NO. 80037-5

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE RHONE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee, Judge

No. 03-1-02581-1

SUPPLEMENTAL BRIEF

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SUPREME COURT
STATE OF WASHINGTON
2009 APR 27 P 3: 26
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant has failed to make a prima facie showing of purposeful discrimination based upon the State's exercise of peremptory challenges where there is no evidence in the record that the State's use of its peremptory challenge was racially motivated?

B. STATEMENT OF THE CASE.

1. Facts

The parties appeared for voir dire on April 27, 2005. SuppRP 2. At the beginning of voir dire, the court asked general questions of prospective jurors. SuppRP 8-53. These questions included whether any of the prospective jurors had heard of this case, had experience with similar types of crimes, and asked them to give general information about themselves including their names, where they lived, and basic family information. SuppRP 8-53. At the conclusion of the court's questions, each of the attorneys were given opportunities to follow-up on the court's questions and to ask their own questions of the jury. SuppRP 53, 71.

Prospective Juror No. 19[1] first spoke during the court's general questioning. SuppRP 42. He answered as follows to the court's general questions:

> My name is Larry Nelson. I live in Spanaway. I'm a Boeing employee. My wife is employed at a hospital in

[1] Prospective Juror No. 19 was identified by the State after defendant's motion as the African American prospective juror who was the subject of defendant's motion. RP 547.

> 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. Prospective Juror No. 19 also answered in the affirmative when defense counsel asked him if he was nervous. RP 78. When defense counsel asked if the fact that he was nervous meant that he was not telling the truth, Prospective Juror No. 19 responded "No, it does not." SuppRP 78.

Prospective Juror No. 19 also answered a series of questions posed by the State:

> STATE: ...Now, let me ask – I'm trying to think of people I haven't spoken to. Juror No. 19, are you familiar with Bill Gates?
>
> NO. 19: Yes, I am.
>
> STATE: 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?
>
> NO. 19: I would say so.
>
> STATE: Okay. In some respects, he might almost be almost as influential as the president, maybe even more so in some circles. Would you agree with that?
>
> NO. 19: I would.
>
> STATE: Let's say Mr. Gates's house over on Mercer Island is robbed. Do you think the police and the prosecutor's office up in King County should properly investigate that case and prosecute that case?

NO. 19: Yes.

STATE: Okay. What if you had a homeless person who was sitting out here, you know, in front of the courthouse? He is 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?

NO. 19: I do.

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

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

STATE: 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?

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

STATE: 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, they have experienced crime – do you think those people are always perfect individuals?

NO. 19: No.

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

NO. 19: I do.

STATE: Okay. Thank you.

SuppRP 93-95 (emphasis added).

The final comment Prospective Juror No. 19 made during voir dire was when defense counsel asked the venire in general "Why would a person end up in prison for all these years prior to having this evidence [DNA] exonerate them? Anyone know why?" RP 125. Prospective Juror No. 19 volunteered that it may be a coincidence – a person being in the wrong place at the wrong time. RP 125.

At some point, the parties and the court went into chambers to address for cause challenges that had arisen during the voir dire process. SuppRP 111. The challenges and the bases were put on the record after the jurors were excused for the day. SuppRP 110-116. The prospective jurors who were excused for cause were 5, 11, 20, 22, and 41. Both the State and the defense agreed each of these individuals should be excused for cause. SuppRP 110-116.

At the conclusion of voir dire, the parties exercised their peremptory challenges. SuppRP 138; CP 179. The State exercised peremptory challenges to strike prospective jurors numbered 4, 7, 12, 17, 19, 26, 29, and 32. CP 179. Similarly, defendant used his peremptory challenges to strike prospective jurors numbered 3, 14, 18, 21, 23, 24, and 30. CP 179. There were no objections to any of the peremptory challenges exercised by either party. SuppRP 138-140.

After the jury was empanelled, trial counsel for defendant advised the court that defendant wished to address the court about the jury. RP

438. At that time, defendant noted the prosecutor removed "the black, African-American, man off the jury." RP 439. Defendant advised the court that he wanted someone from his culture on the jury. RP 439. Without someone from his culture on the jury, defendant advised the court that it would not be a jury of his peers. RP 439. After some discussion off the record, defense counsel advised the court defendant was requesting a new jury pool. RP 439.

While noting that there is no Constitutional right to be tried by a jury containing at least one member of the defendant's race, the court interpreted defendant's motion to be a ***Batson*** challenge. RP 451. The court set out the three part ***Batson*** test and found that "defendant has not provided this Court with any evidence of circumstances raising an inference of discrimination by the prosecution. The defendant merely makes a bare assertion that there are no African Americans on this jury." RP 452. The court further explained:

> That there were only two African Americans in the entire veneer panel. One was excused for cause based on agreement by the defense. Therefore, out of a panel of 41, there was only one African American in the pool. The mere fact that [the] State exercised its preemptory on that African American, without more, is insufficient to establish a prima facie case of discrimination. Defense's request is denied.

RP 452-53.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MAKE A PRIMA FACIE SHOWING OF PURPOSEFUL DISCRIMINATION BASED UPON THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES.

