

No. 93408-8

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2015 AUG -7 PM 2:56

No. 73754-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MATTHEW ALEX ERICKSON, Petitioner,

v.

CITY OF SEATTLE, Respondent,

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

MATTHEW ALEX ERICKSON, "Petitioner," asks for this motion for discretionary review to be granted, and his convictions reversed, for the reasons below.

B. DECISION

Petitioner Erickson seeks review of his conviction in Seattle Municipal Court, no. 589641 and RALJ appeal in King County Superior Court, no. 14-1-06819-7 SEA. The final judgment and sentence was entered on November 13, 2014. The denial of Mr. Erickson's RALJ appeal was June 24, 2015. Mr. Erickson does not seek review of the courtroom closure issue raised in the RALJ Appeal. A copy of the Order on RALJ Appeal is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

I. Did the Municipal Court violate Mr. Erickson's right to equal protection of the laws when it failed to grant Defense's *Batson* challenge by ruling that Defense had not made a *prima facie* showing of a racially motivated use of the City's peremptory challenge?

II. Did the City present sufficient evidence to convict Mr. Erickson of possession of a dangerous weapon-- a switchblade knife or metal knuckles--when the evidence presented did not that the knuckles made of

reinforced metal, and no testimony was presented that they were used to protect a hand or increase the force of a blow, and that the knife blade did not open automatically via a button press or ejection due to a thrusting motion?

D. STATEMENT OF THE CASE

Mr. Erickson was charged by the City of Seattle with one count of resisting arrest under SMC 12A.16.050, and one count of possession of a dangerous weapon (switchblade and/or metal knuckles), SMC 12A.14.080, 12A.14.010 stemming from events alleged to have occurred on or about June 10, 2013. Mr. Erickson's jury trial started October 21, 2014 and concluded on October 23, 2014. Mr. Erickson was sentenced on November 13, 2014.

During the first day of trial, the Court conducted voir dire to select jurors for the case. Verbatim Report of Proceedings (VRP) 110 (Appendix B). During Defense's voir dire, Juror Five, identified as Mr. Meyer, discussed at length his interactions with police officers, detailing a time he felt profiled by officers. VRP 152. Juror Five stated that he was stopped by officer because he "fit the description" of a suspect in a church theft. *Id.* Juror Five stated that the officers would not tell him how he fit the description. *Id.* During peremptory challenges, the City struck Mr. Meyer, identified as the "only black member of the jury panel". VRP 180. At the

time, no one objected to Defense's contention that Mr. Meyer was the only black member of the jury panel. In response to this peremptory challenge, Defense raised a claim under *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). *Id.*

To support the *prima facie* showing of discriminatory intent, Defense stated:

Juror No. 5, who was dismissed with a peremptory challenge by the City was, as far as I could tell, the only black juror on the jury. He was the only member of that particular racial group and he was stricken from the jury. I think we also noted for the record previously that Mr. Erickson is a black male. So to the extent that it's relevant that Mr. Erickson is of the same racial group.

VRP 193. Defense further noted that previous cases have held that striking some members of a racial group is sufficient to support a *prima facie* showing of discriminatory intent, and that because Juror Five was the only member of the same racial group as Mr. Erickson, analysis into jurors of other cognizable racial groups left on the jury panel is not necessary. VRP 193-94.

In response to this motion, the City conceded that Juror Five was of African American descent but noted that there were "other jurors that I would classify as people of color." VRP 194-95. Based on this assertion, the Court, as well as Defense counsel, indicated that there were other persons who did not appear to be Caucasian in the venire, but, given a lack

of juror questionnaires on race or video, the Court could not be certain of the exact racial makeup of the venire. VRP 195-96.

Prior to the Court ruling on the sufficiency of Defense's *prima facie* showing, Defense counsel further elucidated its position:

The concept of *Batson* has to do with cognizable racial groups rather than minorities versus white people and minorities versus non-minorities. So in this case, there was . . . one black man on the jury and he was stricken. Therefore, it's not a situation where there are multiple people of the same cognizable group and thus a pattern could be detected from those people. It's a situation where there's only one person in that, in the group and therefore, we have to do our best to make a decision as to whether there is such a pattern based on that one piece of information rather than numerous pieces of information.

...

And finally, that there are other people on the panel who had experience with the police who were not probed, were not questioned, were not probed to the same extent and therefore we don't know as much about their experiences. . . . In this case, it happens that the one black person also had an experience that was relevant to this case and he was dismissed from the jury.

VRP 203-205.

