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NO. 67332-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PIERRE SPENCER WADE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 7

1. The prosecutor's racial discrimination in jury selection denied Wade his right to equal protection of the laws 7

a. A prosecutor may not choose jurors in a racially motivated fashion 7

b. The trial court denied the Batson challenge based on a clearly erroneous legal standard 9

i. The prosecutor conflated the responses of the two African-American jurors 14

ii. The prosecutor erroneously claimed Juror 34 missed an easy question 15

iii. The prosecutor asserted that Juror 34 bonded with other African-Americans 16

iv. The prosecutor misconstrued Juror 34's desire to be a juror and selected other jurors who expressed similar sentiments 18

c. The prosecutor's purported race-neutral reasons were not neutral, logically plausible, or supported by the record 20

d. The prosecutor's reasons for striking the African-American juror do not withstand the scrutiny Batson requires 21

i. The prosecutor gave reasons for striking Juror 34 that were plainly race-based and contradicted by the record 23

ii. The prosecutor's illegitimate reasons cast doubt on the remaining reasons 25

f. The use of racially discriminatory criteria in selecting the jury requires a new trial 32

2. The court impermissibly ordered everyone to leave the courtroom so he could speak with the jury in private during the middle of trial 32

a. The court may not communicate with the jury in private during trial 32

b. The court ordered everyone out of the room so the judge could speak to the jury in private 34

c. Courtroom closures constitute structural errors 35

3. The court encouraged a fundamentally flawed jury deliberation process by communicating with the jury without informing counsel or Wade, and permitting them to deliberate in a public courtroom in the presence of a member of the prosecutor's office without notifying Wade or his lawyer 39

a. Jury deliberations are private and may not be conducted in open court in the view of the public 39

b. The jury deliberated in public, in front of a member of the prosecutor's office, without Wade's knowledge 40

c. The jury's deliberation, in public, without notice to Wade, undermined his right to a fair trial 43

4. Defense counsel's failure to request a jury instruction telling the jury to consider the dog tracking evidence with caution denied Wade his Sixth Amendment right to ineffective assistance of counsel 45

a. An accused person is constitutionally entitled to the effective assistance of counsel 45

b. Wade would have been entitled to an instruction telling the jury to view the dog track evidence with caution if he had requested one 46

c. Defense counsel's failure to request a jury instruction that would have told the jury to view the dog track evidence with caution was deficient performance that prejudiced Wade 48

E. CONCLUSION 50

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975) 33

In re D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) 33

Jones v. Sisters of Providence Hospital, 140 Wn.2d 112, 994 P.2d 838 (2000) 44

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) 32

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 45

State v. Aker, 54 Wash. 342, 103 P. 420 (1909) 40

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1990) 33

State v. Bourgeios, 133 Wn.2d 389, 945 P.2d 1120 (1997) 34

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) 33

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) 38, 40

State v. Cuziak, 85 Wn.2d 146, 530 P.2d 288 (1975) 40, 43

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 36, 37, 38

State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008) 9

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 37, 43

State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010) 10, 11, 14

State v. Shutzler, 82 Wash. 365, 144 P. 284 (1914) 37

State v. Strode, 167 Wn.2d 222, P.3d 310 (2009) 36, 37

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....45

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010)..43

Washington Court of Appeals Decisions

State v. Bockman, 37 Wn. App.474, 682 P.2d 925 (1984) 46

State v. Hoff, 31 Wn.App. 809, 644 P.2d 763, rev. denied, 97 Wn.2d 1031 (1982).....44

State v. Langdon, 42 Wn.App. 715, 713 P.2d 120, rev. denied, 105 Wn.2d 1013 (1986).....34

State v. Montgomery, 163 Wn.App. 75, 259 P.3d 324 (2011).....10

State v. Wagner, 36 Wn.App. 286, 673 P.2d 678 (1983).....46, 48

United States Supreme Court Decisions

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) 6, 7, 8, 9, 10, 11, 14, 15, 20, 21

Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892) 39

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) 8, 16, 17

Presley v. Georgia, _ U.S. _, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). 32, 36, 37

Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) 39

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) 9, 25

Wiggins v. Smith, 539 U.S. 510, 125 S.Ct. 2527, 176 L.Ed.2d 471 (2003) 48

Federal Decisions

Ali v. Hickman, 584 F.3d 1174 (9th Cir. 2009) 20, 25

Cook v. LaMarque, 593 F.3d 810 (9th Cir 2010) 21

Fernandez v. Roe, 286 F.3d 1073 (9th Cir. 2002) 11

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) 21

Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006) 21, 25

Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971). 23

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) 12

United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990) 22, 24

United States v. Alvarado, 923 F.2d 253 (2nd Cir. 1991) 11

United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989) 26

United States v. Collins, 551 F.3d 914 (9th Cir. 2009) 14

United States Constitution

Fourteenth Amendment 7

Sixth Amendment 2, 4, 39, 45

Washington Constitution

Article I, section 10 ..... 32, 38

Article I, section 21 ..... 39, 43

Article I, section 22 ..... 32, 39, 45

Court Rules

CrR 6.15 ..... 40, 41, 43

ER 404 ..... 16, 24

Other Authorities

CALJIC No. 2.16 46

Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, 17 (August 2010) 25

People v. Mitchell, 110 Cal.App. 4th 722, 2 Cal.Rptr 3d 49 (2003) 46

Smith v. United States, 966 A.2d 367 (D.C. 2009) 22

State v. Bridge, 60 Ohio App. 3d 76, 573 N.E.2d 762 (1989) 47

State v. Taylor, 118 N.H. 855, 395 A.2d 505 (1978) 47

Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System (March 2011) 30

Turnbull v. State, 959 So.2d 275 (Fla. Ct. App. 2006) 31

Tursio v. United States, 634 A.2d 1205 (D.C. 1993) 21, 22

United States v. Robinson, 878 A.2d 1273 (D.C. 2005) 22

A. ASSIGNMENTS OF ERROR.

1. The prosecutor violated Wade's right to equal protection of the laws by striking a juror based on his race.

2. The prosecutor denied African-American Juror 34 his right to serve on a jury by striking him based on his race.

3. The court untenably refused to inquire into the racially discriminatory purpose of the prosecutor's peremptory strike based on the legally erroneous requirement that Wade was required to show a pattern of racial discrimination.

4. The court denied Wade his right to a public trial and violated the requirement of the open administration of justice by closing the courtroom so it could speak with the jurors in private during the trial.

5. The court impermissibly spoke with the jurors without Wade's presence, in violation of Wade's right to be present during material stages of the trial.

6. The court improperly responded to a question from the deliberating jury without notifying Wade or his lawyer, contrary to the Sixth Amendment and Article I, section 22.

