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Supreme Court No. _____

(Court of Appeals No. 64467-0-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIRK SAINTCALLE,

Petitioner.

PETITION FOR REVIEW

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STATE OF WASHINGTON

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A. INTRODUCTION

Petitioner Kirk Saintcalle is an African American man who was tried by a jury of none of his peers. The State used a peremptory challenge to exclude the sole African American member of the venire. It did so despite the prosecutor's acknowledgment that the struck panelist was "probably representative of the perfect juror."

Indeed, she was. During voir dire, she showed empathy for both victims and defendants, stated she was not an emotional person, and repeatedly promised she would fairly consider all the facts. But the prosecution struck her anyway, claiming they did so because she did not know how she would react to crime scene photographs given that a friend of hers had been shot to death. But her sympathy for a murder victim would have made her an ideal prosecution juror. And the State did not strike a white juror who knew people who had been shot.

The U.S. Supreme Court in recent years has granted relief in Batson¹ cases, making it plain that the deferential standard of review is not a rubber stamp and that racism in jury selection must not be tolerated. Recent cases, events, and studies in Washington show that our jurisdiction is not immune to racial bias. This Court should grant review to address the important Equal Protection issue presented.

¹ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

B. IDENTITY OF PETITIONER AND DECISION BELOW

Kirk Saintcalle, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in State v. Saintcalle, No. 64467-0-I (Slip Op. filed June 27, 2011). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The State denies a 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. In this case, the State used a peremptory challenge to strike the lone African-American venire member, stating it was striking her because she did not know how she would react to evidence of a murder given that she knew someone who had been killed recently. But the State did not strike a white juror who knew people who had been shot, and the African-American venire member repeatedly stated that she could fairly weigh the facts and decide the case. Did the exclusion of the lone black venire member from the jury violate the Equal Protection Clause of the Fourteenth Amendment? RAP 13.4(b)(3), (4).

2. A prosecutor commits misconduct if she comments on a defendant's exercise of a constitutional right, states her personal opinion, vouches for the credibility of her witnesses, or informs the jury that its job is to speak the truth. Here, the prosecutor stated during closing argument

that Mr. Saintcalle's co-defendants were credible because they pled guilty, that it was her personal impression that witnesses had certain characteristics, and that the jury's job was to "tell the truth of what happened." Did the prosecutor commit misconduct during closing argument? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

Kirk Saintcalle, Narada Roberts, and Roderick Roberts were charged with one count of first-degree felony murder and three counts of second-degree assault. CP 1, 29-31. The Roberts brothers pled guilty, while Mr. Saintcalle exercised his right to trial by jury. 3/25/09 RP 87; 3/26/09 RP 104. Mr. Saintcalle's defense was that one of the Roberts brothers shot the victim while Mr. Saintcalle was elsewhere in the house and unaware of any plan to kill. Indeed, the surviving victims told police that Mr. Saintcalle was upstairs with them while the Roberts brothers were downstairs with the eventual murder victim when shots rang out. 3/12/09 RP 40; 3/16/09 RP 31; 3/17/09 RP 81.

Voir dire commenced in King County Superior Court on March 9, 2009. Over 85 potential jurors were screened. 3/9/09 p.m. RP 34. Only one was black. 3/10/09 RP 67.

During voir dire, the prosecutor asked whether anyone felt that "there are certain segments of the population, whether it be based on

wealth, poverty, race, other things, where they just feel like they may not be treated fairly by the criminal justice system?" 3/9/09 p.m. RP 64.

Juror 46 discussed the fact that affluent people fare better in the justice system. 3/9/09 p.m. RP 64. The following conversation then occurred:

JUROR 72: I feel there are some areas of unfairness in our system. I am aware, for example, that a jury of their peers, yet as you look around this panel, all of the faces are white.

JUROR 34: No, not quite.

(Laughter.)

3/9/09 p.m. RP 65.

The prosecutor then asked Juror 34 about her background. 3/9/09 p.m. 65. Juror 34 stated that she worked as a middle-school counselor in the city. 3/9/09 p.m. 66. The prosecutor asked for her impressions of the criminal justice system. Juror 34 responded:

Gosh, I feel like I am on the spot here. But being a person of color, I have a lot of thoughts about the criminal system. I see – I have seen firsthand – and a couple people have already mentioned that if you have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.

And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.

And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven't heard anything about this case, we watch the

news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.

So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as they see this young man sitting up here.

3/9/09 p.m. RP 66-67.

The prosecutor then asked Juror 34 how she would handle being asked to sit in judgment of somebody. 3/9/09 p.m. RP 67. Juror 34 stated:

I think number one, because I am a Christian, I know I can listen to the facts and, you know, follow the judge's instruction. But also it's kind of hard, and I haven't mentioned this before because none of those questions have come up for me to answer, but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here. Even though I don't know the facts of this particular case, and I would like to think that I can be fair because I am a Christian, I did lose someone two weeks ago.

3/9/09 p.m. RP 68.

The prosecutor concluded, "You have a lot that is going through your mind currently both that would give you a lot of empathy for someone who is charged with a crime and also empathy for someone who may be a victim of a crime. In that way, you may be representative of the perfect juror." 3/9/09 p.m. RP 69.

The next day, the defense attorney asked whether anyone else knew victims of violent crimes. Juror 33 responded that he knew "people who have been shot." 3/10/09 RP 15. The defense attorney then asked if

would affect the juror's ability to be fair, and the panelist responded, "No, I don't believe so." 3/10/09 RP 16.

The prosecutor did not ask any follow-up questions of juror 33, even though he said he knew people who had been shot. The prosecutor did, however, check back with Juror 34, asking how she was feeling about serving on the jury. 3/10/09 RP 41-42. She responded that she did not particularly feel like serving on the jury because she knew someone who had been killed recently and did not know how she would react to hearing testimony and seeing pictures of a murder. 3/10/09 RP 42-43. However, she also emphasized that she was not normally an emotional person, and that she had the skills and knowledge to be a good juror because she could weigh the evidence fairly: "But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I guess I'm saying who could be like me I would want me. So sometimes you have to do things that you don't want to do."² 3/10/09 RP 42-43.

