders were not an effective tool in protecting a domestic violence victim because "there's nobody that's going to watch you 24 hours a day and make sure you're safe." 6/25/2013RP 13. Juror 34 noted "[t]here's not

enough police officers out there to deal with all the domestics and everything else that you gotta deal with[.]" 6/25/2013RP 15.

While the prosecutor focused on what she perceived was the similarity between juror 35's experience with domestic violence and the court order and the facts of Mr. Piggee's case, the prosecutor never asked juror 35 any questions about this subject. The prosecutor never asked questions about the specifics of juror 35's experience, relying instead on the prosecutor's perceived view of what juror 35 had experienced. The prosecutor only asked juror 35 questions regarding her refusal to call the police after she learned of her ex-spouse's violation of the court order.

The only information juror 35 disclosed to the parties about her domestic violence experience consisted of her statements that she had been in a violent relationship, the court imposed a no-contact order against her wishes, and her ex-spouse had been prosecuted for a felony for the domestic violence, but was convicted of a misdemeanor. 6/24/2013RP 135-36.

One of the prosecutor's reasons for striking juror 16 was the juror's view that some people use no-contact orders as swords as opposed to shields. 6/25/2013RP 99. In fact, several non-African-

American jurors expressed a similar view that some people take advantage of no-contact orders to gain the upper hand in divorces and child custody matters.

For instance, Juror 37 noted his former spouse did just that; sought a court order to gain an advantage in the divorce. 6/24/2013RP 143-44. Juror 30 also shared that her sister's husband's ex-wife sought a court order out of spite. 6/24/2013 RP 145.

The trial court rejected Mr. Piggee's *Batson* challenge, finding the reasons given by the prosecutor for the challenges were not pretextual. 6/25/2013RP 103. The jury subsequently convicted Mr. Piggee of the felony violation of a court order but acquitted him of the malicious mischief count. CP 31-32.

The Court of Appeals rejected Mr. Piggee's arguments regarding the denial of his *Batson* challenge and affirmed his conviction.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE PROSECUTOR'S USE OF RACE IN JURY SELECTION VIOLATED MR. PIGGEE'S AND THE AFFECTED JURORS RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

The Fourteenth Amendment's Equal Protection Clause requires defendant's be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky,* 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[2] The *Batson* Court noted that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause'" and that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" 476 U.S at 95, *quoting Arlington Heights v. Metropolitan. Housing Development Corporation,* 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The Court further declared that "[f]or evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id.* at 95-96 (citation omitted). In addition, an individual juror has "the right not to be excluded from one

[2] Under art. I, § 21, the Washington Constitution provides greater protection than the Fourteenth Amendment's protection under *Batson. State v. Hicks,* 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

[particular jury] on account of race," and thus "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race." *Powers v. Ohio*, 449 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. *Batson*, 476 U.S. at 87.

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). *See also State v. Saintcalle,* 178 Wn.2d 34, 58, 309 P.3d 326 (2013) ("racial inequalities permeate our criminal justice system and present important moral issues we all must grapple with. Twenty-six years after *Batson*, it is increasingly evident that discriminatory use of peremptory challenges will be difficult to eradicate.").

A *Batson* challenge involves a three-part analysis: (1) the defendant challenging the State's use of a peremptory challenge must first establish a *prima facie* case of racial discrimination; (2) if a *prima*

facie showing of discrimination is made, the burden shifts to the State to offer a race-neutral reason for its peremptory challenge; and (3) the trial court then decides if the defendant has established that the State's use of the peremptory challenge was purposeful racial discrimination. *Batson,* 476 U.S. at 94-98.

Relevant circumstances which a court may consider include: striking a group of jurors that share race as their only common characteristic, disproportionate use of strikes against a group, the level of a group's representation in the venire as compared to the jury, race of the defendant and the victim, past conduct of the state's attorney in using peremptory challenges to excuse all African-Americans from the jury venire, type and manner of State's questions and statements during venire, disparate impact (i.e. whether all or most of the challenges were used to remove minorities from jury), and similarities between those individuals who remain on the jury and those who have been struck. *State v. Wright*, 78 Wn.App. 93, 99-100, 896 P.2d 713 (1995).

> Although there may be "any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause . . ., the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]."

