

SUPREME COURT NO. 80037-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEODORE ROOSEVELT RHONE,

Petitioner.

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

The Honorable Linda Lee, Judge

ADDITIONAL BRIEF OF APPELLANT/PETITIONER

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A. ISSUES ON REVIEW

Does the trial court err in denying a challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), without requiring the prosecutor to provide a reason for excusing the only available African-American on the panel, where there is nothing in the record of voir dire to suggest any plausible race-neutral reason for excusing the juror?

B. STATEMENT OF THE CASE

The court began voir dire by asking the jurors general questions to determine whether they had heard of Mr. Rhone's case, knew anyone connected with the case, had been involved in a similar case or were unable to sit on the jury because of other commitments. SuppRP 8-34. Juror No. 19 was not among the jurors who had a prior personal experience with charges similar to Mr. Rhone's (SuppRP 9-24), nor did he have any connection with the legal profession, the court system or law enforcement.¹ SuppRP 24-30. He was not among the prospective jurors who identified a reason why they could not sit on the jury. SuppRP 32-35.

After the general questions, the court asked each prospective juror to provide: "No. 1, your name; No. 2, area of the county where you live; No. 3, your employment and/or activities; No. 4, employment of your

¹ At trial, the prosecutor identified Juror No. 19 as the juror whose peremptory challenge gave rise to the Batson motion. RP 547.

spouse and/or children; and 5, the activities of you suppose [sic] and/or your children." SuppRP 34. Prospective Juror No. 19 answered:

My name is Larry Nelson. I live in Spanaway. I'm a Boeing employee. My wife is employed at a hospital in Lakewood. And I have three adult kids, and they work -- The oldest one works at a restaurant at Sea-Tac, and my son works at Walmart. And I have a daughter that's a student. My hobbies are weightlifting and bodybuilding.

SuppRP 42-43. Seven of the other forty-one prospective jurors, like No. 19, were employed, had working spouses and adult children. SuppRP 35-36, 37-38, 41, 45, 49, 50-51, 53. Others differed only in that they were retired, homemakers, divorced or had younger children. SuppRP 35-53. Only five were single and without children. SuppRP 37-39, 44, 48.

During the the first round of questioning by counsel, the prosecutor focused on the experiences of prospective jurors who had previously served on juries. SuppRP 54-70. Because Juror No. 19 had never served on a prior jury, he was not questioned by the prosecutor during this round.

Defense counsel, during his first round of questioning, asked the jurors how they would know if someone were telling the truth. When no one responded, defense counsel directed the question to Juror No. 19. Before No. 19 could answer, however, another juror volunteered an opinion. SuppRP 77. A third juror stated that a person who acted nervous might not be telling the truth, even though being nervous did not

necessarily mean the person was lying. SuppRP 78. When asked if he was nervous, No. 19 agreed that he was, but stated that this did not mean he was not telling the truth. SuppRP 78-79.

During the second round, the prosecutor led this exchange:

MR. OISHI: Juror No. 19, are you familiar with Bill Gates?

PROSPECTIVE JUROR NO. 19: Yes, I am.

MR. OISHI: Okay. Bill Gates I think you would agree with me is a very powerful, influential person in our country, if not our world, probably correct?

PROSPECTIVE JUROR NO. 19: I would say so.

MR. OISHI: Okay. In some respects, he might almost be as influential as the president, maybe even more so in some circles. Would you agree with that?

PROSPECTIVE JUROR NO. 19. I would say so.

MR. OISHI: Let's say Mr. Gates' house over on Mercer Island is robbed. Do you think the police and the prosecutor's office up in King County would properly investigate that case and prosecute that case?

PROSPECTIVE JUROR NO. 19: Yes.

MR. OISHI: Okay. What if you had a homeless person who was sitting out there, you know, in front of the courthouse? He's panhandling, let's say. And to be honest, I probably should know this. I don't know. But let's presume that you are not supposed to panhandle out in front of the courthouse. What if that panhandler gets robbed? Juror No. 19, do you think the police and the prosecutor's office should investigate that case and seek justice in that case as well?

PROSPECTIVE JUROR NO. 19. I do.

MR. OISHI: Okay. Should the authorities, the State, take any more actions or do any more in Mr. Gates' case than they do in the panhandler's case, or do you think it should be the same?

PROSPECTIVE JUROR NO. 19: It should be the same, but I doubt that it would be.