7. The court erroneously permitted the jury to conduct part of its deliberations in a public courtroom in the presence of court staff and a member of the prosecutor's office without notifying Wade.

8. Trial counsel denied Wade the effective assistance of counsel to which he was entitled under the Sixth Amendment by failing to request an instruction cautioning the jury on the unreliability of dog track evidence

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. It constitutes invidious discrimination to strike a potential juror because he shares the same minority race as the accused. Wade objected to apparent racial motive of the prosecutor when he struck an African-American juror. The court refused to inquire further because Wade had not shown a pattern of racial discrimination. Did the court err by insisting that Wade first show a pattern of racial discrimination when the case law expressly holds that no pattern is required?

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 34 showed he mixed up Juror 34 with Juror 5, the other African-American in the jury venire, misconstrued his answers during voir dire, and gave reasons that applied equally to comparable jurors who were seated. Did the prosecutor's misrepresentation of Juror 34's comments, coupled with his explicit focus on the racial identity of Wade, Juror 34, and defense counsel show the prosecutor was substantially motivated by Juror 34's race?

3. A court is required to conduct a trial in open court and may not communicate with the jury in private during the trial. The judge ordered everyone out of the courtroom so it could speak to the jury in private during the trial, for the apparent purpose of explaining a delay in the proceedings to the jurors. Did the court improperly communicate with the jury and impermissibly exclude both Wade and the public from the proceedings?

4. Jury deliberations are secret and private. When the deliberating jury has a question, the court must notify the parties before it responds. Here, without notice to Wade, the court answered two jury questions seeking access to exhibits by letting the jury deliberate in the open courtroom, in front of a paralegal from the prosecutor's office and members of the court staff. Did the

court deny Wade his right to be present and to trial by a jury unaffected by outside influences when it let them deliberate in public without telling Wade or his lawyer?

5. An accused person is guaranteed the right to the effective assistance of counsel by the Sixth Amendment. Because of the uncertain reliability of dog track evidence, Washington courts require the jury be instructed to view the track with caution where such an instruction is requested. Where identity was the sole contested issue at trial, and the State relied heavily on the dog track evidence to corroborate its claim that Wade was a participant in the crime, did trial counsel deny Wade the effective assistance of counsel to which he was constitutionally entitled by failing to request a cautionary instruction regarding the evidence?

C. STATEMENT OF THE CASE.

While Angelina Dowell was working at a 7-11 in Seattle, three people came into the store wearing masks, hoods, and gloves. 9/9/10RP 14.[1] She did not recognize them and did not see their faces. Id. at 21. Two or three of them had either real or toy

[1] The verbatim report of proceedings is referred to by the date of the proceeding. There are two, non-consecutively paginated volumes for September 8, 2010. The morning proceeding is referred to as "9/8/10(a.m.)RP" and the afternoon as "9/8/10(p.m.)RP."

guns and demanded money. Id. at 35. She gave them the cash drawer. Id. at 16. One took some Fat Tire beer. Id. at 18.

Police officers brought a trained dog and searched the neighborhood. 9/8/10(a.m.)RP 27-28, 35-36. They found a woman hiding by a house several blocks away who wore a distinctive skeleton on her clothes. Id. at 43, 99-100. She also had a gun with her. Id. at 97.

After a further search of the neighborhood, police found Pierre Spencer Wade. 9/8/10(a.m.)RP 48. Some Fat Tire beer was in his vicinity. 9/8/10(p.m.)RP 24. He was not carrying a gun and the police found no gun in the area dispute a later search with a dog trained to find weapons. 9/9/10RP10.

Although police conducted a show-up of Wade after he was arrested, Dowell did not know whether he was one of the people in the store. 9/9/10RP 26, 29-30, 32. Her husband, who had seen the robbery from outside the store, did not believe Wade was one of the perpetrators and could not identify him in court. 9/9/10RP 46, 47. The prosecution relied on a videotape from inside the store that had grainy, fleeting images of the perpetrators. Exs. 20, 21; 9/13/10RP 30.

At Wade's jury trial, the State struck one of two African-American men from the jury panel. 9/7/10RP 94-97. The court rejected Wade's Batson challenge on the ground that Wade needed to show a pattern of excluding African-Americans and he had not done so. Id. at 97.

During the trial, the court ordered a recess so the defense attorney could investigate newly discovered evidence. 9/9/10RP 72-73. The judge ordered everyone to leave the courtroom so he could speak to the jurors about this recess in private. 9/9/10RP 73.

While the jury was deliberating, they sent a written inquiry to the judge asking to review the videotape. CP 35. Without notice to Wade or his lawyer, the court called the jury into the courtroom and let them examine the evidence in public. 9/14/20RP 2-3. The jurors reviewed and discussed the videotape as well as clothes admitted into evidence while in the court, in front of members of the court staff and a paralegal from the prosecutor's office. 9/14/10RP 3, 4, 7. Wade and his attorney were not notified about this procedure until the jury had reached a verdict. 9/14/10RP 2, 9.

Wade was convicted of the charged offense, first degree robbery while armed with a firearm. CP 10, 11. He received a standard range sentence. CP 38, 40

D. ARGUMENT.

1. **The prosecutor's racial discrimination in jury selection denied Wade his right to equal protection of the laws**

Wade, an African-American man, objected when the prosecutor used a preemptory challenge to strike one of the only two African-Americans jurors from the jury venire. The court rejected the challenge on the ground that striking a single juror did not show a pattern of discrimination, yet the law does not require a pattern of racial discrimination. Thus, the court applied the wrong legal standard. The prosecutor's focus on Wade's race during jury selection and the false reasons he gave for excluding the African-American juror show that Wade was denied his right to a jury of his peers selected without racial bias and the stricken African-American juror was denied his right to participate in the jury trial.

a. A prosecutor may not choose jurors in a racially motivated fashion

"[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); U.S. Const. amend. 14. In addition, an individual juror has "the right not to be

excluded from one [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).

Batson requires a three-part analysis to determine whether the prosecution used discriminatory criteria for peremptorily challenging a member of the jury panel. First, the person challenging the peremptory strike must establish a prima facie case that the prosecutor's challenge was based on race. A prima facie case requires evidence of any relevant circumstances that "raise an

inference" that a peremptory challenge was motivated by the potential juror's race. Batson, 476 U.S. at 96.

Second, if a prima facie case is established, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the jury panel member. Id. at 97. Third, once a race-neutral explanation is tendered, the trial court determines whether the defendant has established purposeful discrimination.

b. The trial court denied the *Batson* challenge based on a clearly erroneous legal standard.

A prima facie case may be established by the striking of a single juror of a racial minority. State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008). A "single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " Id. at 491 (quoting Batson, 476 U.S. at 95); see Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("the Constitution forbids striking even a single prospective juror for a discriminatory purpose" (citation and quotation marks omitted)); see also State v.