In ruling on this motion, the Court noted that there were other members of cognizable classes left on the jury panel. VRP 206. The Court believed that there may have been another person in the venire who also may have been African-American, but was unsure of this. VRP 205. As noted above, no one contradicted Defense's assertion that Juror Five was the only African-American member of the jury when the *Batson* issue was

initially raised. VRP 180. When asked about this issue, the City said there were other people of color, but did not identify other African American members of the jury. VRP 195. The City indicated that Juror Five "seemed to be me to be [sic] visibly of African American descent." *Id.* The Court agreed that "there was a strike against an African American male." VRP 206. The Court found that there was a "diverse jury" and did not find that Defense made a *prima facie* "showing that the City acted in a non-race neutral manner." VRP 207. The Court never ruled on the sufficiency of any race neutral explanations because it found that no *prima facie* showing was made.

Once the jury was empaneled, the City began its case in chief, first calling Officer Kevin Oshikawa Clay. VRP 228. As part of his testimony, Officer Clay discussed his observations of the knife allegedly used in this case. VRP 283. Officer Clay described the knife as a "trench knife" which, as part of its design, incorporated brass knuckles as a hand grip. *Id.* In describing what this meant, Officer Clay stated that the loopholes "go over your fingers and would be between your finger and your hand, making a fist to punch somebody." *Id.* Officer Clay further testified that the knife "operates with a spring *assist*." VRP 285 (emphasis added). In describing this spring assist, Officer Clay indicated "there's a little lever. You can use your finger or your thumb right there to move the blade." VRP 286.

During cross examination of Officer Clay, Defense specifically focused on the differences between a spring assisted and switchblade knife. VRP 299. Officer Clay testified that he believed switchblade knives and spring assisted knives to be "one and the same" *Id.* Defense counsel further confirmed that this knife did not have a button that released the blade quickly. *Id.* In fact, Officer Clay confirmed that "the blade naturally stays closed once it's in a closed position." *Id.* Furthermore, Officer Clay agreed that there is "not a button that releases a spring" and that the level was "a piece of the blade itself." *Id.* at 299-300.

Next, Defense inquired about the handle of the knife. VRP 300. When discussing the opening slot in the handle, Officer Clay agreed that "there's a, enough space for the knife to clear both sides of the opening without touching." *Id.* Further, Officer Clay agreed that "those sides aren't joined anywhere on that side of the knife, they're only joined at the base of the knife on the other side." VRP 300-01. Finally, Officer Clay agreed that he does not know what kind of metal blade is and what kind of resistance it has to it. VRP 301.

On redirect examination, the City attempted to clarify the nature of the knife handle and the blade itself. VRP 302. Officer Clay agreed that the "webbings" on top of the handle are what constitutes metal knuckles. VRP 303. In terms of the knife, Officer Clay testified that the lever
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"deploys the blade" by "mov[ing] it out of the linear area." *Id.* Finally, Officer Clay testified that the knife "is assisted by a spring." *Id.*

Mr. Erickson testified as the final witness in the trial. VRP 375. The City cross examined Mr. Erickson about the knife he possessed. VRP 398. The City asked if pressing the lever caused the knife to spring open. VRP 404. Mr. Erickson testified that the knife did not spring open when the lever was pushed. *Id.*

After testimony was completed, the Court turned to jury instructions. VRP 436. The City and Defense discussed the definitional instruction of a dangerous weapon. VRP 437-38. The Court settled on the instruction reading in relevant part "He knowing possesses or carries any metal knuckles or switchblade knife." VRP 438. The remainder of the jury instructions regarding the metal knuckles and knife were not objected to by Defense and seemed to follow standard pattern instruction. VRP 438-39. The Court contemplated a unanimity instruction as to whether Mr. Erickson possessed either metal knuckles or a switchblade knife. VRP 456-60. The Court determines the instruction should read "To convict the defendant of unlawful use of weapons, you must unanimously agree as to whether the defendant unlawfully carried or possessed metal knuckles or a switchblade knife." VRP 461. However, the Court only proposed a general

verdict form--no special verdict was given regarding whether the weapon was a switchblade or metal knuckles. *See* Verdict Forms (Appendix D).

Finally, before closing argument, the Court addressed its concern about people entering and leaving the courtroom during closing argument. VRP 466-474.

The jury heard closing argument, VRP 476, and returned general guilty verdicts. VRP 497. Mr. Erickson was sentenced on November 13, 2014.