Miller-El, 545 U.S. at 239, *quoting Batson,* 476 U.S. at 98 n.2.

Once the defendant objects to the prosecutor's exercise of the peremptory challenges, and the trial court has ruled that the challenges were race-neutral, the focus is on whether the State's reasons given for the challenges were indeed race neutral. *See Hicks,* 163 Wn.2d at 492-93 (even "where a trial court [finds] a prima facie case 'out of an abundance of caution,'" if the prosecutor has offered a race-neutral explanation, the ultimate issue of whether or not a "prima facie case was established does not need to be determined[.]") *State v. Luvene,* 127 Wn.2d 690, 699, 803 P.2d 960 (1995) ("[I]f, as in this case, 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).

The trial court must weigh the evidence of discrimination against the reasons presented for dismissing the juror to "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez,* 500 U.S. at 359. "'An invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . '" *Id., quoting Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). "A prosecutor's motives

may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge." *McClain v. Prunty,* 217 F.3d 1209, 1220 (9th Cir. 2000). *See also Snyder v. Louisiana,* 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the excused juror's]."). Where a proffered reason is shown to be pretextual, it "gives rise to an inference of discriminatory intent." *Id.* at 1212.

A trial court's determination that the prosecutor's rationale for striking a juror was race-neutral is a factual determination based partly on the juror's answers as well as an assessment of the demeanor of the juror and the prosecutor. *Batson*, 476 U.S. at 98 n.21. The trier of fact may not turn a blind eye to purposeful discrimination obscured by race-neutral excuses. "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson,* 476 U.S. at 98 n. 20, *quoting Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 258, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "A *Batson* challenge does not call for a mere

exercise in thinking up any rational basis." *Miller-El,* 125 S.Ct. at 2332. The prosecutor's reasons must be "related to the particular case to be tried." *Batson,* 476 U.S. at 98. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam).

As part of its evaluation of the prosecutor's reasoning, the Court also must conduct a comparative juror analysis - that is, it must compare African-American panelists who were struck with those non-African-American panelists who were allowed to serve. *Miller-El,* 545 U.S. at 241. *See also Reed v. Quarterman,* 555 F.3d 364, 376 (5th Cir. 2009) ("if the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.").

Where the prosecutor's peremptory challenges are based upon race, the remedy is to reverse the conviction and remand for a new trial. *State v. Cook,* 175 Wn.App. 36, 44, 312 P.3d 653 (2013). In addition, should this Court to determine that a least one of the two struck jurors

was impermissibly excused, this Court must grant Mr. Piggee a new trial. *See United States v. Collins,* 551 F.3d 914, 919 (9th Cir.2009) ("'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'"), *quoting United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir.1994).

In this case, this Court should grant review to determine whether the prosecutor's reasons for striking the African-American jurors were race-based and a mere pretext for unconstitutional strikes.

F. CONCLUSION

For the reasons stated, Mr. Piggee asks this Court to grant review and reverse his conviction.

DATED this 11th day of February 2015.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANTE PIGGEE, Appellant.	)	No. 70993-3-I DIVISION ONE UNPUBLISHED OPINION FILED: January 12, 2015

SPEARMAN, C.J. — Dante Piggee appeals his conviction of felony violation of a court order, claiming the trial court violated his right to equal protection when it allowed the prosecutor to use peremptory challenges to remove two of three African American women from the jury panel. Because Piggee fails to establish clear error in the trial court's ruling, we affirm.

FACTS

Dante and Destany Piggee married in 2008 and have three children. Destany obtained a temporary protection order against Piggee in March 2013. Late in the evening of April 8, 2013, Piggee approached Destany in the parking lot behind her apartment, asking to speak to her. Destany told him to leave her alone and he left. A few minutes later, Piggee came to Destany's back door. While Destany prepared food in her kitchen and began cooking on the barbeque grill on her back porch, Piggee questioned her about her Facebook page and argued with her. At one point, one of their children came outside to Piggee and didn't "want to let her dad go," until he carried her back to the door and let her

down. Verbatim Report Proceeding (6/26/13) at 94. Destany repeatedly told Piggee to leave. Piggee continued to argue and became more aggressive, finally threatening to shoot her in the face. Irate, Destany told him she was "going to invoke my restraining order," and called the police. VRP (6/26/13) at 95. While she spoke on the phone, Piggee left through the back door. Destany heard a "boom," and went out to her back porch to find her grill lying flat on its back with the lid open, the food spilled out, and the burners popped out. VRP (6/26/13) at 97.