Rhone, 168 Wn.2d 645, 660, 229 P.3d 752 (2010) (Alexander, J., dissenting); Id. at 658 (Madsen, C.J., concurring).[2]

Here, the prosecutor asserted that Wade could not meet his burden of establishing a prima facie case of racial discrimination without showing a pattern of striking members of a racial group, and the court agreed. 9/7/10RP 94-95. The court ruled that "Mr. Kim [the prosecutor] doesn't have to give reasons not related to race because there was no pattern that was shown." Id. at 97.

This legal standard is wrong. Systematic exclusion is not required by Batson. 476 U.S. at 95 ("a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause"); State v. Montgomery, 163 Wn.App. 75, 84, 259 P.3d 324 (2011) ("We agree, therefore, that the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate 'a pattern of exclusion' in order to establish a prima facie case of purposeful discrimination.").

[2] In Rhone, Justice Madsen joined the four justice plurality decision finding Rhone had not established a prima facie case of racial discrimination but also joined the four justice dissent in adopting a bright line rule that a defendant establishes a prima facie case of discrimination when the State exercised a peremptory challenge against the sole remaining venire member of the defendant's racial group, applied in all cases "going forward." 168 Wn.2d at 658-59.

A pattern of race-based peremptory strikes is merely one way that the court may infer discrimination under the first stage of the Batson test. Batson, 476 U.S. at 97. But Batson does not condemn discrimination only when it is an extensive as possible, and it does not require a showing that prosecutor challenged all minority jurors. United States v. Alvarado, 923 F.2d 253, 256 (2nd Cir. 1991) (even though prosecutor accepted some minority jurors, he used half of his strikes against minorities who composed an estimated 29% of the venire; "a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under Batson"); Fernandez v. Roe, 286 F.3d 1073, 1078 (9th Cir. 2002) (prosecutor used 21% of his strikes against Hispanics, who constituted 12% of the venire).

In Rhone, the four-justice dissent and one-justice concurrence adopted a rule that striking a single juror of a racial minority, when that juror was the only minority in the venire, satisfies the prima facie evidence required under Batson and required the prosecutor to provide a race-neutral explanation. 168 Wn.2d at 660 (Alexander, J., dissenting); Id. at 658 (Madsen, C.J., concurring). The four-justice lead opinion agreed that striking the only minority from the panel could show the prima facie inference,

but there should be "some evidence" that racial considerations played a role in striking the juror. 168 Wn.2d at 655 (C. Johnson, J., plurality). The lead opinion gave examples of circumstances that would be prima facie evidence racial discrimination, such as the race of the defendant and victim; the type and manner of the prosecutor's questions during voir dire, and similarities between those individuals who remain on the jury and those who have been struck. Id.

Here, there were two African-American jurors in the venire, and the prosecutor struck one of them. Removing half the members of one racial group may raise an inference of discrimination. Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) (finding that removal of four out of nine jurors of the same cognizable racial group, a rate of 55%, was sufficient to raise an inference of discrimination). The prosecution's 50% rate of exclusion for African-Americans may raise an inference of racial discrimination when the excluded juror is a member of the same racial minority as Wade.

During jury selection, the prosecutor was particularly focused on the issue of race, even though it had no particular importance to the issues at trial. The prosecutor was the first

person to mention Wade's African-American race. 9/7/10RP 70. He spoke about the effects of racial bias in society. Id. at 69-71. He said that African-American men had suffered the most from racial bias. Id. at 70. Then, the prosecutor pressed the jurors to say whether they would be more lenient toward Wade because he was African-American. 9/7/10RP 69-71. He asked several times for the jurors to declare whether they might favor Wade because of his race. Id. at 71. He asked if any jurors felt the criminal justice system was not fair to certain groups, which implicitly asked for the jurors' views on racial bias. Id. at 70. Furthermore, the prosecutor, Steven Kim, pointed out that he was a member of a minority group, as was defense counsel and the defendant.[3] 9/7/10RP 70.

The prosecutor's explicit attention to the race of the participants and the jurors' beliefs about racial bias shows that the prosecutor believed the racial backgrounds of Wade, his lawyer, and himself were important to selecting the jury. An inference of discrimination exists based on the prosecutor's attention to race

[3] As Kim alluded to in his voir dire comments, he is Korean-American. See http://www.kingcounty.gov/Prosecutor/news/2011/december/kim.aspx.

Defense attorney Christopher Swaby is African-American. See http://seattletimes.nwsource.com/html/localnews/2008579276_haq01m.html; http://www.linkedin.com/in/christopherswaby.

during his questions and remarks to the jury. See Rhone, 168 Wn.2d at 656 (C. Johnson, J., plurality).

The victim in this case is white, while Wade is African-American. Ex. 21 (picture of victim). The issues in this case turned on whether the jury believed the white victim or felt the State had not proven its case against the black defendant. Striking a juror who shares the defendant's race, while the victim is white, is some evidence showing a prima facie case of racially-biased jury selection. Rhone, 168 Wn.2d at 656 (C. Johnson, J., plurality).

While a comparative analysis is more often used at the third stage of the Batson inquiry, it may also be considered to decide whether there is some inference from the record that the prosecutor struck a juror based on his race. United States v. Collins, 551 F.3d 914, 922 (9th Cir. 2009). "An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror." Id.

i. The prosecutor conflated the responses of the two African-American jurors.

One reason the prosecutor gave was that Juror 34 said he was once on a jury and had not reached a unanimous verdict.

9/7/10RP 95. Yet Juror 34 did not say he ever served on a jury. The other African-American juror, Juror 5, was the person who discussed his jury service and said the jury did not reach a unanimous verdict in that case. 9/7/10RP 60, 80-81. The prosecutor's misunderstanding of the record coupled with his confusion over which African-American gave what response is evidence of racially biased decision-making on part of the prosecutor and it raises an inference of bias sufficient for the first stage of Batson.

ii. The prosecutor erroneously claimed Juror 34 missed an easy question.

The prosecutor asked all jurors an extended hypothetical about assessing the credibility of the fictitious characters Johnny and Jane, one of whom broke a lamp. 9/7/10RP 33. In response to the prosecutor's hypothetical, Juror 1 said she was "lost." 9/7/10RP 32. Unlike Juror 1, Juror 34 did not say he was lost. Along with 15 other jurors, Juror 34 raised his hand to indicate he did not think that evidence Johnny had broken lamps in the past would show he was the likely culprit. 9/7/10RP 33. Five other jurors who gave the same answer as Juror 34 were seated on the jury. Id. (seated jurors 3, 4, 6, 29, and 37 gave the same answer as Juror 34).

