

No. 93408-8

E RECEIVED
AUG 0 1 2016
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON *h/h*

CITY OF SEATTLE,
Respondent,

vs.

MATTHEW ERICKSON,
Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

PETER S. HOLMES
SEATTLE CITY ATTORNEY

Richard Greene
Assistant City Attorney
WSBA #13496

Attorneys for Respondent
City of Seattle

Seattle Law Department
701 Fifth Avenue Suite 2050
Seattle, Washington 98104-7097
telephone (206) 684-7757

 ORIGINAL

A. IDENTITY OF RESPONDENT

The City of Seattle asks this court to deny review of the decision designated in Part B of this answer.

B. DECISION

The Order Denying Motion to Modify, entered on June 24, 2016, upheld the Commissioner's Ruling Denying Discretionary Review, entered on February 8, 2016, which denied review of the Decision on RALJ Appeal, which had affirmed defendant's convictions for Unlawful Use of Weapons and Resisting Arrest.

C. ISSUE PRESENTED FOR REVIEW

Has defendant established that his case warrants discretionary review under RAP 13.5(b)(3)?

D. STATEMENT OF THE CASE

Defendant was convicted of Unlawful Use of Weapons and Resisting Arrest. He appealed, contending that the trial court erroneously denied his challenge to the prosecutor's use of a peremptory juror challenge, that the evidence was not sufficient to support the conviction for Unlawful Use of Weapons and that the trial court violated his right to a public trial. The superior court

rejected these arguments and affirmed defendant's convictions, the Commissioner denied discretionary review, the Court of Appeals denied a motion to modify that ruling, and defendant now seeks discretionary review.

On June 10, 2013, Seattle Police Officers Kevin Clay and Matthew Chase saw defendant walking backwards down the sidewalk outside of Nordstrom's holding a knife and waving it back and forth.¹ Defendant was being followed by a group of persons the officers recognized as habitués of Westlake Park.² The sidewalk was extremely crowded with pedestrians.³ Approximately five scared persons came up to the officers to report a man waving about a knife.⁴ The officers followed defendant and contacted him inside Pacific Place.⁵ Defendant was still waving the knife around so Officer Clay drew his firearm and ordered defendant to drop the knife.⁶ Persons in Pacific Place were running away from defendant

¹ RP at 234-35 & 332.

² RP at 288 & 342-43.

³ RP at 235.

⁴ RP at 332-36.

⁵ RP at 235-36.

⁶ RP at 236.

in fright.⁷ Defendant did not drop his knife so Officer Clay repeated his order three or four times.⁸ Once defendant dropped his knife, the officers approached defendant in order to arrest him and ordered him to get down on the ground.⁹ Defendant did not comply with this order either so the officers had to repeat it three or four times.¹⁰ Defendant took on a fighting stance.¹¹ Defendant finally went down on one knee, but kept his hands in front of him in a fighting position.¹² The officers continued to approach defendant and continued ordering him to get on the ground, but he did not do so.¹³ After Officer Clay twice kicked defendant's leg, he finally went down on both knees.¹⁴ The officers then attempted to take control of defendant's hands, which were clenched into fists.¹⁵ The officers repeatedly told defendant he was under arrest and ordered him to roll over and put his hands behind his back, but he refused and physically

⁷ RP at 240.

⁸ RP at 240-41.

⁹ RP at 241 & 337-38.

¹⁰ RP at 241-42

¹¹ RP at 338.

¹² RP at 242-43.

¹³ RP at 243.

¹⁴ RP at 243-45.

¹⁵ RP at 245.

resisted the officers' efforts to arrest him.¹⁶ Defendant repeatedly told the officers that they would have to hurt him.¹⁷ Officer Chase told defendant they did want to hurt him and he should just roll over.¹⁸ Defendant still refused and continued to physically resist.¹⁹ Defendant also was kicking with his feet, which hindered the officers' ability to control and handcuff him.²⁰ He also was pushing the officers with his arms.²¹ Some persons from the crowd pushed on defendant's legs, which enabled the officers to control defendant.²² Two other police officers arrived and assisted Officers Clay and Chase in handcuffing defendant.²³ During this incident, the officers did not see anyone try to get at, swing at or hit defendant or swing a skateboard at him or kick defendant or display a weapon.²⁴

Defendant testified that he was at Westlake Park videotaping

¹⁶ RP at 245-47, 338 & 341.

¹⁷ RP at 247-48 & 339.

¹⁸ RP at 248 & 341.