The State charged Piggee with felony violation of a court order and third degree malicious mischief.

During jury selection, Piggee, who is African American, used his first peremptory challenge to strike juror 14, an African American man who worked as a police detective. The prosecutor used her third peremptory challenge to strike an African American woman, juror 16. The prosecutor accepted the panel after exercising five peremptory challenges. After Piggee exercised another peremptory challenge, juror 35, an African American woman, entered the jury box. When the prosecutor used a peremptory challenge to strike juror 35, Piggee raised a challenge under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), objecting to the prosecutor's dismissal of jurors 16 and 35.

Following a discussion on the record regarding whether Piggee had established a prima facie showing of purposeful discrimination, the trial court was "a bit troubled by the fact that the State did exercise peremptory challenges

against two of the three African American women in the jury box," and asked the State to provide race-neutral explanations, "for safety's sake and to protect the record." VRP (6/25/13) 96-97.

The prosecutor recounted the story told by juror 35 that she had been the protected party to a court order and had chosen not to report a violation when the restricted party visited their child at daycare "because no one got hurt, no one was harmed." VRP (6/25/13) at 98. The prosecutor "had reservations" about the potential for juror 35 "not following the law" because her experience was similar to the facts of Piggee's case, which involved the presence of children and no physical harm. VRP (6/25/13) at 98. The prosecutor stated that juror 16 "did not tend to actually answer the questions" during voir dire and "was not able to articulate her true role as a juror." VRP (6/25/13) at 99. According to the prosecutor, juror 16 also suggested that "some spouses take advantage of the situation" by "using no contact orders as swords rather than a shield." VRP (6/25/13) at 99. The prosecutor "felt very uncomfortable" with juror 16 "passing judgment upon Destany Piggee even though the obligation solely lies with Mr. Piggee to obey the order." VRP (6/25/13) at 100.

Defense counsel argued that other jurors said that people may take advantage of others with no contact orders and other jurors failed to directly answer questions and could not articulate the true role of the jury. But defense counsel was not able to identify particular jurors remaining in the jury box who would have been subject to the same reasons for a challenge because she "didn't take notes on every single one of them." VRP (6/25/13) at 101.

The trial court acknowledged noting that juror 35 expressed "her feeling that it wasn't necessary to report a violation of a no contact order when no one got hurt." VRP (6/25/13) at 103. The court then ruled,

> [B]ased on what's been proffered to me and based on my notes and my recollection of what other members of the [venire] who are in the jury box at the present time said or failed to say, I cannot make a finding that the State's explanations for excusing on peremptory challenges Jurors 16 and 35 are pretexual[.]

VRP (6/25/13) at 103.

The jury found Piggee guilty of felony violation of a court order and acquitted him of malicious mischief. The jury returned a special verdict finding that the violation of the court order was part of an ongoing pattern of domestic violence. The trial court imposed a prison-based drug offender sentencing alternative.

ANALYSIS

Piggee argues that the trial court violated his Fourteenth Amendment right to equal protection when it sustained the State's peremptory challenges to jurors 16 and 35.

The equal protection clause of the Fourteenth Amendment prevents a party from challenging a potential juror solely based on race. Batson, 476 U.S. at 85-86. Batson established a three-part test to determine "whether a venire member was peremptorily challenged pursuant to discriminatory criteria." State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010). First, the party alleging such discrimination must establish a prima facie case of purposeful discrimination. Rhone, 168 Wn.2d at 651. Second, the burden shifts to the other party who must

provide a race-neutral explanation for challenging the potential juror. Rhone, 168 Wn.2d at 651. Finally, the trial court determines whether the challenging party has established purposeful discrimination. Rhone, 168 Wn.2d at 651. The defendant carries the burden of proving the existence of purposeful discrimination. Batson, 476 U.S. at 93.