The State used one of its peremptory challenges to dismiss juror 34. 3/10/09 RP 100. Mr. Saintcalle objected to the dismissal of the lone black potential juror under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). 3/10/09 RP 103-04. The State argued that it

² The transcript attributes all of the statements on this page to Juror 66, but it is clear from the context that Juror 34 is speaking.

was not dismissing Juror 34 because she was black but because she was not sure how she would react to the evidence given she knew someone who had been killed. 3/10/09 RP 66, 101-02. The court denied the Batson challenge and allowed the State to strike the lone African American venire member, stating:

And the reasons are as follows: [Juror 34] stated that her friend recently was murdered, as a well known case to all counsel here at the table. Further stated that she was upset about that. That she – it was a death of a friend, and that yesterday she was not certain whether she should be a juror on that case because of the fact that looking at homicide scene photos would have on her. Today she did, in fact, say that she felt that perhaps, words to the effect of, that she had a duty to be on the jury. She stated still today that she didn't know how she would react to those photographs. But I think those are reasons that she herself articulated that are sufficient, are race neutral to allow peremptory challenge to go forward in this case.

3/10/09 RP 105-06.

At trial, the Roberts brothers testified against Mr. Saintcalle, stating that he was the one who shot Mr. Johnson. 3/25/09 RP 89; 3/26/09 RP 94-95. Narada Roberts admitted that he “saved like fifty years by pleading guilty” and “all he had to say was that Mr. Saintcalle was the shooter.” 3/26/09 RP 110.

Mr. Saintcalle, on the other hand, testified that he was upstairs with the other residents of the house when Mr. Johnson was shot. 3/30/09 RP 58-67. This testimony was consistent with the statements the residents

gave to police the evening of the murder.³ 3/12/09 RP 40, 47; 3/17/09 RP 81. A Washington State Patrol Crime Laboratory forensic scientist testified that Mr. Saintcalle's DNA was not found on any of the 10 items tested, but that Roderick Roberts' DNA was found. 3/17/09 RP 5-61.

Mr. Saintcalle was convicted as charged of one count of first-degree felony murder and three counts of second-degree assault. On appeal, he argued, *inter alia*, that he was denied the equal protection of the law when the trial court allowed the State to strike the sole remaining African American juror, and that the prosecutor committed misconduct in closing argument. The Court of Appeals affirmed. Mr. Saintcalle seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **This Court should grant review because the State struck the lone African American juror despite acknowledging she was probably "representative of the perfect juror," raising a significant question of constitutional law and a matter of substantial public interest.**

- a. The Fourteenth Amendment prohibits the State from striking a juror because of his or her race. "[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,

³ At trial, the residents testified that Mr. Saintcalle was downstairs when the shots rang out, but they acknowledged that on the night of the murder they thought Mr. Saintcalle was upstairs with them when they heard shots downstairs. 3/12/09 RP 40; 3/16/09 RP 31; 3/17/09 RP 81.

476 U.S. at 85; U.S. Const. amend. XIV. 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).

Courts apply a three-part analysis to determine whether a potential juror was peremptorily challenged pursuant to discriminatory criteria.

First, the defendant must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Batson, 476 U.S. at 93-94.

Washington follows a bright-line rule whereby a defendant establishes a prima facie case of discrimination when, as here, the State exercised a peremptory challenge against the sole remaining venire member of the defendant's racial group. State v. Rhone, 168 Wn.2d 645, 659, 229 P.3d 752 (2010) (Alexander, J., dissenting); id. at 658 (Madsen, C.J., concurring and stating that henceforth the rule advocated by the four dissenters would apply). And even before Rhone, trial courts had the

discretion to find a prima facie case in such circumstances. State v. Hicks, 163 Wn.2d 477, 490, 181 P.3d 831 (2008).

Second, the burden shifts to the State to explain the exclusion and demonstrate that race-neutral selection criteria and procedures “produced the monochromatic result.” Batson, 476 U.S. at 94. The prosecutor must give a “clear and reasonably specific” explanation of his or her reasons for striking the relevant juror. Miller-El, 545 U.S. at 239.

Third and finally, the trial court has the duty to determine if the defendant has established purposeful discrimination. Batson, 476 U.S. at 98. In deciding whether the exercise of the peremptory challenge violates equal protection, the court should consider all relevant evidence, and not simply take the State’s race-neutral explanation at face value. Id. at 97-98; Miller-El, 545 U.S. at 240. Prosecutors’ questions, patterns of peremptory challenges, and disproportionate impact may provide circumstantial evidence of discriminatory intent. Batson, 476 U.S. at 93. “For example, total or seriously disproportionate exclusion of [African Americans] from jury venires is itself such an unequal application of the law as to show intentional discrimination.” Id. A reviewing court must perform a comparative juror analysis to ascertain whether the State’s proffered reasons for striking an African American juror were pretextual. Reed v. Quarterman, 555 F.3d 364, 373 (5th Cir. 2009) (citing Miller-El, 545 U.S.

at 241). And “contrasting voir dire questions posed respectively to black and nonblack panel members” may indicate discriminatory intent. Miller-El, 545 U.S. at 255.

An appellate court reviews a trial court’s Batson ruling for clear error. Rhone, 168 Wn.2d at 651. However, “deference does not by definition preclude relief.” Miller-El, 545 U.S. at 240. The error is structural, requiring reversal without any showing of prejudice. Batson, 476 U.S. at 100.

b. In this case, the State engaged in unconstitutional discrimination by using a peremptory challenge to strike the lone black member of the venire. In this case, only the third step is at issue, because the trial court ruled Mr. Saintcalle made a prima facie case of discrimination and the prosecutor presented facially neutral reasons for the strike. Hicks, 163 Wn.2d at 492 (first two steps become moot once trial court has ruled on third step). The State’s proffered race-neutral reasons for the exclusion are pretextual. The trial court clearly erred in allowing the challenge, and the Court of Appeals erred in affirming.

The trial court credited the State’s explanation that Juror 34 did not know what effect the photographs of the victim in this case would have on her, given that an acquaintance of hers had been killed two weeks prior. 3/10/09 RP 105-06. But this is a selective recollection of voir dire. At the

same time Juror 34 made that statement, she said she did not tend to be an emotional person. She further stated that she was the right type of person to serve as a juror because she would fairly consider all of the facts.