¹⁹ RP at 248-49 & 339-40.

²⁰ RP at 251-52 & 340.

²¹ RP at 340-41.

²² RP at 251-52 & 308.

²³ RP at 253-56.

²⁴ RP at 239, 246, 298-99, 304-05, 309, 310, 312, 313, 314, 323, 315, 337, 341, 345, 348, 349, 351 & 354.

police harassment of the youth there.²⁵ He claimed the police officers threatened to assault the youth.²⁶ He followed the officers into Nordstrom, but then realized a crowd of youths from the park, none of whom he had threatened in any way, were following him and brandishing skateboards, knives and other weapons.²⁷ Defendant retreated into Pacific Place and pulled out a knife he had in his backpack.²⁸ He did not attempt to call 911 or ask any pedestrian for help.²⁹ He claimed the officers instigated the youth to hit him with a skateboard.³⁰ He denied that he ever swung his knife.³¹ He testified that he immediately dropped his knife when ordered to do so.³² He agreed that the officers repeatedly told him to stop resisting, and that he refused to stop resisting.³³ He claimed that he was punched and kicked while he was on the ground.³⁴

²⁵ RP at 375-76.

²⁶ RP at 378.

²⁷ RP at 379-80.

²⁸ RP at 379-80 & 399.

²⁹ RP at 405-07.

³⁰ RP at 409.

³¹ RP at 383.

³² RP at 384-85.

³³ RP at 388 & 410 & 412.

³⁴ RP at 389.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

The trial court's decision that defendant had not made a prima facie case of purposeful discrimination regarding the prosecutor's use of a peremptory challenge to remove juror No. 5 was not clearly erroneous.

Defendant contends that the prosecutor's peremptory challenge to juror Meyer³⁵ violated his right to equal protection under *Batson v. Kentucky*.³⁶ Defendant did not raise this issue at trial until after the jury was sworn and the other jurors excused,³⁷ which hindered the prosecutor's and the trial court's ability to recall the race and ethnicity of the prospective jurors.³⁸ The trial court denied defendant's challenge as follows:

First, I want the record to reflect what I believe to be the case. I don't know that I can take judicial notice, but it seems to be undisputed, Juror No. 5 in my mind was clearly an African-American male. It was not a situation as is often the case and as is with some of the other jurors on the panel where I cannot tell what their background is, what their heritage is. He seemed to be a dark-skinned African-American male. But I do not agree with the defense proposition that he was necessarily the only African-American on the jury as I do have a memory of someone else – again, having

³⁵ RP at 173-74.

³⁶ 476 U.S. 79, 90 L.Ed.2d 69, 106 S. Ct. 1712 (1986).

³⁷ RP at 180.

³⁸ See RP at 180-85, 194-96, 200-01, 205 & 207.

been deprived of the opportunity to make the record, and there's just no way to do it realistically, forget procedurally or legally – that there were people on there who were I believe of color, but I can't say exactly where. It's very difficult.

Second, Mr. Schwarz, you indicated in your argument that this one strike indicates a pattern, which is almost impossible. According to the defense, which again, I don't agree with, I don't disagree with it either, it's an unknown situation we're in. There was a strike against an African-American male. But that doesn't establish a pattern. And you indicate that it doesn't matter what the other background of the jurors are, it's constitutionally cognizable groups. But we understand the process, you know, people who have been in a protected class at some point, or could be considered a protected class.

In light of the makeup of this jury as I understand it now, which is not complete, but it involves the panel, juror No. 2, Mr. Metuacha, clearly to me seems to be of a protected class. I could guess he might be Polynesian of some sort, or Hawaiian. I'm not exactly sure. It's not my point to guess. My point is that he is constitutionally protected. Julie Chen appears to me to also be constitutionally protected. She was on the panel. And Estevan Hernandez. I don't remember Anne Toda and I do believe Mr. Teodoro Geronimo, No. 17, also likely was in a protected class.

Of note, the City only struck one person, juror No. 5, that I've been able to identify as in a protected class, and I haven't heard any argument to the contrary. And in fact, jurors No. 2, No. 14 and, excuse me, No. 2, No. 11 and No. 12 are all seated on the jury. Neither side struck them. And No. 17, who I remember as being in a protected class, nobody struck him. He

didn't make it onto the jury, but that had nothing to do with his situation except that he was sitting in the back and he was Juror No. 17. We didn't need that many jurors. Again, I don't remember Anne Toda.