A Notice of Appeal was filed in Seattle Municipal Court on November 17, 2014. Mr. Erickson raised three grounds for appellate relief from his conviction: first, that the trial court erroneously denied Mr. Erickson's *Batson* challenge; second, that there was insufficient evidence to support Mr. Erickson's conviction for possession of a dangerous weapon; and third, that the trial court closed the courtroom to the public without properly conducting a *Bone-Club* analysis. Appellant's RALJ Brief at 1-2 (Appendix C). On June 24, 2015, Mr. Erickson's convictions were affirmed. Order on RALJ Appeal (Appendix A). The superior court concluded that sufficient evidence existed to support Mr. Erickson's conviction for possessing a dangerous weapon, that Mr. Erickson had not raised a *prima facie* case of racial discrimination during jury selection, and that no courtroom closure had taken place. *Id.* Mr. Erickson timely filed a

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Notice for Discretionary Review with the Washington Court of Appeals,
Division One on July 23, 2015.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 2.3(d) allows for discretionary review to be granted in four instances:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

This Court should accept review because (1) the decision of the superior court regarding Mr. Erickson's *Batson* challenge is in conflict with decisions of both the Washington Supreme Court and United States Supreme Court; (2) there is a significant question of law under the Constitution of the State of Washington and the United States concerning Mr. Erickson's right to due process and equal protection under the Fourteenth Amendment and Article I, Section 3 of the Washington Constitution; and (3) this petition involves an issue of substantial public interest warranting review: Mr. Erickson's *Batson* challenge directly involves racial discrimination in jury selection.

A. The trial court denied Mr. Erickson equal protection of the laws when it denied Mr. Erickson's *Batson* challenge by ruling that Defense had not made a *prima facie* showing of a racially motivated use of the City's peremptory challenge.

The superior court's order affirming Mr. Erickson's convictions is in conflict with decisions of the Washington Supreme Court and the United States Supreme Court. "[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 v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986); 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.

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.

Second, "the burden shifts to the State to come forward with a [race-neutral explanation]" for the challenge. *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013) (quoting *Batson*, 476 U.S. at 94). Third and

finally, the trial court has the duty to determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98. *Batson* rulings are reviewed for clear error. *State v. Rhone*, 168 Wn.2d 645, 651, 229 P.3d 752 (2009). Any error is structural, requiring reversal without any showing of prejudice. *Batson*, 476 U.S. at 100.

The use of a peremptory challenge against the only venire member of the same cognizable racial group as a defendant may be sufficient to show a prima facie case of purposeful discrimination. *State v. Rhone*, 168 Wn.2d 645, 652-53, 229 P.3d 752 (2010) (citing *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.2d 1107 (2009)). In determining if the prima facie case of discrimination has been made, the Court should look for "something more" than merely a numerical analysis. *Id.* at 653. There is no hard and fast rule for what constitutes "something more", but the Court should consider factors such as:

- (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

Id. at 656 (citing *State v. Wright*, 78 Wn. app. 93, 100-01, 896 P.2d 713 (1995)).

The striking of Juror 5 satisfies the "something more" test because doing so highlighted issues between the race of Mr. Erickson and the police officers, struck the only member of the venire of the same racial group as Mr. Erickson, and the strike itself was based on a race based experience of Juror 5. In *Rhone*, Mr. Rhone was unable to show a prima facie case of discrimination because he only argued that there were no other African American person in the venire, stating:

I don't mean to be facetious or disrespectful or a burden to the Court. However, I do want a jury of my peers. And I notice that [the prosecutor] took away the black, African-American, man off the jury.

Also, if I can't have—I would like to have someone that represents my culture as well as your culture. To have this the way it is to me seems unfair to me. It's not a jury of my peers.

Rhone, 168 Wn.2d at 649. No argument was made to any other factors tending toward discrimination. Unlike the situation in Mr. Rhone's case, Mr. Erickson did present "something more"--stating "In this case, it happens that the one black person also had an experience that was relevant to this case and he was dismissed from the jury." VRP 205. Simply put, Mr. Erickson appropriately argued that Juror 5 was struck because he had an experience unique to a black male facing racial profiling by police.

This situation is further exacerbated by the fact that this strike served to

highlight 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. In such a situation it is evident that a prima facie case of racial discrimination has been shown because Juror 5 was struck solely for sharing a story unique to black males in American society--one of being hassled and racially profiled by law enforcement. Finally, striking Juror 5 evinces factors (3) and (4) as mentioned in *Rhone*, because there was only one African American member of the venire and this striking highlighted racial differences between the victims (the arresting officers) and Mr. Erickson. See *Rhone*, 168 Wn.2d at 656. Because Mr. Erickson has shown "something more"--that Juror 5 was stricken from the venire for sharing a relevant life experience steeped wholly in racism and racial tension--he has made the prima facie case for discrimination necessary to satisfy the first prong of *Batson*. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson and its progeny make it clear that the initial inquiry as to whether the defense has made a *prima facie* case is focused on the race of the target of the peremptory strike, particularly where, as is the case here, that potential juror is of the same racial group as the defendant. *Batson*, 476 U.S. at 96 ("the defendant first must show that he is a member of a

cognizable racial group... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.”) (internal citation omitted); *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013) (“[r]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in *judging a citizen by the color of his or her skin.*”) (emphasis added).