The prosecutor asserted that Juror 34 "missed" a simple corroboration question about Johnny and Jane. 9/7/10RP 95. But Juror 34's answer to this hypothetical was the same as other seated jurors, and his response was in keeping with the rules of evidence. ER 404(b) bars the prosecution from relying on evidence of a person's prior bad acts to conclude he is likely to have done it on another occasion, on the basis that such evidence does not prove the person was the perpetrator of the crime. By seating jurors who gave the identical answer to a question as Juror 34, the prosecutor's challenge to Juror 34 raises an inference of discriminatory jury selection. Miller-El v. Dretke, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination").

iii. The prosecutor asserted that Juror 34 bonded with other African-Americans.

The prosecutor asserted that Juror 34 seemed to have bonded with Juror 5 and with the defense attorney Swaby, because when Swaby asked Juror 5 whether he was familiar with the term, "pick a switch," Juror 34 "said oh yeah and started laughing, and there was a definite, shall we say, energy between the two."

9/7/10RP 95. He also claimed that Swaby referred to Juror 34 as "brother." 9/7/10RP 95. There is no mention of the word "brother" in the transcript. While Swaby did not dispute using that term because "that's the way I speak," the court reporter's failure to mention that word in the transcript suggests that even if used by defense counsel, it was not noticeable to the court reporter and may not have been heard by any others. Id. at 96. The court did not comment on whether he sensed any special rapport between defense counsel and Juror 34.

Significantly, the commonality that Swaby, Juror 5, and Juror 34 share is membership in the same cognizable racial group. Like Wade, Swaby was also African-American, as were Jurors 5 and 34. The prosecutor's fear that Juror 34 bonded with Swaby based on a shared background raises an inference of race-based jury selection. Furthermore, the prosecutor's explanation indicated a shared bond between defense counsel and Juror 5 as well, who was seated on the jury, and seating a juror who shared similar attributes is evidence of racial discrimination against Juror 34. See Miller-El v. Dretke, 545 U.S. at 241.

iv. The prosecutor misconstrued Juror 34's desire to be a juror and selected other jurors who expressed similar sentiments.

The prosecutor said that Juror 34 "was a little too enthusiastic to be on this jury." 9/7/10RP 95. This reason is untrue and fails on comparative analysis.

First, Juror 34's comments must be viewed in context. Before he spoke, 18 potential jurors had said they were annoyed to be summoned to jury duty. 9/7/10RP 29. Some jurors expressed their clear reluctance if not outright hostility to serving on the jury. 9/7/10RP 77.

The prosecutor asked a number of jurors whether they would be good jurors, or would be unfair for any reason, but he purposefully skipped Juror 34. The prosecutor asked jurors 30, 31, 33, 35, 36, 37, 39, and others whether they would be good jurors but conspicuously omitted Juror 34. 9/7/10RP 66-67 (Jurors 32 and 38 had been excused at the initial hardship stage, so the prosecutor did not skip them as he did Juror 34, 9/7/10RP 19-20).

It was in this context that Juror 34 offered that he wanted to serve because if he or someone in his family was charged with a crime, "they would want somebody, a group of people who were interested in the process, not just thinking, I don't want to be here.

If you don't want to be here you are not going to participate in the process properly." 9/7/10RP 84.

Similarly, Juror 4 repeatedly expressed her desire to be seated as a juror, and she was selected. Juror 4 said she was happy to be summoned and thought it was "really interesting" to be there. 9/7/10RP 29, 82. She thought she would be a good juror because should would "just concentrate on the fact that as far as we know this man is innocent." Id. at 82.

The prosecutor did not construe Juror 4's interest in serving on the jury as showing she too closely identified with Wade, but he interpreted Juror 34's comments as saying that if his family member was charged with a crime he would want to be on the particular jury. 9/7/10RP 95.

Juror 34's comments came as a response to the many ambivalent jurors who did not seem to care about their duties. Moreover, his comments were not different in degree from Juror 4, who made clear her desire to be part of the jury and she offered her interest in service in the context of respecting Wade's innocence.

To establish a prima facie showing of racial identification as a motive in jury selection, Wade needed to offer some evidence

giving rise to an inference that racial considerations were used to exclude a juror. By striking one of the two African-American jurors available, raising the issue of racial bias with the prospective jurors, asking all jurors to declare whether they would be more lenient toward Wade based on his race, and offering reasons for excluding Juror 34 that fall apart on closer scrutiny, the record provides ample evidence that Juror 34's race played a role in the prosecutor's peremptory strike. The court erred by refusing to consider Wade's Batson challenge. Furthermore, because the court rejected the Batson challenge under the misguided belief that a pattern of racially-motivated strikes was required, the court's analysis rested on the wrong legal standard and its ruling was untenable.

c. The prosecutor's purported race-neutral reasons were not neutral, logically plausible, or supported by the record.

At the second step of the Batson analysis, the prosecutor must give "a clear and reasonably specific race-neutral explanation for challenging the potential juror." Ali v. Hickman, 584 F.3d 1174, 1180 (9th Cir. 2009).

The court mistakenly believed that without a pattern of race-based strikes, the Batson challenge necessarily failed. 9/7/10RP

97. However, the prosecutor said, "[j]ust to be safe on appeal, I'll give the reasons why I struck him." Id. at 95. Accordingly, this Court may scrutinize the prosecutor's reasons based on the available record.

d. The prosecutor's reasons for striking the African-American juror do not withstand the scrutiny Batson requires.

The third step of Batson is "whether counsel's race-neutral reasons should be believed." Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). When the prosecutor "was motivated in substantial part by discriminatory intent," the peremptory strike violates equal protection. Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir 2010).

This third stage of Batson requires the court to closely scrutinize the proffered reasons. The reason must be logically plausible and not refuted by the voir dire transcript. Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006). The court must engage apply "rigorous scrutiny" to the prosecutor's reasons to determine whether they are accurate, logical, and credible. Tursio v. United States, 634 A.2d 1205, 1212 (D.C. 1993).

To rebut the prosecution's race-neutral reasons for striking jurors, the defense may: "(1) point out that the prosecutor's claims

about the particular juror are false," (2) to "point out that although the prosecutor's claims about an excluded juror are true, similar claims can be made about non-excluded jurors who are not minorities, which should raise the suspicion of bad faith," or (3) to "argue that claims about the juror, although true, are so irrational as a reason for striking a juror that they might be pretexts for some undisclosed discriminatory reason." Smith v. United States, 966 A.2d 367, 387 (D.C. 2009) (quoting United States v. Alcantar, 897 F.2d 436, 438 (9th Cir. 1990) (internal citation omitted)).

