

NO. 74833-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID BURCH,

Appellant.

FILED
Oct 28, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The court erred in refusing to accept a peremptory challenge where there was no showing of purposeful discrimination.

Issue Pertaining to Assignment of Error

Following the court's own objection, the trial court prohibited defense counsel from exercising a peremptory challenge against an African American juror. But there was no prima facie showing of discrimination. And, even though defense counsel was not legally required to provide an explanation, she offered valid race-neutral reasons for the peremptory challenge. Did the trial court err in refusing to remove the juror based on the valid peremptory challenge by the defense?

B. STATEMENT OF THE CASE¹

The State charged David Burch with first degree theft (taking from person of complainant)² and fourth degree assault, a gross misdemeanor,³ for an incident occurring in downtown Seattle on October 31, 2015. CP 1-6.

¹ The record in this case consists of seven consecutively (but not chronologically) paginated volumes. This brief cites to these volumes as "RP." The sole non-consecutively paginated volume is the March 4, 2016 sentencing transcript. It is referred to as "Sent. RP."

² RCW 9A.56.030(1)(b).

³ RCW 9A.36.041.

During jury selection, the court prevented defense counsel from exercising a peremptory challenge against an African American juror.⁴ RP 685-87. The challenged juror served on the jury that convicted Burch. RP 372, 691-92. Facts related to this issue are set forth in detail in the argument section below.

In a light favorable to the prosecution, the evidence at trial showed the following: Tatiana Deriugin, a physician and Washington Athletic Club (WAC) member, dropped off her gym bag at the WAC garage. RP 190. As she walked southbound on the west side of Sixth Avenue, she saw the man later identified as Burch walking toward her. RP 190-94. He was cursing and kicking at the mirror of a parked car. RP 194.

Deriugin retrieved her phone to call 9-1-1, but she had difficulty entering her pass-code. RP 195. Burch approached Deriugin, yelled at her, and then began to strike at her head and neck with motions that witnesses described as bear-like.⁵ RP 198. Deriugin held her arm up to

⁴ Burch and the complainant in this case are both described as “white.” RP 172 (witness description of complainant); CP 6 (booking form identifying Burch as “W” or white).

⁵ After Burch attempted to interact directly with jurors, the court warned him to address his statements to defense counsel. RP 91-92, 693-94. The court expressed some concern regarding Burch’s mental health, but noted that “Burch understands that this is a trial, and so far he appears to be able to work with [defense counsel] so that she can represent[] him, so I’m not concerned about competency.” RP 92.

protect her face. RP 20.2. As did so, Burch snatched the phone from Deriugin's hand, ran into the street, and smashed the phone on the ground. RP 205-06. Burch then walked away. RP 208.

A group of off-duty service members witnessed the incident, followed Burch, and pointed him out to police. RP 255-62, 273-77.

Deriugin suffered a strained neck and shoulder and a small cut to her face. RP 209.

Burch also testified at trial and denied culpability. Burch perceived that Deriugin was acting bizarrely and "ranting." RP 288-96, 302. She was fumbling with her phone, and she ended up handing her phone to Burch, who dropped it. RP 296, 316. Burch was stopped by police while trying to get away from Deriugin. RP 313-14.

The jury convicted Burch as charged. CP 38. The court sentenced Burch to a low-end standard range sentence on count 1, with the count 2 sentence (12 months unsupervised probation) to run consecutively. CP 65, 68-69; Sent. RP at 14.

Burch timely appeals. CP 74.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO EXERCISE A VALID PEREMPTORY CHALLENGE, AND REVERSAL IS REQUIRED.

Before jury selection, the trial court told the parties it would require them to explain any peremptory challenge exercised toward any juror who appeared to be a member of a minority. The court also stated that any explanation would be subject to the court's approval before the juror would be dismissed. The court then refused to allow defense counsel to excuse a juror, absent any prima facie showing of discrimination.

In employing this procedure, the court impermissibly "collapsed" the test it needed to apply in order to block a party's exercise of a peremptory challenge. Moreover, Washington courts uniformly hold that the remedy for such a denial is reversal of the challenged convictions. Thus, this Court must reverse Burch's convictions in this case.

- a. Introduction to applicable law

An accused person is guaranteed the right to a fair and impartial jury. U.S. CONST. amend. VI; CONST. art. I, § 21 and § 22 (amend. 10). To protect this right, the accused person may excuse any prospective juror "for cause." State v. Brett, 126 Wn.2d 136, 157-58, 892 P.2d 29 (1995); see RCW 4.44.150, .190; CrR 6.4(c). Additionally, an accused person

may exercise a specified number of peremptory challenges against potential jurors without giving a reason. State v. Briggs, 55 Wn. App. 44, 51, 776 P.2d 1347 (1989); see RCW 4.44.140; CrR 6.4(e)(1).