MR. OISHI: Okay. Now, let's go into our panacea, our perfect world, for a second okay.

No. 19, why do you think it should be the same?

PROSPECTIVE JUROR NO. 19: Because they're both individuals. They both should be treated fairly.

MR. OISHI: Okay, Juror No. 19, do you think that crime victims or people that, you know, occasionally have to talk to the police because maybe, you know, that have experienced crime -- do you think those people are always perfect individuals?

PROSPECTIVE JUROR NO. 19: No.

MR. OISHI: Okay. Should those people still be dealt with in a just manner, that they should have equal justice as anyone else?

PROSPECTIVE JUROR NO. 19: I do.

MR. OISHI: Thank you. Juror No. 33, agree or disagree with 19?

PROSPECTIVE JUROR NO. 33: I agree.

MR. OISHI: Okay, What if the panhandler out here is a pretty unsavory character? You know, your were walking into the courthouse, he was bugging you, you couldn't get rid of him, okay? Do you think if he was robbed that he still should be someone who should receive justice?

PROSPECTIVE JUROR NO. 33. Yes.

MR. OISHI: Okay. Do you see any difference between that person and -- you know, obviously I took the extreme example, right, Bill Gates. Do you see any differences in how those cases should be handled?

PROSPECTIVE JUROR NO. 33: None at all.

SuppRP 93-95.

During the preliminary questioning, Juror No. 33 said:

My name is Theodore Lactaøen. I live in Tacoma by Point Defiance. I work for Boeing as a shop investigator. I check out things like electrical problems. My wife works for an insurance processing company. My daughter works at a car dealership. My son works at Guggenheimer, an investment firm. And I fish.

SuppRP 49. Juror No. 33 also was questioned about how he would apply the law to the facts; he agreed that if the facts did not support either a verdict of guilty or not guilty, the verdict had to be not guilty. SuppRP 1-8-109. No. 33 sat as an alternate on the jury.

During defense counsel's second round, counsel asked "Why do innocent people get convicted?. . . [Why] all these years prior to having this [DNA] evidence exonerate them." RP 125. Juror No. 19 explained, "Just a coincidence, wrong place, wrong time." When asked if this had ever happened to him, Juror No. 19 responded "No, it has not." RP 125.

The prosecutor and defense counsel also asked for opinions about the right not to testify, the presumption of innocence, proof beyond a reasonable doubt, false convictions and gun ownership. SuppRP 76-85,

88-89, 90, 96, 97, 104, 207, 236, 130. No other responses by or questions to Juror No. 19 were recorded during voir dire.

Five jurors were excused for cause. SuppRP 110-115. The state used its peremptory challenges to exclude Prospective Jurors Nos. 4, 12, 17, 7, 19 and 26; and potential alternates Nos. 29 and 32. SuppCP ____.

Six men and six women served on the jury. SuppRP 139. Juror No. 1 was retired from his small business. SuppRP 35. His wife worked for the VA Hospital; one of his daughters worked for Boeing and the other two were homemakers. SuppRP at 35. Juror No. 2 was employed, as was her husband and two of her adult children. SuppRP at 36. Juror No. 6 was a homemaker whose husband and adult children were employed. SuppRP 37. Juror No. 9 was a physician whose wife was a homemaker and who had two children in grade school. SuppRP 39. Juror No. 10 was retired, as was her husband; she had adult children who were employed. SuppRP 38. Juror No. 15 was divorced with two adult children who were employed. SuppRP 41. Juror No. 16 worked, as did her husband and adult children. SuppRP 41. Juror 25 worked, was divorced and had an adult daughter who was a homemaker. SuppRP 46. Juror No. 27 was not married and had three adult children. SuppRP 46. Jurors, Nos. 9 and 28 were single and had no children. SuppRP 46-47.

C. ARGUMENT

The trial court ruled that as a matter of law Mr. Rhone had not established a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986); and, accordingly, did not require the prosecutor to provide a race-neutral reason for excluding Prospective Juror No. 19, the lone African-American juror. The voir dire demonstrates that if the prosecutor had been required to provide a race-neutral reason, that reason would have been insufficient and pretextual.