3/10/09 RP 42-43. This was consistent with her statement of the previous day: "I know I can listen to the facts and, you know, follow the judge's instruction." 3/9/09 p.m. RP 68. Thus, she considered it her duty to serve as a juror regardless of what had happened to her friend. 3/10/09 RP 42-43. All of these statements must be considered in addressing the Batson challenge. Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted").

The State's attestation that it was afraid the court might "lose" Juror 34 because she would not be able to handle seeing the photographs was highly speculative, and cannot support the strike. See id. at 482 (prosecutor's "highly speculative" claim that juror might find defendant guilty of a lesser-included offense in order to be finished earlier and return to his job was not a sufficient race-neutral reason for striking the juror).

Furthermore, if Juror 34 was upset about her friend's murder, that would tend to favor the prosecution. See Miller-El, 545 U.S. at 247 ("Fields should have been an ideal juror in the eyes of a prosecutor

seeking a death sentence”); Ali v. Hickman, 548 F.3d 1174, 1184 (9th Cir. 2009) (prosecutor struck black juror ostensibly because her daughter had been molested; court held this reason pretextual because to extent juror was upset about daughter’s molestation, that would favor prosecution, not defense).

The real reason the prosecutor struck Juror 34 is probably that she had earlier provided – at the prosecutor’s urging – her perspective as a person of color. 3/9/09 p.m. RP 66-67. But black jurors may not be excluded based on an assumption that they will be unable to impartially consider the State’s case against a black defendant. Batson, 476 U.S. at 89.

If the fact that Juror 34 knew a shooting victim were the real reason for her dismissal, the State would also have dismissed Juror 33, who was acquainted with multiple individuals who had been shot. 3/10/09 RP 15. But number 33, who was white, served on the jury, and number 34, who was black, did not. 3/10/09 RP 113-14. The proffered reason for the strike of Juror 34 therefore fails. See Snyder, 552 U.S. at 479-83 (State’s proffered reason for striking juror – his student-teaching obligation – failed because other members of the venire also had conflicting obligations but they were not struck); Miller-El, 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 to be considered at Batson's third step”).

At a minimum, if the State was concerned about the impact of a juror's knowing shooting victims, it would have inquired further of Juror 33. But the State asked no questions of this juror regarding his acquaintances who had been shot and the effect on him. This disparate questioning indicates the reason for the strike of juror 34 was pretextual. See Miller-El, 545 U.S. at 244-45 (prosecutor said he struck black juror because of his thoughts on rehabilitation, but fact that prosecutor did not inquire further of other jurors who raised similar issues showed reason was pretext for discrimination); Reed, 555 F.3d at 279 (prosecutor's disparate questioning regarding misunderstandings of the word “premeditation” indicated pretext).

That the stated race-neutral reasons are pretextual is further borne out by the fact that the prosecution did not challenge white jurors who espoused defense-friendly positions. Juror 49, for example, stated in no uncertain terms that he or she did not believe the law of accomplice liability was fair. 3/9/09 p.m. RP 75.

I don't believe it's fair. I think the person that actually did the killing is the guilty person for murder, and I think the other one should be charged with a different crime, but not – unless they are

hanging on the person or somehow involved physically and, you know, holding them down or something along those lines.

3/9/09 p.m. RP 75. Juror 49 served on the jury, but Juror 34, who would have had empathy for the victims because of her friend's recent death, was struck. 3/10/09 RP 113-14, 123.

Jurors 23 and 24 expressed a stricter understanding of the "beyond a reasonable doubt" standard than their fellow jurors. The prosecutor asked whether the fact that a person drove to a gas station and pulled their car up to a gas pump was enough to prove that their intent was to fill their tank with gas. 3/10/09 RP 50. Several jurors said yes, while others said they would need to hear the person say they were "low on gas." 3/10/09 RP 51-53. But Juror 24 would not find they intended to get gas until they actually "went to get the gas or opened their gas can." 3/10/09 RP 52. Juror 23 agreed that the "tipping point" was when they "open the tank." 3/10/09 RP 53. Despite their defense-friendly view of the standard of proof, the State did not strike numbers 23 and 24; they served on the jury, while Juror 34 did not. 3/10/09 RP 111, 113-14.

Another circumstance that must be considered in reviewing the Batson ruling is the fact that the State also tried to strike the only other non-white venire member, Mexican-American juror number 10. 3/10/09 RP 115. The court denied the challenge, but the fact that the State tried

for a monochromatic panel is further evidence of racial animosity. See Snyder, 552 U.S. at 478 (explaining that court would consider strike of a second non-white juror in analyzing whether strike of the first juror was race-based). In Miller-El, the Court found it significant that “prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members.” Miller-El, 545 U.S. at 241. Here, prosecutors used their peremptory strikes to exclude **100%** of the eligible African-American venire members, and tried to exclude 100% of the non-white members. 3/10/09 RP 113-15. “Happenstance is unlikely to produce this disparity.” Miller-El, 545 U.S. at 241.

The prosecutor acknowledged during voir dire that because Juror 34 empathized with both victims and defendants, she “may be representative of the perfect juror.” 3/9/09 p.m. RP 69. The prosecutor struck her anyway, and the evidence indicates that the strike was based on race. The trial court clearly erred in allowing the State to dismiss the lone African-American juror.

c. Appellate courts must intervene to protect the right to equal protection in these cases. Although the standard of review in Batson cases is clear error, this deferential standard of review is not a rubber stamp. Indeed, the U.S. Supreme Court reversed in Snyder under this standard, and granted relief under the even stricter habeas standard in Miller-El.

Circuit courts have followed suit. See Ali, 584 F.3d 1174 (granting habeas relief); Reed, 555 F.3d 364 (same). The Supreme Court has pointed out that “[i]f any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much....” Miller-El, 545 U.S. at 240. And as to the comparative juror analysis that appellate courts must perform, we must look at relevant similarities and not require the defendant to show the State kept a white juror who was exactly the same as the struck black juror. “A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable.” Id. at n.6.

It is important for reviewing courts to engage in a searching inquiry in Batson cases in order to root out racism in the criminal justice system. No jurisdiction is immune from discrimination. A King County prosecutor recently mocked the accents of African American witnesses and told a jury those witnesses should not be believed because “black folk don’t testify against black folk.” State v. Monday, No. 82736-2 (filed June 9, 2011). Washington’s Task Force on Race and the Criminal Justice System has concluded, “The fact of racial and ethnic disproportionality in our criminal justice system is indisputable.” Preliminary Report on Race and Washington’s Criminal Justice System at 1 (March, 2011).

