

O.T. 112-5

64772-5

REC'D

JUL 19 2010

King County Prosecutor
Appellate Unit

NO. 64772-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

NOVELLA HARRIS,

Appellant.

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE



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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's equal protection rights when it granted the prosecutor's exercise of a peremptory challenge to strike an African-American member from the jury panel.

2. Appellant's equal protection rights were violated when the court excluded an African-American from her jury where the prosecutor's race-neutral reason was pretextual.

Issue Pertaining to Assignments of Error

Appellant is African-American. There were few African-Americans on the jury venire. The State used a peremptory challenge against an African-American juror and proffered a reason that was pretextual. Was this a violation of appellant's equal protection rights?

B. STATEMENT OF THE CASE¹

1. Procedural History

Novella C. Harris was charged by amended information with third degree assault. CP 23-24. After a jury trial, Harris was found guilty. CP 51. Harris was sentenced under the first time offender waiver to fifteen days of

¹ The hearing on October 28, 2009 is referred to as 1RP; the hearing on October 29, 2009 is referred to as 2RP; the hearing on November 2, 2009 is referred to as 3RP; the hearing on November 3, 2009 is referred to as 4RP; the hearing on November 4, 2009 is referred to as 5RP; the hearing on November 5, 2009 is referred to as 6RP; the hearing on November 6, 2009 is referred to as 7RP; the hearing on December 18, 2009 is referred to as 8RP.

electronic home detention. CP 56-63. Notice of appeal was timely filed on January 15, 2010. CP 65-74.

2. Voir Dire

During voir dire, the State questioned juror number 27 as follows:

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

A. 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 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.

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

A. 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.

Q. Why do you say that?

A. 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 laws, 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.

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

A. 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.

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

A. I can't say one way or another. It depends on the situation and the way they present themselves.

Q. Okay. What's your initial feeling when you see a police officer?

A. I just want to make sure I am following the law.

Q. 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?

A. I can't say one way or another. Again, it just depends on what evidence is presented, fair to both sides.

Q. Do you think it might?

A. It may. I can't say one way or another because I don't really know.

3RP 109-113.

The State later exercised a peremptory challenge against juror 27.

3RP 141-142. The trial court ruled that if the State was going to challenge any of the prospective minority jurors a non race-based reason would have to be given. 3RP 148. The State articulated that juror 27 felt apprehensive around police. 3RP 148.

Well, when I asked her straight out if she felt like the police were out to get her, she said, no. But she gave answers that indicated apprehensiveness around police officers and perhaps distrust, and also suggested that it went beyond just her and into her family, that several of her family members felt the same way.

3RP 148-149.

The defense objected on the grounds that juror 27 was a member of a minority group and indicated her apprehension around police officers is nothing out of the ordinary and was not a sufficient cause for the challenge. 3RP 149. The judge concluded, “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.

Juror number 10 stated that a friend had been the victim of domestic violence and the police would not help her. 3RP 72. When asked whether he could set aside that incident if a police officer were to testify, juror 10 replied “I think since it is not domestic violence, it would be okay.” 3RP 74. Juror number 34 claimed to have been pulled over in a small town as a “shake down,” stating that “[t]hey are bored and have nothing else to do sometimes.” 3RP 113. Ultimately jurors 10 and 34 were impaneled. 3RP 145.

3. Substantive Facts

In the early morning hours of December 7, 2008, King County Sheriff Deputies Travis Noel and Travis Brunner responded to a fight at Maxi’s Bar at the Doubletree Hotel in SeaTac, Washington. 4RP 50. Maxi’s Bar is on the top floor of the hotel. 4RP 50. As Noel and Brunner were nearing the elevators to go up to Maxi’s, a number of people got off

the elevator, including Mrs. Harris, her husband Kwame-Andre S. Harris, and a security guard. 4RP 58. There were approximately six people in the elevator. 5RP 12.

The security guard asked the deputies to escort the people off the property since they were the ones allegedly involved in a fight. 4RP 58. A majority of the people then became very upset and started to yell and swear at the deputies. 4RP 58. Mr. Harris was the primary instigator of the yelling. 4RP 59. Noel was trying to calm the group down by putting his hands in the air to reassure them. 4RP 59. Mr. Harris slapped his hand down and took a fighting stance. 4RP 59. Noel told him to turn around and place his hands behind his back, but Mr. Harris backed into a corridor and refused to comply. 4RP 60. When both Noel and Brunner were attempting to place handcuffs on him, Mr. Harris started flailing his arms and refused to keep his hands behind his back. 4RP 62. Mr. Harris then grabbed Brunner. 4RP 63. Noel wrestled with Mr. Harris briefly and then Mr. Harris pulled out Noel's flashlight and raised it over his head. 4RP 64. Noel thought he would be knocked unconscious, but managed to get away and Mr. Harris threw down the flashlight. 4RP 66, 73.

While this was happening, the rest of Mr. Harris' family, including Mrs. Harris, attempted to defend Mr. Harris from the deputies. 4RP 133. The entire group became engaged in a physical struggle and at one point

all fell to the ground. 5RP 20. Mrs. Harris started pulling on Brunner's shirt, so he pushed her off of him. 5RP 20. She then swung and punched him in the left side of the face. 5RP 20. Brunner then attempted to arrest Mrs. Harris, but another family member grabbed him from behind. 5RP 23. They fell to the ground also, but Brunner was able to free himself. 5RP 23. Brunner and Noel then drew their tasers. 5RP 24. Soon thereafter the Harris party was in handcuffs. 4RP 71.