The equal protection clause of the federal constitution prohibits racial discrimination during the jury selection process. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Meredith, 178 Wn.2d 180, 189, 306 P.3d 942 (2013), cert. denied, 134 S. Ct. 1329 (2014). The Batson rule, originating in a challenge to a prosecutor's action, has been extended to actions by the defense as well. Georgia v. McCollum, 505 U.S. 42, 44, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). Such discrimination in jury selection harms not only individual defendants and excluded jurors, it undermines the public's confidence in the basic fairness of the judicial system. Batson, 476 U.S. at 87.

The United States Supreme Court established a three-part test to guard against the discriminatory use of peremptory challenges during jury selection. A party objecting on Batson grounds must first establish a prima facie case of purposeful discrimination. Batson, 476 U.S. at 93-94; State v. Vreen, 99 Wn. App. 662, 666, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923, 26 P.3d 236 (2001). The first portion of the test requires "something more" than a peremptory challenge toward a member of a

racially cognizable group. State v. Rhone, 168 Wn.2d 645, 653, 229 P.3d 752 (2010).

“[S]omething more” than a single peremptory challenge against a member of such a group may include (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against such a group, (3) the level of a group’s representation in the venire as compared to the jury, (4) the races of the defendant and the complainant, (5) past discriminatory use of peremptory challenges by the attorney, (6) the type and manner of the attorney’s questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck. State v. Wright, 78 Wn. App. 93, 100-01, 896 P.2d 713 (1995). The list is not exclusive. Rhone, 168 Wn.2d at 656-57.⁶

⁶ The first step of the Batson test has, in recent years, been the subject of controversy in Washington’s courts. But the test has not, ultimately, been altered. In 2010, for example, the Supreme Court addressed the first step of the test in Rhone, 168 Wn.2d 645. There, the four-vote lead opinion applied this state’s established rule for the first step of the test. Id. at 657. The four-vote dissent proposed a new bright-line rule. Id. at 661. Chief Justice Madsen wrote a concurrence stating, “I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent.” Id. at 658 (Madsen, C.J., concurring). This led lower courts to question whether, in the future, they

Next, *if*, and only if, a prima facie case is established, the burden shifts to the challenger to supply with a race-neutral explanation for the challenge. Rhone, 168 Wn.2d at 651. For the final step of the three-part test, the trial court determines whether purposeful discrimination has been established. Id.

However, the trial court should not elicit the race-neutral explanation *before* determining whether a prima facie case is established. Wright, 78 Wn. App. at 100.

Following a number of other jurisdictions, this Court has held that a trial court may raise an objection to the exercise of a preemptory challenge sua sponte. State v. Evans, 100 Wn. App. 757, 763-68, 998 P.2d 373 (2000). But even though a judge, rather than an opposing party, may raise Batson issue on her own, she must carefully follow three-part

should follow the rule in Rhone's lead opinion or in the dissent. Meredith, 178 Wn.2d at 181-82.

In 2013, in Meredith, the Supreme Court reaffirmed the previous rule, as set forth in State v. Hicks 163 Wn.2d 477, 490, 181 P.3d 831 (2008), and State v. Thomas, 166 Wn.2d 380, 397-98, 208 P.3d 1107 (2009). This rule provides that a trial court *may*, but need not, find that a party has made a prima facie showing under Batson ““based on the dismissal of the only venire person from a constitutionally cognizable group.”” Rhone, 168 Wn.2d at 653 (lead opinion) (internal quotation marks omitted) (quoting Thomas, 166 Wn.2d at 397). Under that rule, however, ““something more’ than a single peremptory challenge against a member of a racially cognizable group” is required. Meredith, 178 Wn.2d at 184 (quoting Rhone, 168 Wn.2d at 654).

test set forth in Batson before blocking the peremptory challenge. Evans, 100 Wn. App. at 768; see also State v. Mootz, 808 N.W.2d 207, 216-18 (Iowa 2012), as corrected (Feb. 22, 2012), as corrected (Apr. 9, 2012) (collecting cases and noting that, while the trial court may raise the issue sua sponte, it must first observe an “abundantly clear” prima facie case of discrimination).

- b. The court erred in denying Burch’s peremptory challenge because there was no prima facie showing of discrimination.