So when I look at striking one juror who was African-American in light of the facts that I know, which is I know there were, there was a diverse jury. And I don't know if there were any other African-American jurors on the panel. I can't establish a pattern. I don't believe that the defense has shown a prima facie case, made a prima facie showing that the City acted in a non-race neutral manner.³⁹

The determination whether a peremptory juror challenge is raced based is a three-part test:

First, the challenger 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. Second, the burden shifts to the State to come forward with a neutral explanation for challenging the juror. And third, [t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.

The *Batson* Court further outlined the requirements of a prima facie case. To establish a prima facie case, the challenger first must show that he is a member of a cognizable racial group. Second, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used a peremptory challenge to exclude a potential juror from the jury on account of the juror's

³⁹ RP at 205-07.

race.⁴⁰

In *State v. Meredith*,⁴¹ the court held that the dismissal of the only venire person from a constitutionally cognizable group does not automatically establish a prima facie case under *Batson*. “Something more” than a peremptory challenge against a member of a racially cognizable group is required to establish a prima facie case.⁴² In *Meredith*,⁴³ *State v. Saintcalle*,⁴⁴ *State v. Rhone*⁴⁵ and *State v. Thomas*,⁴⁶ the court upheld the trial court’s determination that the prosecutor’s use of a peremptory challenge to remove the only African-American member of the jury panel did not violate *Batson*. In *Saintcalle*⁴⁷ and *Rhone*,⁴⁸ the struck prospective juror was of the same race as the defendant.

⁴⁰ *State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831, *cert. denied*, 555 U.S. 919 (2008) (citations and quotations omitted).

⁴¹ 178 Wn.2d 180, 184, 306 P.3d 942 (2013), *cert. denied*, 134 S. Ct. 1329 (2014).

⁴² *Meredith*, 178 Wn.2d at 184; *State v. Rhone*, 168 Wn.2d 645, 653, 229 P.3d 752, *cert. denied*, 131 S. Ct. 522 (2010).

⁴³ 178 Wn.2d at 182.

⁴⁴ 178 Wn.2d 34, 35, 309 P.3d 326, *cert. denied*, 134 S. Ct. 831 (2013).

⁴⁵ 168 Wn.2d at 649-50.

⁴⁶ 166 Wn.2d 380, 395-98, 208 P.3d 1107 (2009).

⁴⁷ 178 Wn.2d at 35.

⁴⁸ 168 Wn.2d at 648.

A trial court's ruling on a *Batson* challenge is accorded great deference on appeal and will be upheld unless clearly erroneous.⁴⁹

Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding largely will turn on evaluation of credibility. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. And in *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), the Court declared, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations."⁵⁰

As the court noted in *Rhone*,⁵¹ where reasonable minds may differ in finding an inference of discrimination, an appellate court may not conclude that a trial court's determination regarding that inference is clearly erroneous. Also, deference is important because trial judges must have some assurance that the rest of the trial will not be an exercise in futility if it turns out an appellate court would have ruled on a *Batson* challenge differently.⁵²

⁴⁹ *State v. Rhone*, 168 Wn.2d 645, 651, 229 P.3d 752 (2010).

⁵⁰ *Hicks*, 163 Wn.2d at 493 (citations and quotations omitted).

⁵¹ 168 Wn.2d at 657.

⁵² *Saintcalle*, 178 Wn.2d at 56.

Factors that a trial court can consider in determining whether circumstances exist, *i.e.*, “something more,” than a peremptory challenge against a member of a racially cognizable group, include a disproportionate use of strikes against a group, past discriminatory use of peremptory challenges by the prosecuting attorney and the disparate impact of using all or most of the challenges to remove minorities from the jury.⁵³

In making its decision, the trial court evaluated the composition of the jury to determine whether the prosecutor had used his peremptory challenges to remove members of any racially cognizable group, which is exactly what a trial court should do. The prosecutor exercised only one strike against African-Americans, did not use challenges to remove minorities from the jury and this prosecutor had no history of discriminatory use of peremptory challenges.⁵⁴ The trial court’s decision that defendant had not made a *prima facie* case under *Batson* was not clearly erroneous.

At trial, the primary circumstance that defendant relied on to

⁵³ *Rhone*, 168 Wn.2d at 656.