The trial court did not scrutinize the prosecutor's reasons. The court remarked on only two of the prosecutor's reasons: that Juror 34 "was just a little bit too enthusiastic," and he had both positive and negative experiences with police. 9/7/10RP 97. The court did not endorse any of the reasons and concluded by saying, "I'd rather see Juror 34 seated" but found no error in the prosecutor's challenge. Id.

A juror's race cannot be even part of the reason the juror was excluded. United States v. Robinson, 878 A.2d 1273, 1284 (D.C. 2005); Tursio, 634 A.2d at 1213 n.7. "[R]ace is an impermissible factor, even if a minor one, in exercising peremptory strikes. It need not be "the *sole* reason for discrimination nor the

total factor of discrimination" to be impermissible. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 350 (7th Cir. 1971). "We find no acceptable place in the law for partial racial discrimination." Id.

i. The prosecutor gave reasons for striking Juror 34 that were plainly race-based and contradicted by the record.

The prosecutor said Juror 34's prior jury service, where he had not reached a verdict, was a reason he struck him. 9/7/10RP 95. But Juror 5 was the juror who spoke of that experience. 9/7/10RP 60, 81. Juror 5 was the other African-American juror. 9/7/10RP 95. By mixing up which African-American was which, the prosecutor showed that he viewed the jurors through a racial lens. This reason for excluding Juror 34 was based on his race and not his qualifications.

Additionally, the prosecutor claimed Juror 34 "missed a simple corroboration question" about Johnny and Jane in a hypothetical he asked. Notably, the prosecutor was not certain which question Juror 34 "missed," saying it was either about the phone records or whether someone has something to lose. 9/7/10RP 95.

The record shows that the prosecutor asked all jurors whether knowing of Johnny's past misconduct would help decide if

he was the person who broke the lamp on that day. 9/7/10RP 33 Juror 34 answered the same way as 15 other potential jurors, including five of the jurors who were selected to serve on the jury. Id. Using a reason that applies equally to non-excluded jurors raises the suspicion of bad faith. Alcantar, 897 F.2d at 438.

As to the phone records question, the prosecutor asked all jurors whether it would help them decide if Johnny or Jane was more credible if telephone records showed that Jane was on the phone with her best friend throughout the incident. 9/7/10RP 33-34. Two jurors who were seated at trial, jurors 23 and 33, both said that phone records would not help. Id. Juror 34 did not. He answered as most of the jurors did, by indicating that the phone records might help. Id. Thus, the prosecutor claimed Juror 34 missed a question that he did not miss.

By asserting Juror 34 missed a "simple corroboration question," the prosecutor implied that Juror 34 was not intelligent. Yet the answer Juror 34 gave was correct, and borne out by ER 404(b) which prohibits reliance on prior bad acts to prove the accused was the perpetrator. Falsely painting African-American jurors of having low intelligence is a tactic used commonly to exclude African-Americans from jury service. Equal Justice

Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, 17 (August 2010) ("A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged 'low intelligence'").[4] Juror 34's answers to the corroboration questions are not a legitimate non-race based reason to exclude him, and in fact, this proffered reason shows a racially discriminatory purpose underlying the prosecutor's strike.

ii. The prosecutor's illegitimate reasons cast doubt on the remaining reasons.

When a prosecutor offers reasons that are not legitimate, because they are not supported by the record or are not race-neutral, this alone "raises an inference" that the remaining reasons are pretextual. Ali, 551 F.3d at 1192. "[T]he prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent," even where other, potentially valid explanations are offered. Snyder, 552 U.S. at 485; see also Kesser, 465 F.3d at 360 ("If a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.") (internal quotation marks and citations omitted); United States v.

[4] Available at: http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf (last visited

Chinchilla, 874 F.2d 695, 699 (9th Cir. 1989) ("[T]he fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency [of the remaining two reasons].").

The prosecutor said Juror 34 was "a little too enthusiastic." 9/7/10RP 95. As explained above, this reason fails comparative juror analysis and takes Juror 34's comments out of context. Seated Juror 4 expressed a sincere desire to be on the jury, saying it was "really interesting to have this opportunity." 9/7/10RP 82. She was happy to be summoned and insisted she would "really listen to the facts and just concentrate on the fact that as far as we know this man is innocent." 9/7/10RP 29, 82.

When Juror 34 spoke about whether he would be a good juror, his remarks were in response to other members of the venire who told the attorneys that they did not wish to serve, or would do so reluctantly. Juror 34 said he would be a good juror because he wanted to be "part of the process" and if jurors did not wish to serve, they were not likely to be good jurors. Juror 34's fair and reasonable answers indicate that he would be a capable, fair juror.

Additionally, the prosecutor misrepresented his comments as an excuse for striking him. He claimed Juror 34 said he would

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January 27, 2012).

want to be "on that particular jury" if a family member was accused of a crime. 9/7/10RP 95. But Juror 34 said if he or a family member was charged, he would a group of people on the jury who "wanted to be part of the process" because if a juror did not want to serve, he "would not participate in the process properly." 9/7/10RP 84. The prosecutor misconstrued Juror 34's remark, and equated his mention of his family as if Wade was part of his own family. This mischaracterization of Juror 34's remarks further shows that the prosecutor was particularly concerned that Juror 34 and Wade shared the same racial background.

Another reason the prosecutor gave was he felt "shall we say, energy between the two," seemingly referring to defense counsel, when defense counsel asked Juror 5, the other African-American in the jury venire, about whether he knew the term "pick a switch." 9/7/10RP 95. This reason for challenging Juror 34 misconstrues the record and is likely based on his race.

This interaction arose when defense counsel noted Juror 5 was from Tennessee and asked, "Ever hear of pick a switch?" 9/7/10RP 45. Juror 5 said yes and Swaby asked the entire venire , "does everybody understand what that means?" 9/7/10RP 45. No one responded that he or she needed further explanation. Id. Juror

34 was one of the many jurors who nodded or otherwise indicated that he understood. Although the prosecutor claimed that Juror 34 said "yeah and laughed," the transcript does not show his response was different in kind from other jurors, most of whom must have nodded or indicated agreement with the attorney's question. 9/7/10RP 45. Also, Juror 34's response does not appear to have been different in degree from Juror 5, who was seated on the jury.

The prosecutor then indicated that there was "an energy" he felt based on Juror 34's "giggling" and said defense attorney called the juror "brother." 9/7/10RP 95. These subtle expressions are not part of the record and were not endorsed by the trial court. Defense counsel said he regularly used the word brother but it never appears on the transcript. 9/7/10RP 96.

The shared energy must be considered in the context that Jurors 5, 34, and defense counsel all share a common race, as well as Wade, and the prosecutor seemed more concerned with those two jurors and Swaby understanding one another than any other juror also sharing that understanding, which is not a legitimate racial-neutral explanation for striking Juror 34. Defense counsel countered that he was skilled at developing a rapport with jurors of all races, and had bonded with many jurors in this case.

