

64744-0

64744-0

NO. 64744-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KWAME-ANDRE HARRIS,

Appellant.

2012 FEB -3 PM 1:21

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL HISTORY .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	4
1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO CHALLENGE JUROR 27 .....	4
a. Relevant Facts .....	5
b. The Trial Court's <u>Batson</u> Determination Is Not Clearly Erroneous.....	11
c. Any Error Was Harmless.....	22
2. HARRIS RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT .....	24
a. Relevant Facts .....	25
b. The Prosecutor Did Not Commit Misconduct In Closing Argument .....	29
D. <u>CONCLUSION</u> .....	42

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Fulminante, 499 U.S. 279,  
111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ..... 23

Batson v. Kentucky, 476 U.S. 79,  
106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 10-13, 15, 21, 22, 24

Carter v. Kemna, 255 F.3d 589  
(8th Cir. 2001) ..... 24

Hernandez v. New York, 500 U.S. 352,  
111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) ..... 14

Nevius v. Sumner, 852 F.2d 463  
(9th Cir. 1988) ..... 23

Rice v. Collins, 546 U.S. 333,  
126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) ..... 11, 12

Snyder v. Louisiana, 552 U.S. 472,  
128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) ..... 12, 16, 21

State v. Miller-El v. Dretke, 545 U.S. 231,  
125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) ..... 15, 16, 22

United States v. Lane, 866 F.2d 103  
(4th Cir. 1989) ..... 23

Washington State:

Panag v. Farmers Ins. Co., 166 Wn.2d 27,  
204 P.3d 885 (2009) ..... 15

State v. Barajas, 143 Wn. App. 24,  
177 P.3d 106 (2007), review denied,  
164 Wn.2d 1022 (2008) ..... 40

<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	41
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	29, 30, 34, 41
<u>State v. Carter</u> , 4 Wn. App. 103, 480 P.2d 794 (1971).....	36
<u>State v. Clafin</u> , 38 Wn. App. 847, 690 P.2d 1186 (1984).....	41
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	41
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	30, 37
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	34
<u>State v. Frederick</u> , 45 Wn. App. 916, 729 P.2d 56 (1986).....	36
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	29
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	30, 33
<u>State v. Hicks</u> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	12, 21
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	14
<u>State v. Perez-Mejia</u> , 134 Wn. App. 907, 143 P.3d 838 (2006).....	39
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	32, 33

<u>State v. Rhone</u> , 168 Wn.2d 645, 229 P.3d 752 (2010).....	11, 13, 15, 16
<u>State v. Rivera</u> , 108 Wn. App. 645, 32 P.3d 292 (2001).....	23
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	31
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	29, 30, 34, 36, 38, 40
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S. Ct. 2007 (2009).....	33
<u>State v. Wright</u> , 78 Wn. App. 93, 896 P.2d 713 (1995).....	13, 15
 <u>Other Jurisdictions:</u>	
<u>People v. Lenix</u> , 187 P.3d 946, 80 Cal. Rptr. 3d 98 (2008).....	21
<u>State v. Ford</u> , 513 S.E.2d 385 (S.C. Ct. App. 1999).....	23, 24

**A. ISSUES**

1. Whether the trial court properly allowed the State to exercise a peremptory challenge against Juror 27, an African-American.

2. Whether Kwame Andre Harris has failed to show that the prosecutor committed misconduct in closing argument.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The State charged Harris and his wife, Novella Harris<sup>1</sup>, each with one count of Assault in the Third Degree for intentionally assaulting a law enforcement officer. CP 1, 75-76. The jury convicted both defendants as charged at a joint trial.<sup>2</sup> CP 33. Instead of imposing a standard range sentence, the trial court

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<sup>1</sup> For clarity, the State will refer to Kwame Harris by his last name and Novella Harris by her full name.

<sup>2</sup> Novella Harris has also appealed her conviction in COA No. 64772-5-I. Novella Harris's appeal has been fully briefed and is currently waiting to be set for consideration. Although the defendants were tried together and have raised the same jury selection issue on appeal, their cases were not consolidated. Consequently, the State is moving to consolidate the cases, or alternatively to link them, to ensure that the same panel hears each case.

granted Harris a first time offender waiver and imposed 15 days on Electronic Home Detention. CP 37-45; 8RP 6-7.<sup>3</sup>

## **2. SUBSTANTIVE FACTS**

Early one morning, Doubletree hotel security called police when Novella Harris got into a fight with another woman at the hotel nightclub. 4RP 84, 124. As hotel security tried to separate the women, Harris became "very aggressive" and "hostile." 8RP 84-85. When King County Sheriff's Deputies Travis Noel and Travis Brunner arrived, hotel security asked the officers to trespass the people involved in the fight. 4RP 18-19, 101.

Upon hearing that security wanted him trespassed, Harris turned to Dep. Noel and said "fuck you." 4RP 101. Harris became the "primary instigator" in a group of people who started swearing at the deputies. 4RP 28-29; 5RP 14-15. Although the deputies tried to calm down Harris and the rest of the group, Harris continued to swear at Dep. Noel and actively resisted being detained. 4RP 29-30; 5RP 14-15. Harris slapped Dep. Noel's hand

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<sup>3</sup> The Verbatim Report of Proceedings consists of eight volumes and will be referred to as follows: 1RP (10/28/09); 2RP (10/29/09); 3RP (11/02/09); 4RP (11/03/09); 5RP (11/04/09); 6RP (11/05/09); 7RP (11/06/09); and 8RP (12/18/09).

down and took a fighting stance. 4RP 30-33; 5RP 15-18. Both deputies called for back-up as the situation escalated and 12-15 people began taking Harris's side and yelling "Leave him alone; get your hands off him." 4RP 44, 49; 5RP 18, 60.