The court erred when it denied Burch’s peremptory challenge because there was no prima facie showing that the challenge was exercised in a race-based or discriminatory manner. In any event, defense counsel provided a valid-race neutral explanation for the challenge.

The record in this case shows the following: Before jury selection began, the trial court stated it would require an explanation for the exercise of any peremptory challenge toward any juror who appeared to be a member of a minority group. RP 78-79. The court explained that

if I see somebody that’s clearly from a minority group . . . and I don’t see a basis for you to exercise a peremptory [challenge] against them and then you do, I’m probably going to ask you about that. Okay? And I’m going to be looking for a really good reason that . . . I observed as to why that person is leaving us, and if I don’t hear it, we’ll keep them.

RP 79.

This scenario came to pass with Juror 15, an African-American woman whom defense counsel sought to remove on Burch's third peremptory challenge. RP 685.

At the start of the voir dire process, each potential juror introduced him- or herself. Juror 15 introduced herself as follows:

My name is [redacted]. I live in Kirkland with my husband. He is a project manager with an investment bank that's based in New Jersey so he's back twice a month. In terms of non-work-related clubs, I'm very active with my sorority, Alpha Kappa Alpha Sorority, Incorporated. I'm an officer in the graduate chapter and also an officer with the foundation which is our fundraising arm. In terms of sources of news, newspaper, subscription to USA Today and Wall Street Journal, internet as well, MSN, Yahoo News, radio, mostly talk radio, sports related, big sports fan. And then in terms of hobbies, my husband and I love to travel. As I said, we're really into sports. He's a football official so I attend a lot of his games. And then I work out. I'm a crossfit⁷ addict.

RP 478-79.

Juror 15 participated in voir dire but did not volunteer significantly more or less information than most jurors. In answering questions posed to the panel as a whole, she did not report any traumatic personal experiences, or experiences closely associated with the charged crimes.

⁷ "CrossFit" is a branded fitness regimen. CrossFit workouts incorporate elements from high-intensity interval training, Olympic weightlifting, plyometrics, powerlifting, gymnastics, kettlebell lifting, calisthenics, "strongman," and other exercises. The regimen "is promoted as both a physical exercise philosophy and also as a competitive fitness sport." See <https://en.wikipedia.org/wiki/CrossFit> (last accessed Oct. 24, 2016).

She reported, however, that her aunt's car had been stolen. E.g. RP 505, 515, 518-24. She had previously served as a juror on a criminal case. RP 568. The prosecutor specifically asked Juror 15 about variations in memories among her and her former sorority sisters when they socialized and talked about old times. Juror 15 clarified that she continued to be affiliated with the sorority at the graduate level as well. She noticed the phenomenon described by the prosecutor more in her workplace than in her interactions with sorority sisters. RP 595-97.

When the time came to exercise peremptory challenges, the jurors were excused from the courtroom, and the parties offered their challenges in open court. RP 78, 684.

As stated above, Juror 15 was Burch's third requested peremptory challenge. The following exchange ensued:

[Defense counsel]: Number 15, Your Honor.

THE COURT: Why?

[Defense counsel]: Your Honor, I'm selecting number 15 because she indicated two things about herself, including her professionalism. She's a profession in a job [sic⁸]. She is very involved with her sorority and with a pretty strict Crossfit regimen. The defense perspective on that is that she's very regimented, she's very much so a

⁸ The voir dire transcripts appear to contain a number of errors in transcription, but, for the most part, the gist of the parties' statements may be gleaned from the existing transcripts.

rule-follower and may have some trouble seeing areas of gray.

THE COURT: I didn't hear that, and she's African American. I mean, . . . she did indicate she's involved in her sorority, but she said they're involved in community activity, which hardly indicates that she's rule driven, and *she didn't say anything about being [rigid] about Crossfit. She just said it's an activity.* It didn't—it's not a stress she gave us when she was talking about her life. I mean, I just don't see it, and I'm very concerned about dismissing a juror of color where I don't see a basis.

Do you follow me? Anything else [regarding Juror 15] that concerns you?

[Defense counsel]: That was just my impression of her, Your Honor, overall was that she was very rule oriented.

THE COURT: I don't know where you get that from. Okay? Is there any other answer you point to? *I hate to assume everybody in Crossfit is rule driven. Do you follow me? I mean, especially when the person doesn't express that in any other way.*

[Defense counsel]: I—I think of it in terms of the—not in being a member of sororities, perhaps just my own impressions, but—

THE COURT: Okay.

