

No. 93408-8

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

No. 73754-6-I

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

CITY OF SEATTLE,
Respondent,

vs.

MATTHEW ERICKSON,
Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

**PETER S. HOLMES
SEATTLE CITY ATTORNEY**

Richard Greene
Assistant City Prosecutor
WSBA #13496

Attorneys for Respondent
City of Seattle

Seattle Law Department
701 Fifth Avenue Suite 2050
Seattle, Washington 98104-7090
telephone (206) 684-7757

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 Decision on RALJ Appeal, entered on June 24, 2015, affirmed defendant's convictions for Unlawful Use of Weapons and Resisting Arrest.

C. ISSUE PRESENTED FOR REVIEW

Has defendant established that his case presents any issue that warrants discretionary review under RAP 2.3(d)?

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, and he 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 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

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.

⁷ RP at 240.

⁸ RP at 240-41.

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 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

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.

¹⁶ RP at 245-47, 338 & 341.

¹⁷ RP at 247-48 & 339.

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 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

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.

²⁵ RP at 375-76.

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

Ryan Swanson testified that he was in his car when he saw a large group of kids on the sidewalk yelling at a man, who was backing away from them carrying a knife.³⁵ The man moved the knife in reaction to persons who were trying to confront him.³⁶ One

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.

³⁵ RP at 358-59.

³⁶ RP at 359.

person swung a skateboard or backpack at the man.³⁷

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. 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 Meyer³⁸ violated his right to equal protection under *Batson v. Kentucky*.³⁹ Defendant did not raise this issue at trial until after the jury was sworn and the other jurors excused,⁴⁰ which hindered the prosecutor's and the trial court's ability to recall the race and ethnicity of the prospective jurors.⁴¹ 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

³⁷ RP at 359.

³⁸ RP at 173-74.

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

⁴⁰ RP at 180.

⁴¹ See RP at 180-85, 194-96, 200-01, 205 & 207.

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 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.⁴²

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

⁴² RP at 205-07.

prosecutor used a peremptory challenge to exclude a potential juror from the jury on account of the juror's race.⁴³

In *State v. Meredith*,⁴⁴ 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.⁴⁵ In *Meredith*,⁴⁶ *State v. Saintcalle*,⁴⁷ *State v. Rhone*⁴⁸ and *State v. Thomas*,⁴⁹ 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*⁵⁰ and *Rhone*,⁵¹ the struck prospective juror was of the

⁴³ *State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831, cert. denied, 555 U.S. 919 (2008) (citations and quotations omitted).

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

⁴⁵ *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).

⁴⁶ 178 Wn.2d at 182.

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

⁴⁸ 168 Wn.2d at 649-50.

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

⁵⁰ 178 Wn.2d at 35.

⁵¹ 168 Wn.2d at 648.

same race as the defendant.

A trial court's ruling on a *Batson* challenge is accorded great deference on appeal and will be upheld unless clearly erroneous.⁵²

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."⁵³

As the court noted in *Rhone*,⁵⁴ 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

⁵² *State v. Rhone*, 168 Wn.2d 645, 651, 229 P.3d 752 (2010).

⁵³ *Hicks*, 163 Wn.2d at 493 (citations and quotations omitted).

⁵⁴ 168 Wn.2d at 657.

have ruled on a *Batson* challenge differently.⁵⁵

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.⁵⁶

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.⁵⁷ The trial court’s decision that defendant had not made

⁵⁵ *Saintcalle*, 178 Wn. 2d at 56.

⁵⁶ *Rhone*, 168 Wn.2d at 656.

⁵⁷ See RP at 207 (I believe I’m the only judge in this building that has ever granted a *Batson* challenge, against a different City attorney.)

a prima facie case under *Batson* was not clearly erroneous.

At trial, the primary circumstance that defendant relied on to show discrimination was that Meyer was the only black member of the jury panel.⁵⁸ 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.⁵⁹ This claim bordered on the absurd. The prosecutor did not ask a single question about any prospective juror's prior experience with the police.⁶⁰ Defense counsel himself raised this subject, elicited the response from Meyer and then dropped the matter.⁶¹ 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.

Defendant now claims that the prosecutor's challenge "was

⁵⁸ RP at 180, 193 & 204.

⁵⁹ RP at 204.

⁶⁰ See RP at 139-50.

⁶¹ RP at 151-53.

based on a race based experience of Juror 5.”⁶² This claim does not appear to be correct. Nothing in Meyer’s explanation of the experience he had with the police⁶³ even suggested that his race was a factor. Defendant also claims that the prosecutor’s challenge highlighted “racial differences between Mr. Erickson and the arresting officers in his case – a situation that Juror 5 experienced – a situation steeped in racial tension and one which no other venire member shared.”⁶⁴ This claim erroneously suggests that the defendant’s theory of the case can establish a valid *Batson* challenge. It also 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.

⁶² Motion for Discretionary Review, at 13.

⁶³ See RP at 152.

⁶⁴ Motion for Discretionary Review, at 14.

2. Sufficient evidence was presented to support defendant's conviction for Unlawful Use of Weapons.

Defendant contends that the evidence was not sufficient to prove every element of Unlawful Use of Weapons beyond a reasonable doubt, in particular that the knife was metal knuckles or a switchblade knife. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; any challenge to the sufficiency of the evidence admits the truth of the prosecution's evidence and all inferences that can reasonably be drawn therefrom.⁶⁵

The standard for sufficiency of the evidence requires the evidence to be interpreted most strongly against the defendant.⁶⁶ The existence of a hypothetical explanation consistent with innocence does not mean that the evidence is insufficient to support the

⁶⁵ *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1988), *review denied*, 111 Wn.2d 1033 (1989).