As the deputies tried to arrest him, Harris grabbed a hold of Dep. Brunner and the two fell to the ground along with Dep. Noel. 4RP 33-34. Harris continued to resist arrest by throwing punches and flailing his arms. 4RP 34. At some point, Harris managed to get Dep. Noel's metal flashlight and held it over Dep. Noel's head as if to strike him. 4RP 35, 105. Dep. Noel quickly moved out from underneath Harris and avoided being hit. 4RP 36, 43.

As Dep. Noel tried to handcuff Harris, Novella Harris and others from the group interfered. 5RP 18-20. Novella Harris grabbed onto Dep. Brunner's shirt and punched him in the face with a closed fist, causing "instant pain" to Dep. Brunner and leaving a red mark on his cheek. 5RP 20, 22, 26. Consequently, Dep. Brunner turned his attention to arresting Novella Harris. 5RP 23. As Dep. Brunner tried to arrest her, another person in the group grabbed Dep. Brunner from behind in a "bear hug." 5RP 23. The deputies could not take either Harris or Novella Harris into custody until back-up officers arrived to assist them and help restore order.

4RP 52; 5RP 25. The majority of the incident was caught on surveillance video. 4RP 25-41.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO CHALLENGE JUROR 27.**

Harris argues that the State's peremptory challenge of Juror 27, an African-American, violated the Equal Protection Clause. To prove his claim, Harris compares Juror 27's answers during voir dire to other jurors in the venire and argues that the similarity in their answers reveals that the State's race-neutral reason for striking Juror 27 was pretext for discrimination. Harris's attempt at comparative juror analysis, however, is severely hindered by the inadequate record, which fails to indicate any juror's race except for Juror 27. Nonetheless, a review of the record makes plain that the State repeatedly challenged jurors, including Juror 27, who equivocated about their ability to listen fairly and impartially to officers' testimony. Given that the victims in the case were police, the trial court's finding that Harris failed to prove purposeful racial discrimination is not clearly erroneous. Finally, any error committed by the trial court was harmless because Juror 27 was a potential

*alternate* juror, and therefore never would have deliberated if the State had not exercised a peremptory challenge.

**a. Relevant Facts**

Prior to jury selection, the court decided to impanel 14 jurors with the juror in seat 13 serving as the first alternate, and the juror in seat 12 serving as the second alternate. 1RP 10, 12. Although the first alternate juror deliberated in the case, the second alternate juror did not deliberate. 4RP 60-61; 6RP 52.

During voir dire, the court asked the venire "[d]o you have any memorable bad experiences with law enforcement officials?" 3RP 48. Nine potential jurors answered in the affirmative: Jurors 6, 8, 10, 11, 17, 19, 27, 31, and 34. 3RP 48. The State focused the majority of voir dire on following up individually with each juror about their negative experiences and their ability to listen fairly to an officer's testimony. 3RP 61-75, 106-13.

The State challenged Jurors 6 and 8 for cause after both jurors equivocated about their ability to listen fairly to an officer's testimony based on their prior negative experiences with law enforcement. 3RP 64, 69. Juror 6 admitted to being "apprehensive" around police officers and repeatedly indicated that

his distrust of them could "possibly" affect his view of their credibility. 3RP 62, 68, 71. Similarly, Juror 8 stated that his recent, negative experience with law enforcement made him "very cynical" and that he "might" have difficulty being fair and viewing an officer as credible. 3RP 62-64. The court struck both jurors for cause.<sup>4</sup> 3RP 67, 71.

The State exercised three peremptory challenges to strike jurors who indicated that they had prior negative experiences with law enforcement: Jurors 19, 27, and 31. 3RP 108-13, 139-45. Juror 19 discussed three negative episodes with police, including a recent one that "made me mad." 3RP 109-10. Juror 31 admitted that prior negative encounters with police affected the juror's view of officers. 3RP 109. Juror 27 equivocated about whether her prior negative experiences with law enforcement would affect her view of them:

PROSECUTOR: Okay. Juror No. 27, you raised your card about a bad experience with a police officer?

JUROR NO. 27: Yes, when I was younger and I was driving home late from work, and I didn't know at the time but a police officer was following me, and it made me very nervous. I was driving on a highway, and I got off the exit ramp. I stopped at

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<sup>4</sup> After questioning Juror 8, Harris's counsel did not object to the State's motion to strike Juror 8 for cause. 3RP 65.

the stop sign, and I sped through the stop sign. Because I refused to stop, he pulled me over, and it just made me feel anxious and nervous. And ever since then I am cautious and make sure I am obeying the speed limit and stop and signal. But it wasn't a positive experience.

PROSECUTOR: Okay. Does that change how you, that experience change how you view police officers today?

JUROR NO. 27: It depends on the situation. But I know for me personally when I see police or I know they are in the area, I make sure I'm not in a bad situation because it's easier, I feel it is easier for me to get caught up, or for a group of people, even though I don't do anything wrong.

PROSECUTOR: Why do you say that?

JUROR NO. 27: Just based on my experience, my brothers have been pulled over. They haven't been cited. But just because in an area, they match the descriptions. Friends get pulled over, you know, make sure you are going the speed limit and obeying the law. Sometimes, you know, I know police are concerned about safety and enforcing the statutes and law, but it just depends on the situation. Sometimes people are breaking the law and they need to face the consequences, but I just feel it depends on the person.

PROSECUTOR: Okay. So, you feel like the police are out to get you? Is that what you are saying?

JUROR NO. 27: No, not necessarily, but in certain situations the circumstances for a group of people, they can't identify who said something or who threw something, then you can get caught up in a situation.

PROSECUTOR: Okay. Do you feel like you trust police officers, or do you feel like you in general distrust them?

JUROR NO. 27: I can't say one way or another. It depends on the situation and the way they present themselves.

PROSECUTOR: Okay. What's your initial feel when you see a police officer?

JUROR NO. 27: I just want to make sure I am following the law.

PROSECUTOR: Now, your experience, all these experiences you talked about, these feelings you talked about, is that going to affect how you view a police officer who might testify in this case?

JUROR NO. 27: I can't say one way or another. Again, it just depends on what evidence is presented, fair to both sides.