⁵⁴ See RP at 207 (I believe I’m the only judge in this building that

show discrimination was that Meyer was the only black member of the jury panel.⁵⁵ This assertion certainly is not supported by the trial court's ruling.⁵⁶ Also, as shown by the cases previously discussed, this circumstance is not adequate to establish a prima facie case of discrimination. Defendant also claimed that other prospective jurors who had experience with the police were not questioned to the extent that Meyer was.⁵⁷ This claim bordered on the absurd. The prosecutor did not ask a single question about any prospective juror's prior experience with the police.⁵⁸ Defense counsel himself raised this subject, elicited the response from Meyer and then dropped the matter.⁵⁹ The prosecutor obviously did not have an opportunity thereafter to further question the jury panel. Defendant presented to the trial court no valid basis for a *Batson* challenge.

has ever granted a *Batson* challenge, against a different City attorney.)

⁵⁵ RP at 180, 193 & 204.

⁵⁶ See RP at 205 (But I do not agree with the defense proposition that he was necessarily the only African-American on the jury as I do have a memory of someone else – again, having been deprived of the opportunity to make the record, and there's just no way to do it realistically, forget procedurally or legally – that there were people on there who were I believe of color, but I can't say exactly where.)

⁵⁷ RP at 204.

⁵⁸ See RP at 139-50.

⁵⁹ RP at 151-53.

Defendant now claims that the “strike itself was based on a race based experience of Juror 5”⁶⁰ and “Juror 5 was stricken from the venire for sharing a relevant life experience steeped wholly in racism and racial tension.”⁶¹ This claim is not supported by the record. Nothing in Meyer’s explanation of the experience he had with the police⁶² even suggested that his race was a factor. He thought the investigative stop was based on the length of his hair.⁶³

Defendant also claims that “Juror 5 was struck because he had an experience unique to a black male facing racial profiling by the police.”⁶⁴ This claim erroneously assumes, from a silent record, that none of the other prospective jurors had ever been subjected to racial profiling. Defense counsel chose not to ask them about their experience with the police or whether any had experienced racial profiling. As previously mentioned, the prosecutor did not ask any questions of the prospective jurors’ regarding their experience with the police.

⁶⁰ Motion for Discretionary Review, at 10.

⁶¹ Motion for Discretionary Review, at 10-11.

⁶² See RP at 152.

⁶³ RP at 152.

Defendant has abandoned all of the bases upon which he sought discretionary review in the Court of Appeals and now contends that the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings as to call for review.⁶⁵ In considering the briefs and oral argument of the parties and applying the correct standard of review to the trial court's decision, the superior court decided defendant's appeal in exactly the manner envisioned by the RALJ rules. The Court of Appeals did not sanction a departure from the accepted norm of judicial conduct.⁶⁶ Neither defendant's RALJ appeal nor his motion for discretionary review were decided other than by the accepted⁶⁷ and usual⁶⁸ course of judicial proceedings. Defendant has not established that review under RAP 13.5(b)(3) is warranted.

⁶⁴ Motion for Discretionary Review, at 10.

⁶⁵ See RAP 13.5(b)(3).

⁶⁶ See 1 Washington Appellate Practice Deskbook, § 10.8(1), at 10-11 (3rd Ed. 2005) (discussing meaning of RAP 2.3(b)(3) (essentially identical to RAP 13.5(b)(3)).

⁶⁷ "Accepted" means widely used or found or generally agreed upon. *Webster's Third New International Dictionary* 11 (2002).

⁶⁸ "Usual" describes that which happens frequently in the normal course of events and lacks any element of strangeness. *Webster's Third New International Dictionary* 2524 (2002).

F. CONCLUSION

Because defendant has not demonstrated that the Court of Appeals' decision warrants discretionary review under RAP 13.5(b)(3), this court should deny his Motion for Discretionary Review.

Respectfully submitted this 29th day of July, 2016.

**PETER S. HOLMES
SEATTLE CITY ATTORNEY**

By Richard Greene
Richard Greene
Assistant City Attorney
WSBA #13496

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,)
Respondent,)
)
vs.)
)
MATTHEW ERICKSON,)
Petitioner.)
_____)

No. 93408-8

**CERTIFICATE OF PROOF
OF SERVICE**

I am an Assistant City Attorney representing respondent City of Seattle in this case.
On July 29, 2016, I served a true copy of the Answer to Motion for Discretionary Review
on counsel for petitioner by personally delivering the same to him at the following address:

Philip Chinn
Public Defender Association
810 Third Ave., Suite 800
Seattle, WA 98104

I certify under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct.

Signed this 29th day of July, 2016 at Seattle, Washington.

Richard Greene
Richard Greene