⁶⁶ *State v. Joy*, 121 Wn.2d 333, 342, 851 P.2d 654 (1993).

conviction.⁶⁷ In a sufficiency of the evidence challenge, a defendant's alternative interpretations of the evidence are irrelevant.⁶⁸

Circumstantial evidence is no less reliable than direct evidence,⁶⁹ and, to support a criminal conviction, circumstantial evidence need not be inconsistent with innocence.⁷⁰ Credibility determinations are for the trier of fact and are not subject to review.⁷¹ The finder of fact, and not the reviewing court, determines what conclusions reasonably follow from the particular evidence in a case.⁷² "Only with the greatest reluctance and with clearest cause should judges – particularly those on appellate courts – consider

⁶⁷ *State v. VJW*, 37 Wn. App. 428, 433, 680 P.2d 1068, review denied, 102 Wn.2d 1001 (1984).

⁶⁸ *State v. Calvin*, 176 Wn. App. 1, 10, 316 P.3d 496 (2013).

⁶⁹ *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 110 (1997); see also Instruction No. 23; Clerk's Papers (The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts of this case. One is not necessarily more or less valuable than the other.)

⁷⁰ *State v. Zunker*, 112 Wn. App. 130, 135, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012 (2003).

⁷¹ *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010).

⁷² *State v. Bencivenga*, 137 Wn.2d 703, 708 & 711, 974 P.2d 832 (1999).

second-guessing jury determinations.”⁷³

The jury was instructed, in pertinent part, as follows:

To convict the defendant of the crime of Unlawful Use of Weapons, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 10th June, 2013, the defendant possessed or carried a metal knuckles or switchblade knife;
- (2) That the defendant acted knowingly; and
- (3) That the possession or carrying occurred in the City of Seattle.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.⁷⁴

“Metal knuckles” means any device or instrument made wholly or partially of metal that is worn for purposes of offense or defense in or on the hand and that either protects the wearer’s hand while striking a blow or increases the force of impact from the blow or injury to the person receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it or consist of projections or studs which would contact the person receiving a blow.⁷⁵

⁷³ *State v. Kirkman*, 159 Wn.2d 918, 938, 155 P.3d 125 (2007).

⁷⁴ Instruction No. 13; Clerk’s Papers.

⁷⁵ Instruction No. 14; Clerk’s Papers.

“Switchblade knife” means any knife having a blade that opens automatically by hand pressure applied to a button, spring mechanism or other device or a blade that opens, falls or is ejected into position by force of gravity or by an outward, downward or centrifugal thrust or movement.⁷⁶

Officer Clay described the knife as a trench-style folding knife with metal knuckles integrated into the handle.⁷⁷ The metal knuckles extend over the fingers of the person holding the knife and enable the holder to punch another person.⁷⁸ Defendant admitted he was using the knife to shield himself.⁷⁹ From the officer’s description of the knife, the circumstances in which defendant was using the knife and their common sense, a reasonable jury could determine that the purpose of the metal knuckles that extended over the wearer’s fingers was to protect the wearer’s hand while striking a blow or to increase the force of impact from the blow or injury to the person receiving the blow. Indeed, based on the design of the knife, no other purpose seems likely. The knife plainly was constructed and fashioned as a weapon, which is how defendant was using it.

⁷⁶ Instruction No. 15; Clerk’s Papers.

⁷⁷ RP at 257 & 283.

⁷⁸ RP at 283 & 302-03.

Viewed in the light most favorable to the City, the evidence and reasonable inferences from the evidence were sufficient to prove that the knife was “metal knuckles.”

Officer Clay also explained that the knife blade was activated or deployed by a lever and a spring mechanism.⁸⁰ The knife blade did not have to be manually pulled out, but springs out.⁸¹ Defendant acknowledged that the knife opened when he pressed a lever.⁸² This evidence showed that the knife opened automatically when pressure was applied to the lever. Viewed in the light most favorable to the City, the evidence and reasonable inferences from the evidence were sufficient to prove that the knife was a “switchblade knife.”

Sufficient evidence was presented to support defendant’s conviction for Unlawful Use of Weapons.

⁷⁹ RP at 383-84.

⁸⁰ RP at 285-86, 299-300 & 303.

⁸¹ RP at 286.

⁸² RP at 404.

F. CONCLUSION

Because defendant has not demonstrated that this case involves any issue warranting discretionary review under RAP 2.3(d), this court should deny his Motion for Discretionary Review.

Respectfully submitted this 18th day of August, 2015.

**PETER S. HOLMES
SEATTLE CITY ATTORNEY**

By Richard Greene
Richard Greene
Assistant City Attorney
WSBA #13496

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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CITY OF SEATTLE,)
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MATTHEW ERICKSON,)
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No. 73754-6-I

**CERTIFICATE OF PROOF
OF SERVICE BY MAILING**

I am an Assistant City Attorney representing respondent in this case. On August 18, 2015, I served a true copy of the Answer to Motion for Discretionary Review on counsel for petitioner by mailing the same to them, postage prepaid, at the following addresses:

Philip Chinn
Kirshenbaum & Goss
1314 Central Ave. S. #101
Kent, WA 98032-7430

Michael Schueler
Cowlitz County Public Defender
1801 1st Ave. #1A
Longview, WA 98632-3271

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

Signed this 18th day of August, 2015 at Seattle, Washington.

Richard Greene
Richard Greene