PROSECUTOR: Do you think it might?

JUROR NO. 27: It may. I can't say one way or another because I don't really know.

3RP 110-13. The State moved to strike Juror 27 based on her apprehensiveness and possible distrust of officers. 3RP 148-49. Juror 27 would have been the second alternate juror in seat 12, if she had been impaneled. 3RP 142.

Counsel for Novella Harris exercised peremptory challenges against Jurors 11 and 17, who ultimately indicated that their prior negative experiences with police might not affect them. 3RP 141,

144. Upon further questioning, Juror 11 declared that "I am impartial. I don't have bad feelings about police officers." 3RP 74-75. Juror 17's negative experience happened when the juror was 14 and accused of throwing rocks at cars. 3RP 107-08. Although Juror 17 had not interacted with police since the incident, Juror 17 "really couldn't say" whether the experience would affect the juror's view of an officer's credibility. 3RP 107-08.

The remaining two jurors who indicated that they had prior negative experiences with law enforcement, Jurors 10 and 34, were impaneled. 3RP 139-45. Both jurors stated unequivocally that their prior experiences would not affect their view of police officers in the present case because it did not involve domestic violence (Juror 10) or "small town" police (Juror 34).<sup>5</sup> 3RP 72-74, 113.

Before any party exercised a peremptory challenge, the trial court requested a "quick sidebar" with the parties and asked the

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<sup>5</sup> Although the transcript attributes this statement to Juror 31, this is likely an error given that statement was a follow-up response to the State's initial question:

PROSECUTOR: No. 34, you raised your card about a bad experience with police officers?

JUROR NO. 34: Just small town harassment . . .

PROSECUTOR: Have those experiences changed how you view police officers?

JUROR NO. 3[4]: No, not really. The small towns are different than metropolitan areas, the professionalism.

3RP 113.

State whether he planned to challenge any of the "four or five black prospective jurors," given that the defendants were African-American. 3RP 139, 148-49. The State indicated an intent to challenge only one - Juror 27. 3RP 148. At the court's prompting, the State explained that he challenged Juror 27 based on her "apprehensiveness around police officers and perhaps distrust," which went beyond her personal experience to that of her family members as well. 3RP 148-49. The court concluded that the State offered a "non-race based reason" and allowed the challenge. 3RP 142, 148.

Afterward, Harris's counsel suggested that Juror 27's apprehensiveness at being followed by police "was nothing out of the ordinary, and that tends to suggest that there is a Batson challenge to her." 3RP 149. In response, the court indicated, "I might agree it is completely normal to have that feeling. It is, she expressed some concern about it, and that's a non-race based reason. So, it's an issue should your clients be convicted for appeal." 3RP 149.

**b. The Trial Court's Batson Determination Is Not Clearly Erroneous**

The Equal Protection Clause guarantees the defendant the right to be tried by a jury selected free from racial discrimination. Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When reviewing a Batson challenge, the trial court undertakes a three-part inquiry to determine whether the challenged juror is being stricken based on discriminatory reasons. State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010).

First, a defendant opposing the State's peremptory challenge of a juror must establish a *prima facie* case of purposeful discrimination. Id. Second, if the defendant establishes a *prima facie* case, then the burden shifts to the State to articulate a race-neutral explanation for challenging the juror that specifically relates to the case being tried. Id.; Batson, 476 U.S. at 98. Third, the trial court considers the State's explanation and determines whether the defendant has demonstrated purposeful discrimination. Rhone, 168 Wn.2d at 651. Although the final step involves evaluating the persuasiveness of the State's explanation, the ultimate burden of persuasion rests with the defendant. Rice v.

Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

On review, the trial court's Batson determination is accorded "great deference" and "upheld unless clearly erroneous." State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). The trial court plays "a pivotal role" in evaluating Batson claims because the third step of the inquiry involves evaluating the prosecutor's credibility, and the best evidence of discriminatory intent is often the demeanor of the attorney exercising the challenge. Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

Further, race-neutral reasons that invoke a juror's demeanor, such as nervousness or inattention, are best determined by the trial court who "must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." Id. Determinations of credibility and demeanor are "peculiarly within a trial judge's province" and must be deferred to on appeal absent exceptional circumstances. Id. (citations omitted).

Here, the trial court skipped over the first Batson step, requiring the defendant to prove a *prima facie* case of racial discrimination, and essentially raised a Batson challenge *sua sponte* by asking whether the State intended to challenge any of the "four or five black prospective jurors." 3RP 148. Contrary to his claims, Harris did not make a *prima facie* showing that the prosecutor challenged Juror 27 based on discriminatory reasons. Indeed, the State had not exercised a single peremptory challenge before the trial court required the State to offer an explanation - *in advance* - for challenging Juror 27. 3RP 48.

The trial court erred when it bypassed the first Batson step and launched into the second step, requiring the prosecutor to provide a race-neutral explanation for challenging Juror 27, given that Harris never proved, and the trial court never found, a *prima facie* case of discrimination. Rhone, 168 Wn.2d at 656 (recognizing a trial court "should not elicit the prosecutor's race-neutral explanation *before* determining whether the defense has established a *prima facie* case" because it collapses the analysis) (quoting State v. Wright, 78 Wn. App. 93, 100-01, 896 P.2d 713 (1995)).

Nonetheless, once a prosecutor has offered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a *prima facie* showing is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

The trial court found that the State's race-neutral reason for challenging Juror 27 was valid and not pretextual. Although Harris argues that the trial court failed "to engage in any analysis of the prosecutor's strike," Harris is incorrect. *Appellant's Br.* at 12. The record reveals that the trial court solicited the prosecutor's explanation and found that "[the prosecutor] gave me a non-race based reason." 3RP 148. If the court had not found the State's reason credible, then the court would not have allowed the State to challenge Juror 27 after the sidebar. 3RP 142. The court's proactive, albeit wrong, approach to soliciting the State's reason for striking Juror 27 reveals the court's commitment to ensuring that the jury be impaneled free from racial discrimination and suggests that the court took its obligation to evaluate the State's reason seriously.