Prospective Juror No. 19, Larry Nelson, was typical of the other jurors on the 41-person panel and the jurors who actually sat on the jury. SuppRP 35-53, 139. Nothing about his work or family situation set him apart. SuppRP 35-53. He worked at Boeing; his wife and two of his adult children worked as well; his third child was a student. SuppRP 42-43. In particular there was a remarkable similarity between Juror No. 19's answers to questions about whether all crime victims should be treated equally and fairly and those of Prospective Juror No. 33, who also worked for Boeing and whose wife and adult children were also employed. SuppRP 49, 93-95. Neither Juror No. 19 nor No. 33 were questioned at any length about other views or opinions. Juror 19, who was African-

American, was excused, while Juror No. 33 who was not African-American, sat as an alternate on the trial jury.² SuppRP 139.

Juror No. 19 had no prior knowledge of the case or prior experience with a similar case. Nothing from the record suggested any basis for challenging Juror No. 19. The prosecutor made no effort to question No. 19 about his life or opinions beyond his views on crime victims.

The state might argue that a juror who believed that the police and prosecutor would make a greater effort for Bill Gates than for a panhandler would be sympathetic to the defense. Here, it was, however, the state's theory that the victim was a drug user who owed money to Mr. Rhone. RP 989. The state was, therefore, looking for jurors, who like No. 19, believed all victims should have their case well prosecuted.

After the Batson challenge, the judge clearly did not identify anything about Juror No. 19's demeanor which would provide a race-neutral reason for denying the challenge. The court's only finding was that

² In supplementing the record at trial, the prosecutor noted Juror No. 9, appears to be Asian-American," first alternate "Mr. Castro, appears to be perhaps Hispanic," and "alternate No. 2, Mr. Lactaoen, I believe perhaps is Filipino-American." SuppRP 547. The presence of persons of different ethnicities, however, cannot justify the discriminatory excusing of African-Americans from jury pools. If prospective jurors are excused because of the prosecutor's bias against having African-Americans sit as jurors, Batson is violated. It is not necessary that the prosecutor has not removed all people whom he perceives to be "minorities."

the defense failed to show circumstances beyond excusing Juror No. 19 which would give rise to an inference of discrimination.

In Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), the United States Supreme court held that "side-by-side comparisons of some black venire panelists who were struck to white panelists allowed to serve" could provide evidence "tending to prove purposeful discrimination." Even recognizing that a prosecutor's reason for excusing a juror might be intuitive, the Court held that, where race is at issue, the peremptory challenge must nevertheless stand or fall on the plausibility of the reason given for it. Miller-El, 545 U.S. at 253. Further, where the prosecutor fails to engage in any meaningful examination on a subject, it is unlikely that this subject provided a legitimate reason for exercising a challenge. Miller-El, 545 U.S. at 246.

In Snyder v Louisiana, 128 S. Ct. 1203, 170 L. Ed. 2d 176 (2008), the Supreme Court reiterated that the prosecutor's reasons for excusing a black juror can be evaluated in light of similar non-African-American jurors who were not excused. And while the demeanor of a prospective juror might distinguish him or her from jurors who were not excused, the trial court cannot be presumed to have relied on the demeanor of the prospective juror where the court does not make a finding about demeanor. Snyder,

128 S. Ct. at 1208-1209. In Snyder, the prosecutor identified the prospective juror's nervousness as one of two reasons for excusing him. Snyder, 128 S. Ct. at 1208-1209. But because the trial court made no finding about the juror's demeanor, the Supreme Court held that it could not be presumed that trial court relied on the juror's credibility as a legitimate basis for excusing him.

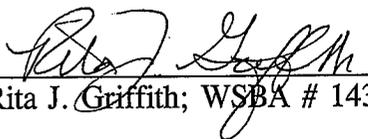
Here, nothing in the record suggests a race-neutral basis for excluding Prospective Juror No. 19. What the record *does* makes clear is that requiring the prosecutor to give his reasons for excusing the sole African-American on a panel is essential to protecting against invidious discrimination in jury selection. Otherwise, a prosecutor can show little interest in the juror and excuse him or her by a peremptory challenge. The defense will be unable to demonstrate overt circumstances suggesting discrimination, and neither he nor the excused juror will be protected.

D. CONCLUSION

Mr. Rhone's conviction should be reversed under Batson.

DATED this 24th day of March, 2009.

Respectfully submitted,


Rita J. Griffith; WSBA # 14360

CERTIFICATE OF SERVICE

I certify that on the 24th day of March, 2009 I caused a true and correct copy of Additional Brief of Appellant/Petitioner to be served on the following via prepaid first class mail:

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