9/7/10RP 96. One excused juror, "a former law enforcement officer," had offered to buy him lunch as he left the courtroom. 9/7/10RP 95-96. The prosecutor only objected to the bonding when it involved African-American jurors, which indicates purposeful discrimination.

The fifth and final reason the prosecutor offered for striking Juror 34 was the he had both positive and negative experiences with police officers. 9/7/10RP 97. But when asked whether his prior bad experience with a police officer would affect him, Juror 34 had "no sir," said without hesitation or prompting. 9/7/10RP 61. He explained that despite having had a bad experience with a police officer, he also had positive experiences with police officers. He harbored no negative sentiment toward police officers as a group. He did not say that he had witnessed law enforcement officers being unfair and did not believe that the criminal justice system was unfair to certain groups. 9/7/0RP 69.

Juror 34 said he would not give Wade any more latitude because of his race. 9/7/10RP 70, 71. He did not indicate that there was any reason to feel uncomfortable based on the lack of African-Americans in the jury pool. 9/7/10RP 72. In sum, Juror 34 was repeatedly asked whether he would be a fair juror based on his life

experiences and his race. He consistently and unequivocally responded that he would be fair and he harbored no ill-will or biases that would be of concern to the prosecution.

Excluding Juror 34 because he had both positive and negative experiences with police, but harbored no ill-will toward them or biases against them, would be the epitome of racially discriminatory jury selection. It is undisputable that "racial iniquities ... permeate the criminal justice system." Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System (March 2011) at 6-7.[5] African-Americans are incarcerated at 6.4 times the rate of whites, and this discrepancy is not explained solely by differences in crime commission rates. Id. at 10-11. It is far more common for an African-American to have had a negative experience with the police. It is unconstitutional to allow prosecutors to voir dire African-American panelists about bad experiences with the police and then to exclude them on the basis of their truthful answers when that answer gives no reason to affect the juror's qualifications to serve on a particular case. Turnbull v. State, 959 So.2d 275, 276-78 (Fla.

[5] Available at: http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf (last visited January 5, 2012).

Ct. App. 2006). Prosecutors may not raise the issue of racial bias as a subterfuge for eliciting responses that will strike black jurors when the responses will reflect the common experience of an African-American and will not show actual bias related to the case at hand. Id. Juror 34 answered truthfully about his experience but also said without hesitation that his bad experience with a police officer had no affect on him and was nullified in his mind by positive experiences with police. Striking him because he had a negative experience with a police officer, when that experience did not affect his ability to be fair and impartial, shows the prosecutor's racial discrimination in striking Juror 34. The prosecutor was trolling for reasons to exclude Juror 34, trying to elicit information that would make Juror 34 unqualified to serve.

The prosecutor's discriminatory purpose is shown by his focus on Wade's race in his comments to the jury, his insistence that jurors declare they would not be more lenient to Wade based on his race, his seating of jurors who gave remarkably similar if not identical answers to questions as Juror 34, his confusion of the answers given by the two African-American jurors in the venire, and his fear that Juror 34 identified too closely with defense counsel or Wade based on their shared racial backgrounds. The prosecutor

was substantially motivated by Juror 34's race when he struck that juror.

f. The use of racially discriminatory criteria in selecting the jury requires a new trial.

As explained above, the record demonstrates that the prosecution engaged in impermissible race discrimination when striking the African-American juror, Juror 34. Wade respectfully requests that this Court reverse his convictions and remand for a new trial.

2. **The court impermissibly ordered everyone to leave the courtroom so he could speak with the jury in private during the middle of trial**

a. The court may not communicate with the jury in private during trial.

Open court proceedings are a fundamental guarantee to the defendant who has the right to a public trial and to the public who has the right to the open administration of justice. Presley v. Georgia, _ U.S. _, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). Washington protects the right to a public trial even more emphatically than the federal constitution. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Const. art. I, §§ 10, 22 "Justice in all cases shall be administered openly in the

Washington courts." In re D.F.F., 172 Wn.2d 37, 48, 256 P.3d 357 (2011) (J. Johnson, concurring) (quoting Const. art. I, § 10).

Both the defendant's right to a public trial and the right to open court proceedings serve to ensure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. D.F.F., 172 Wn.2d at 43; State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public's right to watch and scrutinize court proceedings is essential to the operation of the courts. D.F.F., 172 Wn.2d at 43; Cohen v. Everett City Council, 85 Wn.2d 385, 387, 535 P.2d 801 (1975) ("A trial is a public event. What transpires in the court room is public property.").

A trial court may close the courtroom to any person only "under the most unusual circumstances." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1990). Courts stringently protect the public's access to the courtroom because, "the public trial right operates as an essential cog in the constitutional design of fair trial safeguards." Id. The trier of fact and the judge are best reminded of the importance of their task when they conduct the business of a trial in the public's view. Id.

Similarly, the trial judge is prohibited from communicating with the jury during the trial in private. State v. Bourgeois, 133

Wn.2d 389, 407, 945 P.2d 1120 (1997). Neither judge nor bailiff may communicate with the jury in the absence of the defendant or without the parties' knowledge. Bourgeois, 133 Wn.2d at 407. The appropriate practice for a trial judge is to communicate with a jury only with all parties present. State v. Langdon, 42 Wn.App. 715, 717, 713 P.2d 120, rev. denied, 105 Wn.2d 1013 (1986).

b. The court ordered everyone out of the room so the judge could speak to the jury in private.

In the middle of trial, the court announced, "Let's clear the courtroom so I can talk to the jurors without anybody here. (Recess taken)." 9/9/10RP 73.

The court did not explain why he was ordering everyone out of the courtroom. The remarks arose in the context of a request by defense counsel to conduct some further investigation.

During the State's case-in-chief, the court called a 10 minute recess and excused the jury so it could hear an objection from defense counsel. 9/9/10RP 61. The defense attorney explained that he just learned during the detective's testimony that the detective test-fired the firearm the police recovered from a separately charged co-defendant and determined it was operable. 9/7/10RP 61. The State had not informed the defense about its

testing of the weapon. Id. The complaining witness had said that she thought the gun might have been a toy. 9/9/10RP 35. Because the defense attorney premised part of his strategy on the State's failure to investigate whether the seized item was a "firearm" even though the complainant said the weapon did not appear to be a firearm, defense counsel expressed a need for further investigation. 9/9/10RP 67-68. The court granted the request and adjourned the case for the day. 9/9/10RP 72.