The crux of Harris's argument, raised for the first time on appeal, is that the trial court should have used comparative juror analysis to evaluate the State's race-neutral reason for challenging Juror 27. Harris contends that the trial court's failure to do so constituted a "misapplication of mandatory federal law," relying on Ninth Circuit and federal district court decisions. *Appellant's Br.* at 18. Harris, however, fails to acknowledge that federal courts' decisions are not binding on Washington courts, and no Washington court has ever held that the trial court must conduct comparative juror analysis when confronted with a Batson challenge. Panag v. Farmers Ins. Co., 166 Wn.2d 27, 47, 204 P.3d 885 (2009) ("Federal court decisions are guiding, but not binding, authority."); see also Rhone, 168 Wn.2d at 657 (applying comparative juror analysis but not requiring it); Wright, 78 Wn. App. at 97 (same).

In any event, it is difficult to conduct a meaningful comparative juror analysis on this record given the glaring absence of information about the potential jurors' races. Comparative juror analysis requires "side-by-side comparisons" of "black venire panelists who were struck and white panelists allowed to serve." State v. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317,

162 L. Ed. 2d 196 (2005); see also Rhone, 168 Wn.2d at 657 (comparing “the similarity between African-American juror 19, who was struck from the jury, and non-African-American juror 33, who served on the jury”).

Here, the record only reveals the race of Juror 27. 3RP 148. Although the court indicated that there were three or four other African-American jurors in the venire, it is unclear who those jurors were or whether they were even impaneled. 3RP 148. Harris ignores this material lack of information and dives headlong into comparing Juror 27 with other jurors, without ever recognizing that those “comparative jurors” may have been African-American, thereby casting doubt on the accuracy of the entire analysis.

Nonetheless, reviewing the record without the jurors’ racial background, it is clear that the State consistently challenged jurors who admitted or appeared unable to set aside their negative experiences with law enforcement to hear the case.<sup>6</sup> The State challenged Jurors 6 and 8 for cause based on their admitted apprehensiveness, distrust, and cynical attitude about law

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<sup>6</sup> Although Harris limits the category of “relevant comparators” to the four jurors that the State did not challenge, the Court must consider “all of the circumstances that bear upon the issue of racial animosity.” Snyder, 552 U.S. at 478.

enforcement. 3RP 62-64. The court shared the State's concern, excusing both jurors and then providing the jury with a lengthy explanation about the need for "fair and neutral" jurors. 3RP 71-72.

The State exercised peremptory challenges against Juror 19, who admitted to feeling "mad" about a recent negative encounter with police, and Juror 31, who affirmatively stated that previous negative experiences affected how the juror viewed police. 3RP 109-10. Including Juror 27, the State challenged five of the nine jurors who initially indicated that they had prior negative experiences with law enforcement. 3RP 48, 64, 69, 139-45. The State's repeated and strategic efforts to strike jurors who questioned police officers' credibility makes sense given that the victims in this case were officers, and that Harris strongly disputed the officers' view of events. CP 11-12; 6RP 22-38.

The remaining four jurors, whom the State did not challenge, almost all indicated that their prior negative experiences would *not* affect their view of police officers in the present case. Juror 11 stated unequivocally, "I am impartial. I don't have bad feelings about police officers." 3RP 74-75. The State asked Jurors 10 and

34 if their prior negative experiences, involving domestic violence<sup>7</sup> and “small town” police,<sup>8</sup> would affect their view of police officers in the present case, and both jurors answered “No.” 3RP 74, 113. Unlike Juror 27, these jurors unequivocally stated that their prior negative experiences would not prejudice their view of officers in the current case. Harris’s characterization of Jurors 10, 11, and 34 as “relevant comparators” falls flat given the material lack of information about their race, and their unequivocal promise to set their prior negative experiences with police aside.

The only juror that the State did not challenge, and who equivocated about the effect of a prior negative experience, was Juror 17. Without knowing Juror 17’s race, it is nearly impossible to

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<sup>7</sup> Although Juror 10 indicated that personally the juror had “pretty good” experiences with police, the juror had a friend who had been killed as a result of domestic violence and the police’s failure to take prior domestic violence more seriously. 3RP 72-74. Juror 10’s frustration that the police had not been aggressive enough in the friend’s case stands in stark contrast to Juror 27, who suggested that in her and her brothers’ experience police had been over aggressive in pulling them over “just because in an area, they match the descriptions.” 3RP 111. Any comparison between Juror 10 and Juror 27 is misplaced.

<sup>8</sup> Juror 34’s negative experience involved “small town harassment” and being pulled over for minor infractions by police who were “bored and [had] nothing else to do.” 3RP 113. Juror 34 denied being affected by those experiences because “small towns are different than metropolitan areas, the professionalism.” 3RP 113. In contrast, Juror 27 did not suggest such a distinction and could not say “one way or another” whether her prior negative experiences would affect her. 3RP 110-13.

draw a meaningful comparison between Juror 17 and Juror 27. Nonetheless, the two jurors offered significantly different accounts of their negative experiences with police. Unlike Juror 27 whose negative experiences transcended beyond her to that of her family and friends, Juror 17's negative experience was purely personal. 3RP 107-08, 110-11.

Further, Juror 27 mentioned multiple negative encounters involving the police pulling over her brothers and friends "because in an area, they match the descriptions," in contrast to Juror 17, who mentioned only one negative experience with police when the juror was 14. Id. Juror 27 evidenced lingering concern with police, suggesting that since her experience, "when I see police, or I know that they are in the area, I make sure I'm not in a bad situation because it's easier . . . for me to get caught up . . . even though I don't do anything wrong." 3RP 111. Juror 17, on the other hand, had not "interacted with police officers" since the incident. 3RP 108.