C. ARGUMENT

THE DISCRIMINATORY EXCLUSION OF AN AFRICAN-AMERICAN JUROR AT HARRIS' TRIAL VIOLATED HARRIS'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

Under the equal protection clauses of the United States and Washington Constitutions, a peremptory challenge may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity.² State v. Evans, 100 Wn.App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); see also State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). The Batson Court noted that "a consistent pattern of official racial

² U.S. Const. amend. 14 provides in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Const. art. I, § 12, provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

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.” 476 U.S. at 95-96 (citation omitted).

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. See, Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

The defendant establishes a prima facie case first “by showing that the peremptory challenge was exercised against a member of a constitutionally cognizable group” and second, “demonstrate that this fact

‘and any other relevant circumstances raise an inference’ that the prosecutor’s challenge of a venire person was based on group membership.” Batson, 476 U.S. at 96. 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 the State’s questions and statements during venire, disparate impact (i.e. whether all or most of the challenges 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).

If the defendant makes out a prima facie case of racial motivation, the burden shifts to the State to articulate a race-neutral explanation for the peremptory challenge. Miller-El v. Dretke, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005), Luvene, 127 Wn.2d at 699, 903 P.2d 960. The prosecutor must provide a clear and specific explanation of the reasons for exercising the peremptory challenge. Miller-El, 545 U.S. at 238.

Although there may be “any number of bases on which a prosecutor reasonable [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. “To determine ‘whether a prosecutor’s explanation is based on discriminatory intent, [we] consider whether the prosecutor has stated a reasonably specific basis for the challenge, such as specific responses or the demeanor of the juror during voir dire, or a particular identifiable incident in that juror’s life.’” State v. Rhodes, 82 Wn.App. 192, 196, 917 P.2d 149 (1996) (citing State v. Burch, 65 Wn.App. 828, 840, 830 P.2d 357 (1992)).

This analysis requires a court to 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.” Id. at 359. “‘An invidious discriminatory purpose may often be inferred from the totality of 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, 128 S.Ct. 1203, 1211, 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.

The trial court’s determination of a Batson challenge is “‘accorded great deference on appeal’ and will be upheld unless clearly erroneous.” State v. Luvene, 127 Wn.2d 690, 699, 803 P.2d 960 (1995), quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

The trial court noted that if the State was going to challenge any of the prospective minority jurors a non race-based reason would have to be given. 3RP 148. Therefore the trial judge necessarily found the use of the State’s peremptory to strike one of the few African-American jurors constituted a prima-facie showing of racial discrimination on the part of the State, thus requiring the State to proffer a race-neutral reason for exercising the challenge. See Miller-El, 545 U.S. at 238; State v. Hicks, 163 Wn.2d 477, 490, 181 P.3d 831, 838 (2008) (“[T]rial courts are not *required* to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in

their discretion, recognize a prima facie case in such instances.”)
(emphasis in original).

Harris contends the State’s rationale for challenging the juror was not a race-neutral reason. Juror 27 stated:

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

A. I can't say one way or another. It depends on the situation and the way they present themselves.

Q. Okay. What's your initial feeling when you see a police officer?

A. I just want to make sure I am following the law.

Q. 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?

A. I can't say one way or another. Again, it just depends on what evidence is presented, fair to both sides.

Q. Do you think it might?

A. It may. I can't say one way or another because I don't really know.

3RP 112-113.

The State argued the answers indicated apprehensiveness around police officers and perhaps distrust, and also suggested that several of her family members felt the same way. 3RP 148-149. Yet none of her answers clearly indicated apprehension or distrust with any specificity. The prosecutor must provide a clear and specific explanation of the reasons for exercising the peremptory challenge. Miller-El, 545 U.S. at

238. Here the State was only able to provide general and vague concepts of apprehensiveness that were nothing out of the ordinary. 3RP 148-149.³

Evidence tending to prove purposeful discrimination also exists if a prosecutor's explanation for striking an African-American applies equally to a non African-American who serves on the jury. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir.1997) (“[T]he prosecutor's stated reasoning is revealed as pretextual in the light of a comparison between McCain and a nonminority juror who ultimately was empanelled.”). Here, two prospective jurors with views similar to those of potential juror 27 sat on the jury. Juror 10 stated that a friend had been the victim of domestic violence and the police would not help her. 3RP 72. When asked whether he could set aside that incident if a police officer were to testify, juror 10 replied “I think since it is not domestic violence, it would be okay.” 3RP 74. This answer is no clearer than juror 27's answer. Juror 34 claimed to have been pulled over by police in a small town as a “shake down,” stating that “[t]hey are bored and have nothing else to do sometimes.” 3RP 113. That indicates a clear distrust of some law enforcement personnel. This raises an inference the state struck the prospective juror based on her race.

³ The trial judge concluded, “I might agree it is completely normal to have that feeling.” 3RP 149.

At Harris' trial, had the court taken the time to fully and carefully consider the reasons given, it would have concluded the prosecutor's reasons were pretextual. Any finding of non-discriminatory intent would have been clearly erroneous. The prosecutor's race-neutral reasons cannot withstand the scrutiny required by the third step of the Batson test. The court erred in not assessing those reasons at trial, and the record shows they were race- based. For that reason, Harris' conviction must be reversed.

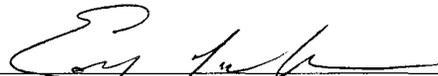
D. CONCLUSION

For the above reasons, Harris' conviction should be reversed

DATED this 19 day of July, 2010.

Respectfully submitted,

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