After the judge agreed that Wade should have more time to determine how to respond to this newly discovered information, and while the jury was not in the courtroom, he ordered everyone else out of the courtroom. The judge directed everyone to "clear he courtroom so I can talk with the jurors without anybody here." 9/9/10RP 73.

The judge never explained what he said to the jury. The judge never said why he needed to speak with the jurors in private. The court reporter did not take notes of the proceeding.

c. Courtroom closures constitute structural errors.

The court's request that everyone leave the courtroom so the court could talk with the jurors in private, in the middle of trial, violates the state and federal constitutional guarantees of open

court proceedings. The trial court has an independent duty to protect both the defendant's right to a public trial and the public's right to open access to the courtroom. Presley v. Georgia, _ U.S. _, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). "The public has a right to be present whether or not any party has asserted the right." Id. at 724-25. The court improperly closed the courtroom without first engaging in the required analysis.

The trial court "must ensure" that the "five [Bone-Club] criteria are satisfied" before closing court proceedings. State v. Strode, 167 Wn.2d 222, 227, P.3d 310 (2009); see also State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006) (court may not close the courtroom without "first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order."); Bone-Club, 128 Wn.2d at 258-59 ("We hold the five criteria a trial court must obey to protect the public's right of access before granting a motion to close are likewise mandated to protect a defendant's right to public trial.") (emphasis added).[6]

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[6] The required factors are:
1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

The Presley Court further held,

> even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide."

130 S.Ct. at 725.

Finally, Washington "has never found a public trial right violation to be [trivial or] de minimis." Strode, 167 Wn.2d. at 230 (quoting Easterling, 157 Wn.2d at 180). Here, the court ordered everyone out of the courtroom so it could speak with the jurors during trial. 9/9/10RP 73. A court's communication with jurors is fraught with the possibility of unintended messages. Article I, section 22 expressly guarantees the accused the right to appear and defend at all stages when his substantial rights may be affected. State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011) (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).

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2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

The court's private communication with the jury during trial was purposefully ordered by the court, without explanation. Speaking to the jury without the defendant present violates the right "to be personally present during trial." Shutzler, 82 Wash. at 367. Wade's substantial rights are affected when he cannot know what the court said to the jury in private. See State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983) (noting that "conclusive presumption of error" may follow judge's private communication with jurors). Additionally, the court's order that everyone leave the courtroom denied the public its right to open administration of justice. Easterling, 157 Wn.2d at 179 ("decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guaranty of providing open access to criminal proceedings."). This error is both structural and harmful, because Wade cannot know how the court's remarks affected the jury. Thus, it requires reversal of Wade's conviction.

3. **The court encouraged a fundamentally flawed jury deliberation process by communicating with the jury without informing counsel or Wade, and permitting them to deliberate in a public courtroom in the presence of a member of the prosecutor's office without notifying Wade or his lawyer**

a. Jury deliberations are private and may not be conducted in open court in the view of the public.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. 6; Const. art. I, §§ 21, 22. To protect the right to an impartial jury, "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892). Any "contact," direct or indirect, "with a juror about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Conducting jury deliberations in the presence of someone who is not a juror, "even by one sworn to secrecy and silence, violates the cardinal requirement that juries must deliberate in

private." State v. Cuziak, 85 Wn.2d 146, 148-49, 530 P.2d 288 (1975); see also State v. Aker, 54 Wash. 342, 347, 103 P. 420 (1909) ("We are not inclined to sanction any practice which permits the invasion of the privacy of the jury room during deliberation.").

While jury deliberations are private, when the jury asks the court a question, the court may not answer the question privately. CrR 6.15(f). "It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." Caliguri, 99 Wn.2dat 508. In Caliguri, the deliberating jury asked to listen to tape recordings that had been admitted into evidence. Without notifying any of the parties, the court instructed a law enforcement officer to play the tapes for the jury. The Supreme Court held, "[r]eplaying the tapes in the present case without prior notice to Caliguri was highly improper." Id.

b. The jury deliberated in public, in front of a member of the prosecutor's office, without Wade's knowledge.

In Wade's case, the deliberating jurors asked to review a videotape admitted into evidence. CP 35. CrR 6.15(f) states that when the deliberating jury sends a written question to the judge, "the court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate

response." The court did not provide any notice to Wade or his lawyer. 9/14/10RP 2.

CrR 6.15(f) also provides that, "The court shall respond to all questions from a deliberating jury in open court or in writing." Here, without making any contemporaneous record, the judge called them into the courtroom. The judge explained, "I told them they could come into the courtroom and see it." 9/14/10RP 2.

The judge did not indicate that the courtroom was locked or public access was barred. The bailiff said she went in and out of chambers while the jury reviewed and discussed the evidence. 9/14/10RP 5. The judge did not remain in the courtroom, but the clerk Shawnee, the bailiff, and a paralegal from the prosecutor's office were present. 9/14/10RP 3.

The bailiff let the juror watch the videotape for up to one-half hour. 9/14/10RP 3. The court sent for a member of the prosecutor's office to control the videotape so that bailiff would not have to operate the computer that held the videotape. Id. at 7.

When the jurors came into the courtroom, they sought multiple playbacks of the same videotape and instructed the prosecutor's paralegal, Lori Bridgewater, about what they wanted to see. 9/14/10RP 4. The paralegal tried not to "focus on their

discussion," and did not speak to them about the case, but she admitted the jurors were speaking about the case and explaining to her what evidence they wished to see. Id.

After about 15 minutes of watching the videotape, the jurors asked to compare the clothes admitted into evidence with the videotape. The court said, "I guess so." 9/14/10RP 3. The bailiff saw the jury looking at clothes and shoes along with the videotape. Id. The prosecutor's paralegal remained in the room and operated the videotape as instructed by the deliberating jurors. Id. at 4.

The jurors reviewed evidence while in the courtroom, in front of a member of the prosecutor's office and other court staff, without notice to Wade. They discussed and analyzed the evidence in open court.

The exhibits the jurors reviewed, compared, and analyzed were critical to the case. The perpetrators of the robbery wore masks and the two eye witnesses candidly conceded that they could not identify Wade as a participant. 9/9/10RP 20, 32, 47. In closing argument the prosecution relied heavily on a videotape from the store's security camera which showed the clothes of the robbers. 9/13/10RP 30-32. The jurors discussed and compared this

evidence in front of the prosecutor's paralegal, court clerk, and the bailiff.

c. The jury's deliberation, in public, without notice to Wade, undermined his right to a fair trial.