Given that the State's case hinged on the victim officers' credibility, it is not surprising that the State challenged Juror 27, who mentioned multiple, negative experiences with police and remained apprehensive and concerned about the police falsely

accusing her. Having significantly less negative experiences and contact with police, Juror 17 did not express the same level of distrust and apprehensiveness toward police as Juror 27.

The prosecutor never had the opportunity below to explain the differences he perceived in Jurors 17 and 27, leading him to accept one and challenge the other, because Harris never established a *prima facie* case of discrimination, or suggested that Juror 27 compared to any other jurors. Comparative juror analysis, raised for the first time on appeal, is inherently limited and can result in flawed conclusions:

There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. Even an inflection in the voice can make a difference in the meaning. . . .

For example, two panelists may each state he or she was arrested for driving under the influence of alcohol and pled guilty. In response to questions by the prosecutor, each may state he or she harbors no ill feeling against the police as a result of the incident and will not hold that experience against the prosecution. One panelist may deliver that answer in a way that conveys embarrassment, remorse and authenticity of response. The other panelist may answer with a tone of voice, gesture, expression or hesitation that conveys strong negative feelings about the experience and belies the truthfulness of the

answer. A transcript will show that the panelists gave similar answers; it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror.

People v. Lenix, 187 P.3d 946, 961, 80 Cal. Rptr. 3d 98 (2008).

Thus, left with the cold transcript on appeal and deprived of any first-hand observations of Juror 17's race, facial expression, tone, or demeanor, it is difficult if not impossible, to conclude that the State's decision to challenge Juror 27 and accept Juror 17, reflects a discriminatory purpose.

Moreover, the trial court's decision to credit the State's race-neutral reason for challenging Juror 27, and to allow the peremptory challenge to go forward, should be afforded great deference on appeal. Hicks, 163 Wn.2d at 486. The trial court played a "pivotal role" in assessing the prosecutor's credibility and Juror 27's apprehensive demeanor. Snyder, 552 U.S. at 477. Unlike the reviewing court, the trial court had the opportunity to observe both the prosecutor and juror's demeanor, and concluded that there was insufficient indication of purposeful discrimination to justify the Batson challenge.

The fact that the State challenged only one of four to five African-Americans in the venire also confirms that the State did not

harbor discriminatory intent,<sup>9</sup> but rather the intent to impanel a jury that would treat the officers' testimony with the same fairness and impartiality as any other witness. The State's singular effort to excuse one African-American juror, in light of the State's repeated efforts to challenge jurors affected by prior negative experiences with police, reveals a consistent trial strategy and not purposeful discrimination. Based on this record, the deferential standard of review, and the trial court's distinct advantage in assessing demeanor and credibility, Harris cannot show that the trial court clearly erred in denying the Batson challenge.

**c. Any Error Was Harmless**

Alternatively, if the Court concludes that the trial court erred, then the error was harmless because Juror 27 never would have deliberated had she been impaneled. Left unchallenged, Juror 27 would have occupied seat 12, the seat randomly assigned to the second alternate juror. 1RP 12; 3RP 141-42. The second alternate juror did not deliberate the case. 6RP 52. Consequently, any error

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<sup>9</sup> This case stands in stark contrast to other cases where the Court has found purposeful discrimination. See Miller-EI, 545 U.S. at 241 (prosecutor challenged 91% of African-American venire members); Batson, 476 U.S. at 83 (prosecutor challenged 100% of African-American venire members).

committed by the trial court in allowing Juror 27's challenge was harmless beyond a reasonable doubt.

The United States Supreme Court has applied a harmless-error analysis to a wide range of errors and recognized that most constitutional errors can be harmless. Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). If there was an error in excusing Juror 27, it was not a "structural error" affecting the "entire conduct of the trial from beginning to end." Id. at 309. Rather, the error was "simply an error in the trial process itself." Id. at 310. This Court has previously held that an error depriving the defendant of a peremptory strike against an alternate juror was harmless because that juror never deliberated. State v. Rivera, 108 Wn. App. 645, 651-52, 32 P.3d 292 (2001).

Similarly, multiple courts have recognized that constitutional error arising during jury selection is subject to harmless-error review if the error concerned an alternate juror who never would have deliberated. United States v. Lane, 866 F.2d 103, 106 n.3 (4th Cir. 1989) (defendant would not be prejudiced if alternate juror did not deliberate); Nevius v. Sumner, 852 F.2d 463, 468 (9th Cir. 1988) (any error concerning an alternate juror was harmless because no alternate jurors deliberated); State v. Ford, 513 S.E.2d

385, 387 (S.C. Ct. App. 1999) ("Any Batson violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations.").

These decisions make sense. "[I]f no alternate deliberates on the verdict . . . the improper exclusion of an alternate juror is not a structural error because it is clear the error never affected the makeup of the petit jury that decided to convict the defendant." Carter v. Kemna, 255 F.3d 589, 592-93 (8th Cir. 2001). Here, Harris has not demonstrated any error in the composition of the jury that actually determined his guilt. Even if the court erred in permitting the peremptory challenge, the error was harmless because Juror 27 would have been an *alternate* juror and never would have deliberated in the case. Juror 27's exclusion from the jury had no possible impact on the outcome.

## **2. HARRIS RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.**

Harris argues that the State committed prosecutorial misconduct twice in closing argument. First, Harris contends that the State's reference to "spoken" and "unspoken" defenses shifted the burden of proof and disparaged the defense. Second, Harris

contends that the State improperly appealed to the passions and prejudice of the jury by arguing that the defendants' actions endangered the deputies' safety and jeopardized the deputies' vows to return home safely to their families.

Harris, however, cannot show that the challenged arguments were improper and prejudicial. The State distinguished "spoken" and "unspoken" defenses during rebuttal in direct response to arguments made by defense in closing. Further, the State's arguments about the defendants' actions and the officers' vows were reasonably drawn from the evidence at trial. Harris cannot show that the State's comments were "so flagrant and ill-intentioned" that they created a lasting prejudice that could not be remedied by a curative instruction to the jury.