We find that race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

Id. at 2.

Mr. Saintcalle, a young African American man, was tried for very serious crimes before a jury of none of his peers, despite the State's recognition that the African American panelist they struck "may be representative of the perfect juror." This Court should grant review.

2. This Court should also grant review of the prosecutorial misconduct issue.

A prosecutor may not encourage the jury to draw adverse inferences from the defendant's exercise of a constitutional right. State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (prosecutor committed misconduct by commenting in closing argument about the defendant's exercise of his constitutional right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor improperly infringed upon defendants' election to remain silent by stating in closing, "you would hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence").

During closing argument in this case, the prosecutor discussed the credibility of Roderick and Narada Roberts by stating:

And I want to talk to you about the testimony of these two co-defendants at this time that came in and testified to you. ... what we know is they took responsibility. They indicated a willingness to take the responsibility.

3/31/09 RP 39. Mr. Saintcalle objected, but the court overruled the objection. The prosecutor continued, "They pled guilty." 3/31/09 RP 39. Mr. Saintcalle again objected on the basis that the statements invaded the province of the jury and violated Mr. Saintcalle's due process rights.

3/31/09 RP 39. The court again overruled the objection. But the objection should have been sustained because the prosecutor may not state or imply that a person who pleads guilty is more credible than a person who exercises his constitutional right to trial by jury. See Moreno, 132 Wn. App. at 672-73; Fleming, 83 Wn. App. at 214. The State cannot show that this error was harmless beyond a reasonable doubt as to the murder count because that conviction hinged on the credibility of the Roberts brothers.

It is also misconduct for a prosecutor to assert his or her personal opinion as to the credibility of a witness. Monday at 11; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The prosecutor's improper comments discussed above were exacerbated by her later vouching for the same witnesses. She stated:

And here's my impression. That Mr. Roderick Roberts has a tendency to minimize his own involvement. He has a tendency to minimize his understanding of what was going on. And Narada Roberts doesn't do that.

3/31/09 RP 91 (emphasis added). The prosecutor similarly presented her personal opinion as to the credibility of Tammy Brown:

We have never tried to hide the fact that Tammy Brown was confused, and that's my impression. She is genuinely confused about where Mr. Saintcalle was at the time the shots are fired. Her belief currently, and I think she's honestly trying to tell you the truth.

3/31/09 RP 89. Mr. Saintcalle objected to the prosecution's bolstering of its witness, but the objection was overruled. 3/31/09 RP 90.

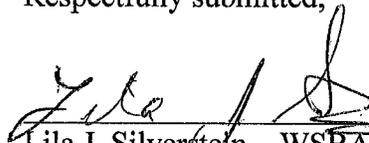
Finally, the prosecutor mischaracterized the jury's role by stating they would "tell the truth of what happened." 3/31/09 RP 89; see State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Mr. Saintcalle asks this Court to grant review on this issue as well.

F. CONCLUSION

Mr. Saintcalle respectfully requests that this Court grant review.

DATED this 13th day of July, 2011.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 KIRK RICARDO SAINTCALLE,)
)
 Appellant.)

No. 64467-0-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: June 27, 2011

FILED
COURT OF APPEALS
DIVISION ONE
JUN 27 2011

GROSSE, J. — Where the State offers a race-neutral explanation for challenging a member of the venire, the issue of whether the defendant established a prima facie case of purposeful discrimination need not be determined in order to uphold the trial court's refusal to find a Batson violation. Here, the State offered a race-neutral explanation for challenging the sole African-American member of the venire and, accordingly, we need not decide whether her dismissal established a prima facie case. The trial court's rejection of Kirk Saintcalle's Batson challenge was not clearly erroneous and is not grounds for reversal of his conviction. Saintcalle raises additional issues, none of which have merit. Accordingly, we affirm his conviction.

FACTS

In the early morning hours of February 9, 2007, Kirk Saintcalle and his friend Narada Roberts, Roberts' brother Roderick, and two other males drove to Tamara Brown's apartment located in Auburn to find out who had assaulted Narada Roberts on New Year's Eve.

While she was upstairs in her apartment, Brown heard a knock on the front door and heard her boyfriend Anthony Johnson walk toward the door. Brown decided it was unusually quiet downstairs and went to see what was going on. At the door, Brown saw Johnson and other people, including Saintcalle. Brown testified that Saintcalle held a gun to her face, rushed her up the stairs, and forced her, along with her roommate Latasha Ellis and Ellis' boyfriend, Ronald Robinson, into a bedroom closet and told them to get on their knees and stay there. Robinson and Ellis testified to similar versions of the events. Robinson testified that he started to go downstairs because he heard commotion; downstairs, he saw three males wrestling Johnson to the ground. One of these males was holding an assault rifle. Robinson wanted to help Johnson, but Saintcalle pushed him back up the stairs, holding a semiautomatic pistol. Ellis also testified that Saintcalle chased Brown and Robinson up the stairs while holding a handgun and that he pointed the gun at all three of them when they were in the closet.

While Brown, Ellis, and Robinson were in the closet, Narada Roberts and Roderick Roberts entered the bedroom. Narada Roberts was holding an assault rifle and put the gun up against each of the three people's heads. Narada Roberts took a suitcase from the closet in the bedroom. The Roberts brothers then left the bedroom and Saintcalle returned. He told Brown there was just "something we got to take care of." Saintcalle then left the bedroom and went back downstairs. The next thing Brown heard were gunshots. Robinson testified that at the time the shots were fired, Narada Roberts was in the bedroom with his

gun pointed at Brown's head. Ellis testified that at the time she heard the gunshots, Saintcalle was downstairs.

Officer Daniel O'Neil of the Auburn Police Department was dispatched to a call of shots fired at an apartment. Officer O'Neil and other officers located the apartment, opened the front door, and saw a body, later identified as Anthony Johnson, lying on the ground in a bathroom that was just inside the door. The officers also saw a shell casing and a bullet fragment on the ground near Johnson's feet. Johnson was dead. He sustained three gunshot wounds. The murder weapon was determined to be a .45 caliber handgun.

The State charged Saintcalle with one count of first degree felony murder and three counts of second degree assault. Each count included a deadly weapon-firearm allegation. The jury convicted Saintcalle on all counts, and he was sentenced to 579 months.