The jury deliberations violated the "cardinal requirement" that deliberations occur in private. Cuziak, 85 Wn.2d at 148-49. The procedure authorized by the court violated CrR 6.15(f) exists to protect that constitutional guarantee, underlying the inviolate right to a jury trial in Washington. Const. art. I, § 21; see State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (noting heightened importance to jury trial right guaranteed by state constitution). The court did not give notice to Wade, or his attorney, that the jury had asked a question. See Irby, 170 Wn.2d at 884-85 (noting right to participate in trial whenever substantial rights may be affected). It did not consult Wade about its procedure for letting the jury review evidence. And of most concern, the court let the jury deliberate in the courtroom, in front of court staff and a paralegal from the prosecutor's office.

The sanctity of jury deliberations is a structural requirement of a fair trial. Cuziak, 85 Wn.2d at 148-49. "[P]rejudice will be presumed to flow from a substantial intrusion of an unauthorized

person into the jury room unless it affirmatively appears that there was not and could not have been any prejudice." Id. Because jurors may not be asked to explain how they reached their verdict, the procedure by which the jury deliberates must ensure that they are deliberating without the potential for improper influence. See State v. Hoff, 31 Wn.App. 809, 813, 644 P.2d 763, rev. denied, 97 Wn.2d 1031 (1982).

The bailiff and paralegal said they tried not to listen or "focus" on the discussions the jurors had in their presence. 9/14/10RP 4, 7. However, the staff members' efforts to insulate themselves does not explain whether the jurors were influenced by deliberating in public. The jurors had no way to know whether the people present were listening and might convey their sentiments to others. These subtle influences affect the jury and threaten "the integrity of the jury process itself." See Jones v. Sisters of Providence Hospital, 140 Wn.2d 112, 120, 994 P.2d 838 (2000). The impossibility of knowing how the improper public deliberations affected the jury is the reason why the error must be treated as structural, especially when the court never told the defense that it was proceeding in this fashion and deprived him of the opportunity to object or suggest a different method of providing the jury with the

information they wanted in a private setting, free from the risk of outside influence.

4. **Defense counsel's failure to request a jury instruction telling the jury to consider the dog tracking evidence with caution denied Wade his Sixth Amendment right to ineffective assistance of counsel**

a. An accused person is constitutionally entitled to the effective assistance of counsel.

An accused person has the right under the Sixth Amendment and article I, section 22 of the Washington Constitution to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel has two components: (1) deficient performance and (2) resulting prejudice, i.e., that but for counsel's deficient performance, there is a reasonable probability that the verdict would have been different. Strickland, 466 U.S. at 687. An ineffective assistance of counsel claim is reviewed de novo. A.N.J., 168 Wn.2d at 109.

b. Wade would have been entitled to an instruction telling the jury to view the dog track evidence with caution if he had requested one.

Recognizing the possibility that such evidence may be of questionable reliability, Washington requires a limiting instruction be given when dog track evidence is introduced that tells the jury to view such evidence with caution. State v. Wagner, 36 Wn.App. 286, 673 P.2d 678 (1983); accord State v. Bockman, 37 Wn.App. 474, 682 P.2d 925 (1984). In Wagner, such an instruction was requested by defense counsel, but refused by the trial court.[7] Wagner, 36 Wn.App. at 287. This Court held that the failure to give the instruction created an impermissible risk that the conviction rested on the dog track evidence alone, and reversed Wagner's conviction. Id. at 288.

Many other jurisdictions similarly require the jury be given a cautionary instruction when dog tracking evidence is admitted. See e.g. People v. Mitchell, 110 Cal.App. 4th 722, 2 Cal.Rptr 3d 49, 60 (2003) (citing CALJIC No. 2.16, which advises the jury that dog

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[7] Wagner's proposed instruction would have informed the jury:

> Evidence of tracking by bloodhounds or other trained dogs should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such evidence alone.

tracking evidence is "not by itself sufficient to permit an inference that the defendant is guilty"); State v. Bridge, 60 Ohio App. 3d 76, 78-79, 573 N.E.2d 762 (1989) (instruction admonishes jury that dog track evidence is of "slight probative value" and should be viewed with the "utmost caution"); State v. Taylor, 118 N.H. 855, 858, 395 A.2d 505 (1978) (instruction must inform the jury to view dog track evidence with caution and that conviction may not rest on such evidence alone).

These decisions make evident the courts' acknowledgment that while dog tracking evidence may be relevant, trial courts must take pains to ensure the evidence on its own cannot lead to conviction, because it is insufficiently reliable. Indeed, the dog tracking evidence admitted here illustrated this principle.

Officer Kirk Waldorf lauded his dog Haji as "successful" in apprehending potential suspects, and said he had made "well over 100 actual criminal apprehensions." 9/8/10(a.m.)RP 27-28.
He explained the dog's superior ability to follow multiple scents of different people over a long distance. Id. at 22, 36. Waldorf claimed the dog could follow the separate scents of the three perpetrators as they fled, Id. at 36. The police found Wade through this K-9

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36 Wn. App. at 287.

search, and because police later found beer in the area, the search was crucial to whether Wade was one of the perpetrators. The complaining witness admitted she did not know if Wade was the perpetrator and the videotape did not show the perpetrators' faces, or even their races. 9/9/10RP 32; 9/13/10RP 38. Given the equivocal evidence and the settled law entitling an accused person to an instruction such as the proposed instruction in Wagner, if Wade's counsel had proposed an instruction it would have been given.

c. Defense counsel's failure to request a jury instruction that would have told the jury to view the dog track evidence with caution was deficient performance that prejudiced Wade.

As noted, the Strickland test requires an accused person to establish that his attorney's performance was deficient and that he was prejudiced by his lawyer's error or omission. Strickland, 466 U.S. at 689-90. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. The focus is on whether counsel's decision "was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 523, 125 S.Ct. 2527, 176 L.Ed.2d 471 (2003). For example, if it can be concluded that counsel's omission "resulted

from inattention, not reasoned strategic judgment" then it was not reasonable. Id. at 526.

In this case, identity was the sole issue. Dowell admitted she could not say whether Wade was the person in the store "because I never saw his face." As the pictures from the videotape show, the recording is blurry and mostly shows black hooded people. Ex. 21. Thus, any evidence that tended to corroborate the State's theory that Wade was a perpetrator was of critical importance. The dog track evidence was presented to the jury as a "successful" aspect of "criminal apprehension" without any effort by Wade's lawyer to temper their consideration of it with an instruction telling them that the evidence should be evaluated with caution. 9/8/10(a.m.)RP 27-28. Wade's lawyers' omission was deficient performance that prejudiced Wade.

E. CONCLUSION.

For the reasons stated above, Pierre Spencer Wade respectfully asks this Court to remand his case for a new trial.

DATED this 31st day of January 2011.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67332-7-I
v.	)	
	)	
PIERRE SPENCER-WADE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PIERRE SPENCER-WADE 891539 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON
2012 JAN 31 PM 4:48

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JANUARY, 2012.

X_____

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