**a. Relevant Facts**

In closing, the State argued that the defendants were "looking for a fight" on the night of the incident based on their actions toward hotel security and the responding deputies. 6RP 14. The State contended that Harris intentionally assaulted Dep. Noel by holding a flashlight over Dep. Noel's head and grabbing his leg. 6RP 19-20. Additionally, the State contended that Novella Harris

assaulted Dep. Brunner by punching him in the face. 6RP 18-19. Recognizing the burden of proof, the State asserted that reasonable doubt requires a doubt that is "reasonable," "based on the evidence or lack of evidence," and relates to an element of the charge. 6RP 15-16.

In response, Harris's counsel argued in closing that "Mr. Harris was not looking for a fight, [the] deputies were." 6RP 23. Counsel contended that Harris grabbed Dep. Noel's leg and flashlight to protect himself and to prevent Dep. Noel from using the flashlight against him. 6RP 23-27. Counsel argued, "I'm glad Mr. Harris picked up the flashlight, because, you know what, if Deputy Noel had the flashlight, who knows what would have happened to Mr. Harris." 6RP 27. Further, counsel claimed that Dep. Noel was "vindictive," had "an ax to grind," and "needed to save face" because Harris, "an unarmed civilian," managed to successfully resist Dep. Noel's efforts to arrest him. 6RP 28, 30, 32.

Counsel ended his remarks by reminding the jury that the burden of proof rests with the State and that the defendants have no burden to present witnesses or evidence. 6RP 34-36. Picking up where Harris's counsel left off, counsel for Novella Harris further

expounded on the State's burden of proof and argued that Dep. Brunner sustained his injury from someone else in the "dog pile of people" rather than Novella. 6RP 39-46.

In rebuttal, the State disputed counsels' characterization of events and questioned whether Dep. Noel would testify in court that he was afraid, if he was "trying to save face." 6RP 48. The State closed by saying:

PROSECUTOR: Ladies and gentleman, there are two types of defenses in criminal cases, there's the spoken defenses and there's the unspoken defenses. Spoken defenses are the ones you all know, alibi, insanity, self-defense - -

MR. CHIANG-LIN<sup>10</sup>: Objection, your Honor, outside the scope.

THE COURT: Overruled

PROSECUTOR: Alibi, insanity, self-defense, those are the spoken defenses, the ones you all know about, those defenses aren't a part of this case. Then there's the unspoken defenses, the general denial, the let's just throw everything up there, see if something sticks and say the State can't prove its case, but we know that the evidence has proved that both Mr. Harris and Mrs. Harris committed Assault in the Third Degree, and there is no reasonable doubt. Our communities depend - -

MR. TODD: Your Honor, objection.

THE COURT: Sustained.

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<sup>10</sup> Mr. Chiang-Lin represented Kwame Harris, while Mr. Todd represented Novella Harris. CP 9.

PROSECUTOR: When Mr. Harris and Mrs. Harris assaulted Dep. Brunner and Dep. Noel, they put everyone in danger there, they put themselves in danger, they put innocent bystanders in danger, and they put the officers in danger, all of them, not just Brunner and Noel, but all of them. These are officers who have vowed to their families - -

MR. TODD: Your Honor, I'm going to object. This is - -

THE COURT: Sustained.

PROSECUTOR: Because they put them in danger - -

MR. TODD: Your Honor, I'm still objecting.

THE COURT: Sustained.

PROSECUTOR: The evidence is clear that both of them acted intentionally, both of them put Dep. Noel, Dep. Brunner in danger of this, their safety, that they were in reasonable apprehension of that fear, and that they were acting intentionally. Because of that, you should find both guilty. Thank you.

6RP 48-50. Although defense counsel objected to the State's comments, neither defense counsel requested a curative instruction.

The court dismissed the jury for deliberations and admonished the prosecutor that his "statements about the community and about police officers coming home safe" appealed to the passion or prejudice of the jury. 6RP 53. The court deemed

"everything else" said by the prosecutor to be "[o]bviously appropriate." 6RP 53.

**b. The Prosecutor Did Not Commit Misconduct In Closing Argument**

To establish prosecutorial misconduct, the defendant must show that the prosecutor's comments were improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Comments are prejudicial only if "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Failing to object to misconduct at trial and to request a curative instruction constitutes waiver on appeal, unless the misconduct is so "flagrant and ill-intentioned" that the resulting prejudice could not be neutralized by a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Ordinarily, a defendant must move for a mistrial or request a curative instruction for an appellate court to consider alleged misconduct in closing argument. Id.

The State has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v.

Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Allegedly improper comments are reviewed in the context of the entire argument, the issues presented, the evidence addressed, and the instructions to the jury. Brown, 132 Wn.2d at 561. Juries are presumed to follow the trial court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

Harris argues that the State shifted the burden of proof, diluted the presumption of innocence, and disparaged the defense by differentiating between "spoken" and "unspoken" defenses. Harris is mistaken. The State's definition of "unspoken defenses," as "the general denial, the let's just throw everything up there, see if something sticks and say the State can't prove its case," was in direct response to the multiple and varied arguments raised by defense in closing. Defense counsel argued, among other things, that the deputies were looking for a fight, that Harris grabbed Dep. Noel's flashlight to protect himself from Dep. Noel, that Dep. Noel was "vindictive" and had an "ax to grind," and that someone else in

the "dog pile of people" assaulted Dep. Brunner, not Novella.

6RP 23-24, 28, 32, 44-46.

"[T]he prosecutor, as an advocate is entitled to make a fair response to the arguments of defense counsel." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). A prosecutor's remarks, even if improper, are not grounds for reversal if defense counsel invites or provokes them, unless the remarks are not a relevant reply or are so prejudicial that a curative instruction would be ineffective. Id. at 86.

Defense counsel took multiple shots at the State's case, including that Harris did not intend to assault Dep. Noel, that Dep. Noel's fear was not reasonable, and that someone other than Novella assaulted Dep. Brunner. Given the different points of attack, the State's response fairly characterized the defense strategy as "throw everything up there [and] see if something sticks." By definition, a general denial defense allows defendants to broadly reject the claims and evidence being brought against them.