"'In reviewing a trial court's ruling on a Batson challenge, [t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous.'" Rhone, 168 Wn.2d at 651 (alteration in original) (quoting State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008)). If there are two permissible views of the evidence, the trial court's choice between them cannot be clearly erroneous. State v. Luvene, 127 Wn.2d 690, 700, 903 P.2d 960 (1995). If the prosecutor provided a race-neutral explanation and the trial court ruled on the question of racial motivation, "the preliminary prima facie case is unnecessary." Luvene, 127 Wn.2d at 699.

Piggee points out that the prosecutor failed to question juror 35 as to whether she would be willing to follow the law despite her experience. He also claims the prosecutor failed to sufficiently question juror 35 about the details of her experience to determine whether her experiences were similar to the present case. Lack of questioning before dismissing a juror can be evidence of racially motivated dismissal. Hicks, 163 Wn.2d at 491 (prosecutor's failure to orally question only remaining African American juror about all his stated reasons for dismissing her was sufficient evidence to support prima facie inference of discrimination).

But juror 35 talked about her "ex" violating a protection order to see their son when defense counsel was questioning the venire and counsel asked juror 35 twice whether she could be fair and impartial in this case, given her experiences. VRP (6/24/13) at 135-37. The prosecutor later returned to juror 35, asking why she chose not to report the violation of the order, whether she would have chosen differently if the circumstances had been different, and whether having a protection order gave her a sense of comfort or assurance. VRP (6/25/13) at 10-12. When the prosecutor offered her explanation for excusing juror 35, she stated:

> [T]he core of the reason why I did not believe she was a good fit for this case was she said that, in the past, he had violated the no contact order by visiting the children, but she did not call the police because no one got hurt, no one was harmed. And I think here in this case, though we do have a threat to kill, it was not charged in this case because she – Destany Piggee did not articulate any fear of the actual threat. So we don't have any physical harm, we just have the allegation that he came over to her house and he would leave when requested.

VRP (6/25/13) at 98.

Because the prosecutor directly questioned juror 35 about her admitted failure to report a violation that did not result in any physical harm, which she identified as the specific source of her concern, we cannot say that her failure to ask for additional details or repeatedly question the juror's willingness to follow the law necessarily demonstrates discriminatory intent based on race.

Piggee also points to the fact that the prosecutor did not excuse jurors 15 and 34, who were not African American, although they expressed opinions similar to juror 35 about the need for cooperation of the people involved as well

as the police in order to make a protection order effective. But the defense exercised a peremptory challenge to excuse juror 15 before the prosecutor excused juror 35. And juror 34, who the prosecutor accepted on the panel but the defense excused, did not report having any personal experience with a protection order, either as a protected or a restrained party. Under these circumstances, we cannot say that the trial court's acceptance of the prosecutor's explanation for excusing juror 35 was clearly erroneous.

As to juror 16, Piggee claims that other jurors expressed a similar view that some people take advantage of protection orders to influence decisions in dissolution proceedings or proceedings involving children. In particular, Piggee claims that the prosecutor's acceptance of jurors 37 and 30 raises a strong inference that her explanation for excusing juror 16 was a pretext for racial discrimination.[1]

During voir dire, Juror 37 said his former wife obtained a protection order against him when they were going through a divorce and then called him on the phone. He said he could be fair and impartial unless he "found out that [Piggee's] wife or ex-wife or whatever she is called him first." VRP (6/24/13) at 144-45.

Juror 30 revealed that his sister had been the respondent to a protection order obtained by her husband's ex-wife, but he believed that she had been treated fairly in the process and that he could be impartial despite his knowledge of her experiences. Juror 30 also admitted his difficulty in presuming the

[1] We note that jurors 30 and 37 did not enter the jury box until after the State excused juror 16. Although the prosecutor accepted the panel with juror 30, Piggee used his last peremptory challenge to excuse juror 30. Juror 37 ultimately served on the jury.

innocence of a person who had two prior convictions for the same crime without some evidence of a change in his life.[2]

Juror 16 shared that her aunt and the mother of a close friend had both been physically abused by their ex-husbands. When defense counsel asked whether her knowledge of those situations would make it difficult for her to be fair and impartial, juror 16 stated she had "heard of like other situations in which the wife or the other spouse will take advantage of the system." VRP (6/24/13) at 147. Until defense counsel asked a question about her job, Juror 16 continued to elaborate on a "very unfair" example of a friend's brother's divorce, which involved "the wife" was "cheating," the husband giving "all the money to her because of the court," and the husband taking primary responsibility for the children. VRP (6/24/13) at 147-48. The prosecutor asked juror 16 generally about whether and why she believes domestic violence occurs and whether help is available. Juror 16 spoke about status in society, differing qualities of schools, limitations on access to resources, and people judging one another "by race" or "by your sexuality." VRP (6/24/13) at 110-11.