Additional facts are discussed below in connection with the issue to which they are relevant.

ANALYSIS

Peremptory Challenge

The State used a peremptory challenge to exclude Juror 34, the only African-American member of the venire. Saintcalle claims that by allowing the State to strike this juror, the trial court deprived him of his right to equal protection. We disagree.

The equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria."¹ A prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection.² The United States Supreme Court in Batson v. Kentucky³ set forth a three-part analysis to determine whether a member of the venire was peremptorily challenged pursuant to discriminatory criteria. Under this analysis, a defendant must first establish a prima facie case of purposeful discrimination. To do this, the defendant must provide evidence of any relevant circumstances that raise an inference that the challenge was used to exclude a venire member on account of his or her race. Second, if the defendant establishes a prima facie case, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member. Third, the trial court must determine whether the defendant has established purposeful discrimination.⁴ In reviewing a trial court's ruling on a Batson challenge, we give the determination of the trial judge great deference, and we will not disturb it unless it is clearly erroneous.⁵

As to a prima facie case of purposeful discrimination—the first part of the Batson analysis—the Washington Supreme Court held in State v. Hicks⁶ that the

¹ Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

² Batson, 476 U.S. at 86.

³ 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

⁴ State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010) (citing Batson, 476 U.S. at 85-86, 96), cert. denied, Rhone v. Washington, 131 S. Ct. 522 (2010).

⁵ Rhone, 168 Wn.2d at 651 (internal quotation marks omitted) (citation omitted).

⁶ 163 Wn.2d 477, 490, 181 P.3d 831, cert. denied, Babbs v. Washington, 129 S. Ct. 278 (2008).

trial court is not required to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but the court may, in its discretion, find a prima facie case in such instances. In a later case, State v. Rhone,⁷ a four-justice plurality of the court declined to adopt a bright-line rule that a prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group.⁸ Four justices dissented in Rhone and stated that the court should adopt such a bright-line rule. Justice Madsen's concurring opinion in Rhone states in its entirety: "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent."⁹

The parties dispute whether the bright-line rule discussed in Rhone is now the law in Washington. We need not resolve that dispute, however, if the prosecutor had offered a race-neutral explanation for the challenge to Juror 34:

Even "where [a] trial court [finds] a prima facie case 'out of an abundance of caution,'" if the prosecutor has offered a race-neutral explanation, the ultimate issue of whether or not a "prima facie case was established does not need to be determined" to uphold the trial court's refusal to find a Batson violation.^[10]

In this case, Juror 34 was the only African-American juror in the venire. When asked whether she had any impressions about the criminal justice system, Juror 34 responded:

A. Gosh, I feel like I am on the spot here.

⁷ 168 Wn.2d 645, ___ P.3d ___ (2010).

⁸ Rhone, 168 Wn.2d at 661 (Alexander, J., dissenting).

⁹ Rhone, 168 Wn.2d at 658 (Madsen, C.J., concurring).

¹⁰ State v. Thomas, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting Hicks, 163 Wn.2d at 492-93).

But being a person of color, I have a lot of thoughts about the criminal system. I see – I have seen firsthand – and a couple people have already mentioned that if you have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.

And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.

And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven't heard anything about this case, we watch the news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.

So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as they see this young man sitting up here.

Q. Right. How about for you, do you think – I mean, you've got a whole lot that you are feeling as you sit here and that you are going to be asked to sit in judgment of somebody. How do you think you are going to be able to handle that?

A. I think number one, because I am a Christian, I know I can listen to the facts and, you know, follow the judge's instruction. But also it's kind of hard, and I haven't mentioned this before because none of those questions have come up for me to answer, but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here. Even though I don't know the facts of this particular case, and I would like to think that I can be fair because I am a Christian, I did lose someone two weeks ago.

Q. Was that in Seattle?

A. Yes.

Q. Was that the Tyrone case?

A. Yes.

After a side-bar, the prosecutor asked Juror 34 more questions:

Q Juror number 34, I am going to move on to the group, but I wanted to close the loop with you. You have a lot that is going through your mind currently both that would give you a lot of empathy for someone who is charged with a crime and also empathy for someone who may be a victim of a crime. In that way, you may be representative of the perfect juror.

At the same time, we don't put people in a position where it's going to cause them a lot of emotional pain. At this point do you think you could sit in this case and listen to the facts and make a decision based solely on the evidence presented in trial here and be fair to both sides?

A. I'd like to think that I could be, but kind of what you just mentioned just with the freshness and the rawness of the death of a friend, I am wondering if that would kind of go through my mind. I like to think that I am fair and can listen, be impartial, but I don't know. I have never been on a murder trial and have just lost a friend two weeks prior to a murder.

The following day, the prosecutor asked Juror 34 whether she had done any more thinking on her serving on the jury. She responded:

Yes. I thought about it last night as well as this morning. And, you know, my thought is I don't want to be a part of this jury because of the situations, and the circumstances that I just went through. But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I guess I'm saying who could be like me I would want me. So sometimes you have to do things that you don't want to do.

The trial court denied the State's challenge for cause to Juror 34, and the State indicated that it intended to use a peremptory challenge. Saintcalle objected under Batson. The trial court denied the Batson challenge, stating the following reasons:

[Juror 34] stated that her friend recently was murdered, as a well known case to all counsel here at the table. Further stated that she was upset about that. That she — it was the death of a friend, and that yesterday she was not certain whether she should be a juror on that case because of the fact that looking at homicide scene photos would have on her. Today she did, in fact, say that she felt that perhaps, words to the effect of, that she had a duty to be on

the jury. She stated still today that she didn't know how she would react to those photographs. But I think those are reasons that she herself articulated that are sufficient, are race neutral to allow peremptory challenge to go forward in this case.

Saintcalle argues that the fact that Jurors 10, 23, 24, 33, and 49 were allowed to serve shows that the State's reasons for challenging Juror 34 were not race-neutral. We disagree.