[Defense counsel]: —being so involved—I've known people who are involved as an adult in sororities.

THE COURT: Okay. But . . . I'm going to point out that, is sorority she mentioned is an African American sorority. Okay? And she indicated that these hear [sic] vehicle for community involvement, so I'm really having trouble with this. Do you follow me?

[Defense counsel]: I do. I follow you, Your Honor, in terms that in not wanting to excuse someone who's of a minority group. All I say is the impression—

THE COURT: Particularly—

[Defense counsel]: —it was the only—

THE COURT: —when their membership—

[Defense counsel]: —impression that I had.

THE COURT: —is in another minority group that's community based, I have trouble with that being a basis to find any indication of—a basis to excuse her.

I'm going to say no for now unless you can think of another reason to excuse her.

Anybody else that you want to bring your . . . third challenge against?

RP 685-87 (emphasis added).

Thus, the court raised its own objection to the defense's exercise of the peremptory challenge on the sole basis that the juror was African-American. Indeed, the court had announced, in advance, that it would require an explanation for the excusal of any minority juror. RP 79. But the court identified, and the record establishes, no "something more" supporting a prima facie showing of discrimination. Thus, it was error for the court to require a race-neutral explanation for the dismissal. Rhone, 168 Wn.2d at 653; Evans, 100 Wn. App. at 770.

Assuming for the sake of argument that the court's ruling survives the first Batson step, it does not survive the second or third. Defense counsel offered a valid race-neutral explanation—her personal concern that Juror 15 was “very regimented” and a “rule follower” who might have trouble dealing with ambiguity. RP 685. This was clearly sufficient to satisfy the second step of Batson. Evans, 100 Wn. App. at 764.

The court found that counsel's explanation was insufficient. As stated above, however, there was no prima facie showing of discrimination, so there was no need for explanation. But, in any event, the court simply got the facts wrong. Notably, the court was incorrect regarding Juror 15's biographical statements, apparently failing to recall that the juror had self-described as a CrossFit “addict.” RP 479. This certainly implies a level of personal stringency that the mere CrossFit aficionado might lack. Given that jury selection is an art, not a science, defense counsel was entitled to rely on her impressions regarding Juror 15's personality.

Moreover—absent evidence to support such a determination—the court also appeared to ascribe sinister motives to defense's counsel's reservations about 15's post-undergraduate sorority involvement. The court appeared to suggest that the sorority with which Juror 15 was affiliated was a traditionally African American sorority. While that might

be true, there is no indication in the record that defense counsel was aware of that fact, or that counsel was using 15's sorority membership as proxy for race.

In summary, the court erred when it denied Burch's peremptory challenge because there was no prima facie showing that the challenge was exercised in a race-based or discriminatory manner.

c. Reversal is required under *Evans* and *Vreen*.

Beyond the general principals articulated above, two Washington cases with analogous facts also clearly establish that the trial court erred in this case.

In *Evans*, a consolidated appeal, Evans was the accused person in one of two underlying appeals. 100 Wn. App. at 759. Before voir dire, the trial court told the parties that

With regard to any members of the jury panel who are jurors of apparent color, the best I can do, you don't ask members of the jury panel to identify themselves by race or ethnicity, so we will identify jurors who appear to be jurors of color once we have the panel down here. If either of you anticipate the possibility of a peremptory challenge as to any of those jurors, you will need to make a preliminary showing to me, at side bar or outside the presence of the panel, of a race-neutral reason for such possible peremptory. And you will need to have that approved by the court in advance of exercising such a peremptory.

Id. at 759-60 (emphasis added). Defense counsel asked the court if it was "waiving" the requirements of *Batson*. The court denied this, but stated it

was requiring the procedure outlined above as a remedial measure, because so few persons of apparent color appeared as prospective jurors or on juries. The court further indicated that it used the procedure in both civil and criminal cases and regardless of the race or ethnicity of the parties or witnesses. Id. at 760.

The court ultimately denied Evans's peremptory challenge to Juror 2. Juror 2 provided his name, the area of the city in which he lived, and his position with a well-known Seattle company. He said his wife attended the University of Washington and that he enjoyed outdoor activities. The record revealed only that Juror 2 answered affirmatively when the court asked whether anyone had been the victim of a crime. Id.

At the time for challenges, Evans attempted to use a peremptory challenge against Juror 2. The court told counsel it would require a statement, on the record, of a race-neutral reason for the challenge. Counsel gave a reason, but the court rejected it, denying the peremptory challenge. Id.