In response to Piggee's Batson challenge, the prosecutor admitted that her explanation for her peremptory challenge to juror 16 had "a little bit more of a nuance." VRP (6/25/13) at 99. The prosecutor observed that juror 16 "had a lot of statements" but "did not tend to actually answer the questions," such that the prosecutor was concerned as to whether "she could actually be a good juror,"

[2] After a lengthy discussion, the trial court denied defense counsel's challenge to juror 30 for cause.

"based on her life experience or the fact that she was not able to articulate her true role as a juror." VRP (6/25/13) at 99.

Piggee does not argue that the prosecutor's description of juror 16's statements was inaccurate or that either juror 37 or juror 30 made lengthy tangential statements or failed to directly answer questions. Although juror 30 notably struggled with his ability to presume the innocence of a person twice convicted of the same crime, the record does not indicate that he failed to describe his views clearly. Given the support in the record as a whole for the prosecutor's explanation of the peremptory challenge to juror 16, we cannot say that the trial court's decision regarding purposeful discrimination was clearly erroneous. See, e.g., Luvene, 127 Wn.2d at 700-01 (where four other jurors in venire had relatives with criminal histories or were ambivalent about the death penalty, but only challenged juror had both traits, trial court's decision that prosecutor's motivation was race neutral was not clearly erroneous).

In his statement of additional grounds for review Piggee claims he was denied his right to a fair trial when juror 9 was allowed to remain on the jury to consider the special verdict on the aggravating factor. A review of the record reveals that after the general verdict, but before the aggravating factor was submitted to the jury, the court informed the parties, outside the presence of the jury, that juror 9 had expressed concerns to the bailiff regarding Piggee's reaction to the verdict. The court stated that Juror 9 reported to the bailiff that Piggee "looked at her, and it made her feel uncomfortable, it made her feel like there was some kind of accusatory intent[.]" VRP (7/2/13) at 19. After the parties agreed to

have juror 9 come into the courtroom for voir dire and the court consulted the bailiff, the court stated on the record, "She doesn't want to come out if Mr. Piggee is in the courtroom, and obviously he's going to be in the courtroom. Now what?" VRP (7/2/13) at 24. After a lengthy discussion on the record and over Piggee's objection, the trial court brought the jury into the courtroom and questioned each juror as to whether he or she had "[a]ny concerns about your ability to be fair and impartial and ... presume the nonexistence of the aggravating factor?" VRP (7/2/13) at 35-36. Each juror answered, "No." VRP (7/2/13) at 35-36.

Piggee contends that the trial court improperly denied him an opportunity to question juror 9 about her reported fear and her subsequent contradictory statement on the record. He also cites the following circumstances to support his claim that juror 9 was biased against him: (1) her "fond memory" of the brother of a witness; (2) her "attempt to get excused for "medical" reasons;" and (3) her "obvious ability & willingness to [malign] & persecute" him. Statement of Additional Ground at 3.

Decisions of whether a juror is impartial or whether a mistrial is required are matters of discretion for the trial court that will not be overturned on appeal absent abuse of that discretion. State v. Colbert, 17 Wn. App. 658, 664-65, 564 P.2d 1182 (1977). Although Piggee clearly disagrees with the trial court's assessment of juror 9's ability to be fair and impartial, nothing in the record demonstrates any abuse of discretion. We therefore cannot further consider this claim on direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Affirmed.

Spearman, C.J.

WE CONCUR:

Cox, J.

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70993-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrea Vitalich, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[Andrea.Vitalich@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 11, 2015

WASHINGTON APPELLATE PROJECT

February 11, 2015 - 4:44 PM

Transmittal Letter

Document Uploaded: 709933-Petition for Review.pdf

Case Name: STATE V. DANTE PIGGEE
Court of Appeals Case Number: 70993-3

Party Respresented: PETITIONER
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PAOAppellateUnitMail@kingcounty.gov
Andrea.Vitalich@kingcounty.gov