Harris mistakenly claims that the State's comments portrayed general denial as "the last stand of an accused person who is guilty," even though the State cast the defenses on equal

footing, arguing that "there are two types of defenses in criminal cases, there's the spoken defenses and there's the unspoken defenses." *Appellant's Br.* at 26; 6RP 48-49. The State never suggested that the "unspoken defenses" were less important or legally sufficient than the "spoken defenses," nor did the State argue that the jury should convict the defendants based on the lack of "spoken defenses."<sup>11</sup> Rather, the State properly argued that despite the defendants' best efforts to "throw everything up there" and generally deny the charges against them, the evidence proved beyond a reasonable doubt that the defendants assaulted the deputies. 6RP 49.

Contrary to Harris's claims, the State's remarks bear no resemblance to the prosecutorial misconduct that required reversal in State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). In Reed, the prosecutor called the defendant a "liar" four times in closing argument, argued that the defense counsel did not have a case, and implied that the defense witnesses should not be believed

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<sup>11</sup> Harris criticizes the State's characterization of "spoken" and "unspoken" defenses in part based on the State's opposition to Harris's proposed "lawful force" defense. Harris fails to acknowledge, however, that the State never mentioned "lawful force" in closing argument or alluded to such a defense. Indeed, in response to a jury question, the State ultimately agreed to have the jury instructed on the defense. 7RP 14.

because they were "city doctors" who drove fancy cars. Id. at 143, 145-46. Unlike the prosecutor in Reed, the State never argued that the defense lacked a case and never resorted to disparaging the defense by name-calling. Instead, the State responded fairly to the defendants' arguments in rebuttal, referencing witnesses' testimony, showing stills from surveillance video, and drawing reasonable inferences from the evidence. 6RP 46-50.

Further, the State neither shifted the burden of proof nor diminished the presumption of innocence. The State properly explained the concept of reasonable doubt, asserting that it required a "reasonable" doubt "based on the evidence or lack of evidence" that related to an element of the charge. 6RP 15-16. Further, both the court and defense counsel repeatedly advised the jury that the burden of proof rests with the State. 6RP 34-36 (Harris's counsel), 39-41 (Novella's counsel); CP 61 (jury instruction). The jury is presumed to have followed the court's instructions. Grisby, 97 Wn.2d at 499.

Moreover, the State's remarks are a far cry from other prosecutorial misconduct deemed to have diminished the burden of proof. See State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009) (prosecutor suggested

that the defendant is *not* entitled to the benefit of the doubt);  
State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996)  
(prosecutor argued that in order to acquit the defendant, the jury  
must find that the State's witnesses are lying or mistaken).

Even if improper, the State's characterization of defenses  
was not prejudicial. Harris's failure to request a curative instruction  
or move for a mistrial strongly suggests that the State's remarks did  
not appear "critically prejudicial" in context. Swan, 114 Wn.2d at  
661. Given the weight of the testimony against him, Harris cannot  
show that there is "a substantial likelihood" that the State's remarks  
affected the jury's verdict. Brown, 132 Wn.2d at 561.

Harris mistakenly claims that there was "inconsistent  
evidence" of his intent to assault Dep. Noel and that the State's  
description of general denial led the jury to resolve the "conflicting"  
evidence against him. *Appellant's Br.* at 29. Nearly every witness  
who testified, however, corroborated Dep. Noel and Brunner's  
testimony that Harris behaved aggressively and intended to assault  
Dep. Noel. 4RP 103, 115 (Soileau testified that Harris was "very  
angry, very aggressive" when he approached Dep. Noel and  
wielded the flashlight "like he was going to attack the deputy with  
it"); 4RP 127-28 (Hitchcock testified that Harris was "angry or

upset" and was holding a flashlight over his head); 5RP 58-59 (Det. Banks testified that Harris struggled with and swore at the deputies); 5RP 103 (Det. Taylor testified that Harris "fought and kicked the entire time we were trying to take him into custody").

The only witnesses who did not corroborate this testimony were either not present (Baker) or otherwise engaged in arresting someone else (Sgt. Caldwell). 4RP 86-87; 5RP 75-77. Further, the jury viewed the surveillance video capturing most of the incident, including Harris grabbing Dep. Noel's right leg and taking a "bladed stance"<sup>12</sup> with Dep. Noel's flashlight in his hand. 4RP 39-40.

Based on this record, Harris cannot show that there is a substantial likelihood that the State's characterization of defenses affected the jury's verdict.

Harris's second claim of error, that the State appealed to the passions and prejudice of the jury, also fails. Harris faults the State for urging the jurors to conclude that the defendants' conduct endangered all the officers who responded and for referencing the "vows" the officers had taken to their families. The State's remarks,

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<sup>12</sup> Dep. Noel described a "bladed stance" as standing sideways "like a boxer, one foot in front of the other, ready to fight." 4RP 30.

however, were properly and reasonably drawn from the witnesses' testimony and were neither flagrant nor ill-intentioned.

Novella Harris - not Harris - objected to the comments now challenged on appeal. 6RP 49-50. Having failed to object or join in the objection at trial, Harris should not now receive the benefit of Novella Harris's objection and be held to demonstrating only that the State's comments were improper and prejudicial. See State v. Frederick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986) (holding defendant's failure to join co-defendant's objection to the admission of evidence precluded appellate review); State v. Carter, 4 Wn. App. 103, 113, 480 P.2d 794 (1971) (holding defendant's failure to join co-defendant's exceptions to jury instructions precluded appellate review). Rather, having not objected, Harris should have to show that the State's comments were so "flagrant and ill-intentioned" that the resulting prejudice could not have been obviated by a curative instruction. Swan, 114 Wn.2d at 661. Nonetheless, Harris's claim fails under either standard.