Juror 10 was the sole Hispanic member of the venire. The State used a peremptory challenge to Juror 10, but the court granted Saintcalle's Batson challenge. The State stated that it flagged Juror 10 early in the jury selection process, before she informed the court that she was a Mexican-American. The State challenged her because she initially indicated that it would be a hardship for her to serve on the jury, but later changed her mind, and because she gave "gobbledygook" answers to questions, chewed gum in court and appeared to have no respect for the process, and her youth. The court disagreed with the State and found no reason for the State to challenge Juror 10. The court determined that Juror 10 shared many of the same characteristics of other members of the jury panel and that on a number of occasions, other members of the jury panel seemed to agree with what Juror 10 was saying and that her answers did not raise any surprise with the other members of the panel. The State obviously believed it had valid, race-neutral reasons for challenging Juror 10. The fact that it challenged both Juror 10 and Juror 34 does not mean that the State was trying for an all-white jury. The State offered race-neutral grounds for challenging both jurors, even though the trial court disagreed with the State's reasons as to Juror 10.

Jurors 23 and 24 expressed a stricter understanding of the "beyond a reasonable doubt" standard than other members of the venire. Saintcalle argues that the fact that the State allowed Jurors 23 and 24 to serve despite their "defense-friendly" view of the standard of proof shows that the State's reasons for challenging Juror 34 were not race-neutral. The fact that the State did not challenge Jurors 23 and 24 does not negate the race-neutral reasons for which it challenged Juror 34, namely that she was upset about having had a friend murdered two weeks prior and was unsure how she would react to seeing photographs of the crime scene and how it would affect her ability to serve as a juror.

Juror 33, who is white, stated that he knew people who had been shot. While, like Juror 34, Juror 33 knew people who had been shot, unlike Juror 34, the people to whom Juror 33 referred were mere acquaintances of his, not friends. Further, Juror 33 unequivocally stated that this fact would not impact his ability to be fair and impartial. This is a very different sort of *knowledge of people who have been shot* than Juror 34's knowledge.

Finally, Juror 49 served on the jury despite expressing the opinion that the law of accomplice liability was unfair. Juror 49 also stated, however, that if the law instructed a juror that an accomplice is as guilty as the principal, he or she would follow the law, notwithstanding any personal beliefs: "[i]f that's what the law stated specifically that that's the way the rules are, and they're aware of the rules the same as the rest of us, if they commit the crime, then they are guilty of it." Juror 49 stated further: "In my gut I would say I don't believe that's fair, but

that doesn't mean I wouldn't follow the law." Juror 49's statements showed that his or her personal opinion about the fairness of the law of accomplice liability would not interfere with his or her ability to apply the law as instructed. By contrast, Juror 34 expressed doubt a number of times as to her ability to fulfill her duty as a juror in this case.

In sum, the fact that Jurors 10, 23, 24, 33, and 49 served on the jury does not show that the State's reasons for challenging Juror 34 were not race-neutral. We find that the State's reasons for challenging Juror 34 were race-neutral. Accordingly, under Hicks and Thomas, we need not determine whether the bright-line rule discussed in Rhone applies or whether Saintcalle established a prima facie case of purposeful discrimination. The trial court's ruling on Saintcalle's Batson challenge was not clearly erroneous and it is, therefore, affirmed.

Admission of Recordings of Jail Telephone Conversations

Over Saintcalle's objection, the trial court allowed the State to play recordings of telephone conversations between Saintcalle and his friend during a call Saintcalle placed from the county jail. He argues that the admission of these recordings violated his right to privacy under article I, section 7 of the Washington Constitution.¹¹

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Whether

¹¹ The State argues that this issue is not properly before us. But, an appellant may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).

undisputed facts constitute a violation of that provision is a question of law that we review de novo.¹²

We have previously rejected the argument Saintcalle raises and find no reason to depart from our previous holding. In State v. Archie,¹³ we held that the defendant had no reasonable expectation of privacy in jail telephone records and that the communications were therefore not private affairs deserving protection under article I, section 7. As here, the telephone calls at issue in Archie were placed from the King County jail. The record in Archie showed that signs were posted near jail telephones warning that telephone calls were subject to recording and monitoring and, when a call was answered, a recorded message was played informing the caller and the recipient that the call would be recorded and subject to monitoring, and the call could not continue until the recipient dialed or pressed three.

As we noted in Archie, the Washington Supreme Court recognized the need for monitoring inmate communications and found no violation of the right to privacy when other forms of inmate communications are inspected so long as inmates have been informed of the likelihood of inspection.¹⁴ As we also noted, the Supreme Court in State v. Modica¹⁵ held that the recording of a local jail inmate's calls to his grandmother did not violate the privacy act, chapter 9.73 RCW, where signs were posted near the telephones, a message informed the

¹² State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

¹³ 148 Wn. App. 198, 199 P.2d 1005, review denied, 166 Wn.2d 1016 (2009).

¹⁴ Archie, 148 Wn. App. at 204 (citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967)).

¹⁵ 164 Wn.2d 83, 186 P.3d 1062 (2008).

caller and the recipient that the call would be recorded, and the recipient had to press or dial three in order to accept the call. The court in Modica held that any subjective expectation of privacy in the calls was not objectively reasonable. In Archie, after balancing the circumstances of the case against the privacy protection usually applied to telephone conversations, we held that the defendant's calls from jail were not private affairs deserving of protection under article I, section 7.

Saintcalle does not argue that the same notices and warnings about calls being recorded as discussed in Archie were not in place at the time he made his calls from the jail such that Archie is distinguishable and not dispositive of his argument. Rather, he appears to argue that either we should overrule Archie or we are not bound by it because the Supreme Court has not addressed the issue under article I, section 7. Saintcalle's arguments for not following Archie are not persuasive. We apply Archie and conclude that the admission of recordings of Saintcalle's jail telephone calls did not constitute a violation of his right to privacy.

Sufficiency of the To-Convict Instructions on the Assault Counts

The to-convict instructions for the second degree assault counts provided:

To convict the defendant of the crime of Assault in the Second degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 9, 2007, the defendant – as principal or an accomplice – assaulted Tammy Brown with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

The jury was given a separate instruction setting forth the defense of others, which included the instruction that the State had the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful. That instruction also informed the jury that if the State failed to prove the absence of the defense beyond a reasonable doubt, it was the jury's duty to return a verdict of not guilty on the assault charges.

Saintcalle argues that the to-convict instructions on the assault counts were constitutionally deficient because they omitted the element that the State must disprove lawful use of force.