When a defendant challenges the State's exercise of peremptory challenges, the court applies the three part test established in ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). First, the defendant must establish a prima facie case of purposeful discrimination. Second, if a prima facie case of racial discrimination has been met, the burden then shifts to the State to provide a race neutral explanation for the peremptory. Finally, if a race-neutral reason is tendered, then the trial court must decide whether the opponent of the strike has proved purposeful racial discrimination.

To establish a prima facie case of purposeful discrimination, the defendant must satisfy two criteria. First, the peremptory challenge must be exercised against a member of a constitutionally cognizable group. Second, 'other relevant circumstances' must raise an inference that the challenge was based upon membership in that group. ***State v. Evans***, 100 Wn. App. 757, 764, 998 P.2d 373 (2000)(footnote omitted). "Other relevant circumstances" can include striking a group of otherwise heterogeneous jurors who have race as their only common characteristic; disproportionate use of strikes against a group; the level of a group's

representation in the venire as compared to the jury; the race of the defendant and the victim; prior discriminatory use of preemptory challenges by the prosecuting attorney; the type and manner of the prosecuting attorney's questions during voir dire; or characteristics shared by those individuals who have been struck, and individuals of a different race who remain on the jury. ***State v. Wright***, 78 Wn. App. 93, 99-100, 896 P.2d 713 (1995).

A trial court's ruling on a ***Batson*** challenge is accorded great deference on appeal. The trial court's ruling will be upheld unless it is clearly erroneous. ***State v. Luvene***, 127 Wn.2d 290, 299, 903 P.2d 960 (1995)(*quoting* ***Hernandez v. New York***, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The reason for this deferential standard of review is because the court's finding is largely based upon a credibility determination. *See* ***Hernandez v. New York***, 500 U.S. 352, 365. The trial court is in a much better position than a reviewing court to make credibility determinations, because the trial court can observe the demeanor of counsel and jurors alike during voir dire.

On appeal, defendant alleges for the first time that the only reason the State could have exercised its peremptory challenge on Prospective Juror No. 19 was because of his race. Additional Brief of Appellant at 7. After combing through the record of voir dire and finding no racially motivated questions, or any indication that there was some discriminatory purpose on the part of the State, defendant now claims that the absence of

such a record is in fact proof that the State could have had a racially motivated purpose. Defendant argues that had the trial court required the prosecutor to provide a race-neutral reason "the reason would have been insufficent [sic] and pretextual." *Id.* Defendant's argument fails because 1) it conflates the first prong of the ***Batson*** test by failing to require defendant to point to 'other circumstance' that would give rise to an inference that the State's use of its peremptory challenge was racially motivated; 2) ignores the record, which shows that the prosecutor's use of its peremptory challenge was not racially motivated; and 3) fails to give any deference to the trial court's ruling on review.

In this case, the trial court found defendant failed to satisfy the first prong of the ***Batson*** test because he failed to make a prima facie case of discrimination. Because defendant did not make a prima facie showing, the court was not required to advance to the second and third prongs of the test. While Prospective Juror No. 19, was a member of a constitutionally cognizable group, African Americans, defendant failed to present any other circumstances to raise an inference that the State had exercised its peremptory challenge because Prospective Juror No. 19 was a member of that group. In fact, the court specifically noted that when defendant asked the court for a new jury pool, defendant did not allege any discriminatory purpose in the State's exercise of its peremptory challenge. *See* RP 438-453. The lack of such an allegation by defendant or his attorney is consistent with the record of voir dire in this case. SuppRP 2-142. There

is no indication in the entire record that the State's use of its peremptory challenges was based on race. For defendant to claim that the lack of a record is sufficient to reverse the trial court's ruling, ignores the purpose of ***Batson***, which is to prevent discrimination. Here, defendant did not allege discrimination, the court, who was present for voir dire and observed the demeanor of the attorneys and venire members, found no discrimination, and this court should decline defendant's invitation to infer discrimination from a record devoid of any evidence of discrimination.

While the record shows a complete absence of a racially motivated questioning by the State, it does show why the State would have exercised its peremptory challenge on Prospective Juror No. 19. This prospective juror answered the general questions asked by the court, answered defense counsel's questions about being nervous, and answered the State's questions regarding the investigation into a crime reported by a panhandler, and a crime reported by Bill Gates. In his response, Prospective Juror No. 19 offered his opinion that while the Gates' and panhandler's cases should be investigated identically, they would most likely not be. Later, in the only instance that defendant volunteered a response without first being directly asked for one, Prospective Juror No. 19 offered that persons who were later exonerated by DNA evidence may have been the victim of a coincidence, or being in the wrong place at the wrong time. SuppRP 125. The combination of Prospective Juror No. 19's belief that the State gives preferential treatment to crime victims who are

prominent members of the community, along with his view that people who are later exonerated by DNA may have been the victim of coincidences or being in the wrong place at the wrong time, would make the State more likely to use a peremptory challenge to avoid having him on the jury in this case.

Finally, the trial court in the present case denied defendant's ***Batson's*** challenge because he failed to make a prima facie case of discrimination. Under ***Luvene***, the trial court's ruling should be upheld unless this court finds it is clearly erroneous.

D. CONCLUSION.

This court should affirm defendant's convictions in this matter.

DATED: APRIL 27, 2009.

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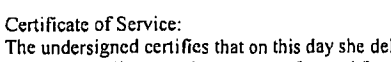
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-27-09 
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