The State's argument that the defendants' conduct endangered the officers who responded was reasonably drawn from the evidence at trial. Dep. Noel testified that Harris wrestled with him on the ground in a "very violent, violent manner" and

ultimately straddled Dep. Noel while wielding a flashlight over Dep. Noel's head. 4RP 35. Dep. Brunner testified that Novella Harris punched him in the face as he tried to detain Harris. 5RP 20. Multiple other witnesses testified that the defendants' conduct led to "mayhem" and "pandemonium." 5RP 59-60, 99. Indeed, Det. Taylor called the situation "as out of control as I can remember seeing in [my] 14-year career." 5RP 99. Given this record, the State could reasonably infer that the defendants' actions endangered all of the officers who responded. See Fisher, 165 Wn.2d at 747 (prosecutors have "wide latitude" in making closing argument, including drawing "reasonable inferences" from the evidence). The State never suggested that the jury should convict the defendants based on the dangerous situation they created. Instead, the State properly argued that the jury should convict the defendants based on their actions. 6RP 17-22.

The State's unfinished comment that, "These are officers who have vowed to their families," was also reasonably drawn from the testimony at trial. Both Dep. Noel and Brunner testified at trial about their families or going home safely. In explaining his fear at being assaulted, Dep. Noel stated, "I didn't know what else [the defendants] were capable of doing, if they were capable of

escalating it to where I was going to be seriously injured and not go home to my wife and kids.” 4RP 76. Dep. Brunner stated, “I vowed that every night I am going to go home, and if that means placing somebody in handcuffs to prevent being assaulted, I’m going to go home tonight.” 5RP 17.

Harris complains about the State referencing this testimony in closing, even though he and Novella Harris both failed to object to the testimony at trial. Consequently, the State properly relied on the testimony in closing. See Swan, 114 Wn.2d at 659 (recognizing jury could consider testimony objected to at trial because the court did not strike the testimony or instruct the jury to disregard it). The State’s comment that the officers had made vows “to their families” was reasonably drawn from the evidence.

Although the trial court admonished the prosecutor for making statements "about the community and about police officers coming home safe," the prosecutor never made such a statement. 6RP 53. Novella Harris's counsel objected twice before the prosecutor could finish his sentence:

PROSECUTOR: Our communities depend - -

MR. TODD: Your Honor, objection.

THE COURT: Sustained.

PROSECUTOR: When Mr. Harris and Mrs. Harris assaulted Dep. Brunner and Dep. Noel, they put everyone in danger there . . . These are officers who have vowed to their families - -

MR. TODD: Your Honor, I'm going to object. This is - -

THE COURT: Sustained.

6RP 49-50. Thus, the jury never actually heard *what* "our communities depend" on, or *what* vows the officers have taken. The State's unfinished statement pales in comparison to other misconduct held to have improperly appealed to the passions or prejudice of the jury. See State v. Perez-Mejia, 134 Wn. App. 907, 917-18, 143 P.3d 838 (2006) (holding prosecutor improperly appealed to jurors' patriotism by quoting from the Declaration of Independence and asking the jury to "send a message" as "citizens of the State of Washington and the United States of America").

Even if the State's remarks about the defendants endangering the officers and the officers taking vows to their families were improper, they were not prejudicial. Neither Harris or Novella Harris moved to strike the State's remarks, requested a curative instruction, or moved for a mistrial. "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear

critically prejudicial to an appellant in the context of trial.” Swan, 114 Wn.2d at 661. A curative instruction advising the jury to disregard the State’s remarks would have remedied the error.

Further, the State's comments were brief and represented a small part of the State's overall closing argument. The court properly instructed the jury that the "lawyers' statements are not evidence" and that they should disregard any argument not supported by the evidence. CP 58. The jury is presumed to have followed the court's instructions. Swan, 114 Wn.2d at 662. Given these circumstances, Harris cannot show that there is a substantial likelihood that the State's remarks affected the jury's verdict. See State v. Barajas, 143 Wn. App. 24, 40-41, 177 P.3d 106 (2007), review denied, 164 Wn.2d 1022 (2008) (holding that the prosecutor improperly compared the defendant to a "mangie [sic], mongrel mutt," but the misconduct did not require reversal because it was brief and an instruction from the court to disregard the characterization could have neutralized any prejudice).

Finally, Harris cannot show that the State’s remarks were “so flagrant and ill-intentioned” that no curative instruction would have eliminated their prejudicial effect. Swan, 114 Wn.2d at 661. Harris does not even attempt to make such an argument. The

State's comments here fall far short of other comments deemed to have required reversal based on their flagrant and ill-intentioned nature. See State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988) (holding prosecutor's remarks that the defendant was "strong in" a group that the prosecutor described as a "deadly group of madmen" and "butchers that kill indiscriminately," were flagrant, highly prejudicial, and could not have been neutralized by a curative instruction); State v. Echevarria, 71 Wn. App. 595, 597-99, 860 P.2d 420 (1993) (holding prosecutor's repeated comments about the "war on drugs" were flagrant, ill-intentioned, and "a blatant invitation" to the jury to convict the defendant based on fear and repudiation of drug dealers in general, rather than based on the evidence); State v. Clafin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984) (finding prosecutor's reading of a poem in closing argument detailing the effect of rape on victims was "nothing but an appeal to the jury's passion and prejudice" that could not be erased by a curative instruction).

None of the State's challenged comments warrant reversal of Harris's conviction, particularly when viewed in context of the total argument, the issues in the case, the court's instructions, and the evidence addressed in argument. Brown, 132 Wn.2d at 561.

The State's remarks were a fair response to the defendants' arguments and reasonably drawn from the evidence. Given the overwhelming weight of the evidence against Harris, there is not a substantial likelihood that the jury's verdict would have been different. Any prejudice caused by the State's comments could have been neutralized by a curative instruction. Harris cannot show that prosecutorial misconduct deprived him of a fair trial.

**D. CONCLUSION**

For all of the foregoing reasons, the Court should affirm Harris's conviction.

DATED this 3rd day of February, 2011.

Respectfully submitted,

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