We review the adequacy of a challenged to-convict instruction de novo.¹⁶ In State v. Hoffman,¹⁷ the court rejected the same argument Saintcalle raises in connection with the defense of self-defense. In Hoffman, the court noted that the jury was instructed to consider the instructions as a whole, and stated that no prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. The court noted further that the self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. The court concluded: "We perceive no error in this instructional mode."¹⁸

Saintcalle argues that Hoffman has been abrogated by later cases. We disagree. None of the cases cited call into question the clear rule stated in Hoffman that giving a separate instruction on self-defense or, as here, defense of

¹⁶ State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

¹⁷ 116 Wn.2d 51, 804 P.2d 577 (1991).

¹⁸ Hoffman, 116 Wn.2d at 109.

others, which includes the State's burden of proof, is the better approach. The to-convict instructions on the assault counts were not deficient.¹⁹

Prosecutorial Misconduct

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial to the defendant's right to a fair trial.²⁰ "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict."²¹ Where defense counsel fails to object to the prosecutor's comments during trial, reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction to the jury could have cured the resulting prejudice.²²

Saintcalle cites to four comments by the prosecutor which he alleges constitute misconduct warranting reversal. He objected to only two of the alleged improper comments:

1. Vouching for, or personal opinion of, credibility of the witnesses; commenting on the exercise of a constitutional right.

Saintcalle argues the following comments constitute misconduct:

And I want to talk to you about the testimony of these two co-defendants at this time that came in and testified to you. . . . what we know is they took responsibility. They indicated a willingness to take the responsibility.

¹⁹ The State argues that this issue is not properly before us because Saintcalle did not object below to the instruction. Regardless of whether Saintcalle properly preserved this issue for review, his argument as to the deficiency of the to-convict instructions is without merit.

²⁰ State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009).

²¹ State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

²² Jackson, 150 Wn. App. at 883.

Saintcalle objected to these comments below and argues on appeal that the comments amount to the prosecutor's improperly implying that a person who pleads guilty is more credible than a person who does not plead guilty but rather goes to trial. We disagree.

"[During] closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record."²³ A prosecutor may not, however, express a personal belief as to the credibility of a witness.²⁴ Nor may a prosecutor personally vouch for the credibility of a witness.²⁵ To constitute prejudicial error, however, it must be clear and unmistakable that the prosecutor is expressing a personal opinion.²⁶ Further, a prosecutor may not urge the jury to draw an adverse inference from the defendant's exercise of a constitutional right.²⁷

Importantly, for purposes of addressing Saintcalle's argument, when addressing allegations of prosecutorial misconduct during closing argument, we look at the entire argument instead of viewing highlighted snippets of argument out of context.²⁸ We view the allegedly improper remarks "in the context of the

²³ State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

²⁴ Millante, 80 Wn. App. at 250.

²⁵ Jackson, 150 Wn. App. at 883.

²⁶ Jackson, 150 Wn. App. at 883.

²⁷ State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (involving a comment about the defendant's exercise of his right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (involving a comment on the defendant's right to remain silent).

²⁸ Jackson, 150 Wn. App. at 884.

total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."²⁹ Saintcalle's quotation contains mere highlighted snippets of the lengthy passage in which the prosecutor made the comments to which Saintcalle objects. Contrary to what his quotation suggests, the comments were not made nearly one after the other, but rather, the first sentence he quotes is separated by a number of lines of argument from the other two sentences. The part of the passage Saintcalle fails to quote shows that the prosecutor did not vouch for the witnesses' credibility or comment on Saintcalle's right to trial. For example, the prosecutor told the jury to heed the court's instruction to carefully assess the witnesses' testimony and not to wholeheartedly believe their testimony "hook, line, and sinker." She also told the jury that she in no way absolved the witnesses of any responsibility and reminded the jury that the witnesses pleaded guilty to murder.

Also in the portion of the argument omitted from Saintcalle's quote, the prosecutor told the jury to heed the following instruction from the court:

Testimony of an accomplice, given on behalf of the State 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 testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

We presume that the jury follows the trial court's instructions.³⁰

Viewed in context of the argument as a whole, we conclude that the prosecutor's comments were not improper comments on the defendant's

²⁹ State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

³⁰ Anderson, 153 Wn. App. at 428.

exercise of a constitutional right or the improper vouching for or personal opinion on the credibility of the witnesses. The comments do not constitute prosecutorial misconduct.

2. Vouching for credibility of a witness.

Saintcalle argues that the following comments constitute the prosecutor's improper vouching for the credibility of a witness:

And here's my impression. That Mr. Roderick Roberts has a tendency to minimize . . . his own involvement. He has a tendency [to] minimize his understanding of what was going on. And Narada Roberts doesn't do that.

Saintcalle did not object to these comments at trial.

While the prosecutor should not have said, "here's my impression," the comments, properly viewed in the context of the argument as a whole, are part of the prosecutor's discussion of the Roberts brothers' testimony and the reasonable inferences that could be drawn therefrom. Because Saintcalle did not object to these comments, in order to warrant reversal, the comments must amount to misconduct that was so flagrant and ill-intentioned that no instruction to the jury could have cured the resulting prejudice. Saintcalle fails to show that the comments amount of such misconduct and, accordingly, the comments are not grounds for reversal.

3. Personal opinion as to credibility.

Saintcalle next argues that the prosecutor improperly stated her personal opinion of the credibility of Tammy Brown by stating:

We have never tried to hide the fact that Tammy Brown was confused, and that's my impression. She is genuinely confused about where Mr. Saintcalle was at the time the shots were fired.

Her belief currently, and I think she's honestly trying to tell you the truth.

Saintcalle objected to these comments, but the trial court overruled the objection stating that "[t]his is argument" and the "jury weighs the evidence independently." After the court's comments, the prosecutor told the jury that her opinion "doesn't mean anything. It's you as a group who will make decisions about what the evidence was. What someone said. What someone's credibility is. It's not enough my belief doesn't carry the day in this courtroom."

Again, although the prosecutor should not have used the terms "my impression" and "I think," given the comments she made after the court overruled the objection, we find no substantial likelihood that the comments affected the jury's verdict.

4. Mischaracterization of the jury's role.

Saintcalle argues that the following comment is reversible misconduct because it constitutes a mischaracterization of the jury's role: "[O]ur mission here in this trial and throughout this trial has been to present you with evidence that will let you tell the truth of what happened." Saintcalle did not object to this comment.