This Court reversed Evans's conviction. This Court noted that, although a court may raise a Batson issues, it may do so only if a prima facie case of discrimination exists. This Court noted that the trial court's "directive" to the parties

was erroneously premised on the view that the mere challenge to a person of color constituted a prima facie case. That approach impermissibly collapsed the required three-part test into two parts by prematurely requiring the proponent of the challenge to state a race-neutral reason for the strike.

Evans, 100 Wn. App. at 770. This Court found the trial court had erred and that the remedy was reversal of Evans's conviction. Id.

In Vreen, Division Three of this Court reached an identical result based on a somewhat different analysis. Juror 55 was a pastor, a retired military veteran, and the sole African-American person on the panel. Vreen wanted to remove the juror because he believed the juror's "authoritarian" background made it likely he would favor the prosecution. After a challenge by the State, the trial court denied the peremptory challenge. Vreen, 99 Wn. App. at 665.

Vreen appealed. Division Three noted that, even though the Court was not provided a record of jury selection, it *was* provided the transcript of a later exchange that revealed what had occurred. After jury selection and before opening arguments, Vreen's attorney moved to reconsider a ruling granting the State's objection to Vreen's peremptory challenge. Id. at 666.

At that point, the State asked the court either to find that the defense's attempt to strike Juror 55 was a racially-motivated act and that

the reasons given by defense were pretextual, or to grant Vreen's motion, and remove the juror. Id.

The trial court responded that Juror 55 was the only African-American in the jury pool, so the defense was required to give a nondiscriminatory reason for challenging him. And the court had determined that defense's reason for the challenge was insufficient to rebut the presumption of discrimination. Similar to the facts of this case, the trial court also expressed its belief that the juror's demeanor indicated he was not authoritarian, but would make a thoughtful and unbiased juror. The court refused to remove the juror from the panel. Id. at 666-67.

Division Three reversed. The Court appeared skeptical as to whether the State had made a prima facie showing of discrimination. But it did not expressly rule on that question. Id. at 667. Instead, moving to the second step of the Batson test, the Court stated that

the defense provided a race-neutral explanation for the peremptory challenge. The court found this explanation to be insufficient to rebut the presumption of discrimination. We disagree. It is plausible that the defense would not want an ex-military man on the jury. The defense's motivation for the challenge was facially race-neutral and the State failed to show mere pretext.

Vreen, 99 Wn. App. at 667.

As in Evans and Vreen, reversal is required in this case. As in Evans, the court impermissibly "collapse[d]" the Batson test. Evans, 100

Wn. App. at 769. Put another way, there was no prima facie showing of discrimination, because “something more” than the peremptory challenge of a member of a racially cognizable group is required. Rhone, 168 Wn.2d at 653. *Nothing* more was present here.

And although it is unnecessary for this Court to reach the second part of the test, as in Vreen, the trial court erred in refusing to accept counsel’s explanation. Defense counsel’s explanation was race-neutral. Moreover, it is supported by the record, and at odds with the court’s erroneous view of the record. RP 478-79, 685-87.

- d. The remedy for the error is reversal of Burch’s convictions.

The remedy for the improper denial of the exercise of a peremptory challenge is reversal. State v. Vreen, 143 Wn.2d 923, 933, 26 P.3d 236 (2001); Evans, 100 Wash. App. at 774-75. The “erroneous denial of a litigant’s peremptory challenge cannot be subject to harmless error analysis when the objectionable juror sits on the panel that convicts the defendant.” Vreen, 143 Wn.2d at 93. As a result, Burch’s convictions must be reversed.

2. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

As a final matter, if Burch does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate

Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Burch, who appears to suffer from some mental health issues, lacks financial resources. CP 71-72 (Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense).

At sentencing, the court imposed only mandatory fines, waiving other costs, as well as interest. CP 64. The trial court then ordered Burch to pay only \$1 a month, commenting that Burch was "truly indigent." Sent. RP at 14.

The superior court also found Burch should be allowed to appeal at public expense. CP 75-77. Indigence is presumed to continue throughout

the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (citing RAP 15.2(f)), review denied, 185 Wn.2d 1034 (2016).

In summary, in the event that Burch does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

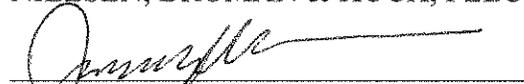
D. CONCLUSION

The trial court erred in refusing to accept Burch's valid peremptory challenge. Reversal is therefore required. Should Burch not prevail on appeal, however, this Court should decline to award the costs of appeal based on his indigence.

DATED this 28TH day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorney for Appellant