A prosecutor's repeated requests that the jury "declare the truth" are improper.³¹ Taken in context, as they must be, the prosecutor's comments here did not amount to repeated requests that the jury declare the truth. After making this statement, the prosecutor explained what she meant by that statement:

³¹ Anderson, 153 Wn. App. at 429 (finding, however, that the comments did not require reversal).

"[W]e didn't pick and choose the witnesses, and we didn't pick and choose what evidence you got. The bottom line is if there was evidence good, bad, or ugly we provided it to you."

Here, the jury instructions clearly laid out the jury's actual duties, and both counsel thoroughly discussed the evidence during closing argument. In State v. Anderson,³² these facts led the court to hold that, while the repeated requests that the jury declare the truth were improper, they were not grounds for reversal even where the defendant objected below. Here too, the prosecutor's statements to which Saintcalle did not object, are not grounds for reversal.

Statement of Additional Grounds

Additional Ground 1 — Saintcalle appears to argue that the State was required to present evidence of each of the underlying alternative means of felony murder and was required to elect a particular means and provide a unanimity instruction. He provides no support for this argument, except a cite to the Court of Appeals opinion in State v. Brown³³ which was reversed in part by the Supreme Court³⁴ and which does not support his argument.

Where, as here, a defendant is charged with committing a crime by more than one alternative means, the State is required to present substantial evidence to support each of the means charged.³⁵ A defendant does not, however, have the right to a unanimous jury determination as to which of the alleged means was

³² 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

³³ 100 Wn. App. 104, 995 P.2d 1278 (2000).

³⁴ 147 Wn.2d 330, 58 P.3d 889 (2002).

³⁵ State v. Scott, 145 Wn. App. 884, 894, 189 P.3d 209 (2008), review denied, 165 Wn.2d 1032 (2009).

used to commit the charged crime. Rather, the "jury must unanimously agree as to guilt for the crime charged, but unanimity is not required as to the alternative means for committing the crime as long as substantial evidence supports each alternative means."³⁶ Saintcalle does not provide any support for his argument that the State did not present substantial evidence as to each of the means charged. We are not required to search the record for evidence to support this claim.³⁷

Additional Ground 2 — Saintcalle claims he was entitled to a jury instruction on second degree murder. But, second degree murder is not a lesser included offense of first degree felony murder because second degree murder requires the specific intent to murder that is not required for first degree murder.³⁸

Saintcalle also claims he was entitled to a jury instruction on the necessity defense to the assault charges. An instruction on necessity is available when the circumstances cause the defendant to take unlawful action in order to avoid a greater injury.³⁹ The instruction is available only where the defendant did not cause the threatened harm and where there was no reasonable legal alternative to breaking the law.⁴⁰ Although Saintcalle provides no indication of what evidence in the record supports his argument, the evidence would not support the argument that Saintcalle was not the cause of the threatened harm (either

³⁶ Scott, 145 Wn. App. at 894.

³⁷ RAP 10.10(c).

³⁸ State v. Dennison, 115 Wn.2d 609, 627, 801 P.2d 193 (1990).

³⁹ State v. White, 137 Wn. App. 227, 231, 152 P.3d 364 (2007).

⁴⁰ White, 137 Wn. App. at 231.

alone or in combination with his accomplices) or that no reasonable legal alternative existed to assaulting the three victims with a deadly weapon.

Additional Ground 3 — Saintcalle argues the evidence was insufficient to convict him of felony murder because there was insufficient evidence of intent or knowledge. As stated above, however, specific intent to murder is not required for first degree murder.⁴¹ The mens rea for felony murder is based solely on the mens rea for the predicate offense: here, first degree burglary or first degree robbery.⁴²

Saintcalle also claims he was entitled to an instruction on the definition of knowledge for purposes of accomplice liability. But the Supreme Court has held that because the statutory definition of knowledge is the same as the word's plain meaning, the technical term rule does not require that the jury be instructed on the meaning of "knowledge" when that term is used to define a criminal offense.⁴³ Also, this court has held that because the word "knowledge" has an ordinary and accepted meaning, the trial court is not required to define it.⁴⁴ Accordingly, the use of the term "knowledge" in the context of an accomplice liability instruction is not misleading and the jury needs no further explanation.⁴⁵

Saintcalle argues further that the evidence was insufficient to prove he had the requisite knowledge for purposes of accomplice liability. He appears, however, to have an incorrect view of the relevant "knowledge." An accomplice

⁴¹ Dennison, 115 Wn.2d at 627.

⁴² State v. Bolar, 118 Wn. App. 490, 502, 78 P.3d 1012 (2003).

⁴³ State v. Scott, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988).

⁴⁴ State v. Castro, 32 Wn. App. 559, 564-65, 648 P.2d 485 (1982).

⁴⁵ Castro, 32 Wn. App. at 565.

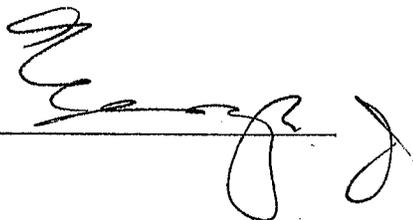
need not have specific knowledge of every element of the crime committed by the principal; rather, the accomplice's general knowledge of his coparticipant's substantive crime suffices for accomplice liability.⁴⁶ Here, assuming the jury convicted Saintcalle as an accomplice and not a principal, the evidence shows that he had knowledge of his coparticipants' substantive crimes of first degree burglary or first degree robbery and second degree assault.

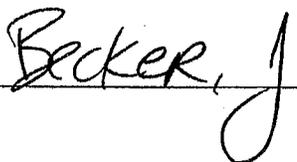
Additional Ground 4 — Saintcalle identifies his fourth additional ground as “[b]eing charged a seperate [sic] crime then [sic] the principle/co-defendant [sic].” The record does not reflect the crimes with which Saintcalle's codefendants were charged. He seems to argue that he should not be charged with any crime as an accomplice because he did not intend for his codefendants to commit any crime. Regardless of the merits of this argument, the evidence fully supports the jury's conviction of Saintcalle as a principal, not an accomplice.

Affirmed.



WE CONCUR:





⁴⁶ State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 64467-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Dennis McCurdy, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 13, 2011

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