Here, the court based its ruling on whether there were members of *any* constitutionally protected group on the jury, *see* VRP 206, rather than on whether the excluded potential juror was peremptorily struck based on his race. This analysis conflicts with *Batson* itself and the cases that follow it, which emphasize racial discrimination against the potential juror.

Accordingly, the trial court committed clear error in ruling that Mr. Erickson did not present a *prima facie* case of racial discrimination, and the superior court erred in affirming this ruling, requiring a reversal of Mr. Erickson’s convictions and a new trial. *Batson*, 476 U.S. at 100.

For the reasons discussed above, Mr. Erickson’s *Batson* claim also involves a significant question of law under both the Washington Constitution and the United States Constitution. Further, as *Saintcalle*

makes clear, racial discrimination in jury selection is an issue of public interest that should be decided by an appellate court:

Twenty-six years after Batson, a growing body of evidence shows that racial discrimination remains rampant in jury selection. . . . We conclude that our Batson procedures must change and that we must strengthen Batson to recognize these more prevalent forms of discrimination.

Saintcalle, 178 Wn.2d at 35-36. Accordingly, review should be granted on this issue and Mr. Erickson's convictions should be reversed.

B. There is insufficient evidence to convict Mr. Erickson of possessing a dangerous weapon when the evidence showed that the knife handle was not reinforced to protect a hand or add force to a blow and that the knife did not open automatically.

The superior court erred in concluding that sufficient evidence existed to convict Mr. Erickson of possession of a dangerous weapon, thus denying Mr. Erickson his constitutional right to due process. Sufficiency of the evidence claims are of constitutional magnitude because "due process requires the State to prove every element of a crime beyond a reasonable doubt." *State v. Zeferino-Lopez*, 179 Wn. App. 592, 599, 319 P.3d 94 (2014). However, in reviewing these claims, the Court must inquire whether "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt

beyond a reasonable doubt." *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006).

When interpreting a statute, the Court first looks to the plain language of the statute. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). When the plain language of a statute is unambiguous, the court need not inquire further as to its meaning. *Id.* Finally, all statutes are enforced in accordance with its plain meaning. *Id.*

Taking all the evidence in a light most favorable to the prosecution, there was insufficient evidence to convict Mr. Erickson of possessing a dangerous weapon. First, SMC 12A.14.010 defines "metal knuckles" as an instrument that is worn for the purpose of offense or defense on the hand that protects it while striking a blow or increase the force of the blow. The evidence presented to the Court regarding the hand grip of the knife Mr. Erickson possessed does not support a plain language finding that it was metal knuckles. Here, the evidence showed that the knife handle had "webbings" on top of it, which Officer Clay asserted were "brass knuckles." VRP 302-03. At no point in his testimony did Officer Clay state that these webbings were designed to protect a hand while striking, or to increase the force of a blow struck with the handgrip-- at best, he testifies that the handgrip went around a wearer's fingers allowing them to make a fist to punch someone. VRP 283. The plain

language of SMC 12A.14.010 requires that metal knuckles either protect a hand while punching or increase the force of a blow--simply having webbing that fits around fingers does not satisfy this explicit requirement.

Further, Officer Clay acknowledged on cross examination that this handgrip had a gap in it that allowed a blade to pass through it and it only connected together at the base of the knife--meaning that the handle itself was not reinforced. VRP 300-301. Officer Clay also acknowledged that he had no idea about how strong the metal was on the knife handle. VRP 301. Such testimony does not prove that this handgrip was metal knuckles beyond a reasonable doubt. Without any testimony that the handle was designed in such a manner to protect Mr. Erickson's hands or increase the force of a blow, the City failed to provide the jury with evidence necessary for a reasonable jury to conclude beyond a reasonable doubt that Mr. Erickson possessed metal knuckles.

Next, the City failed to provide sufficient evidence that Mr. Erickson possessed a "switchblade knife." SMC 12A.14.010 defines a "switchblade knife" as 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*" (emphasis added). Once again, the City failed to present sufficient evidence that the knife opened

automatically or ejected into position by force of gravity, or a particular thrust. Taking all the facts educed in a light most favorable to the City, the knife possessed by Mr. Erickson was a knife that opened with a "spring assist" via the use of a lever to slide the blade. VRP 285-86. In fact, direct testimony by Officer Clay indicated that the knife did not have a button that quickly released the blade or that "releases a spring" that deployed the knife. VRP 299-300.

By the plain language of SMC 12A.14.010, such a blade does not qualify as a "switchblade knife" because it does not open automatically by the press of a button or the flick of a wrist. That Officer Clay believes that spring assisted knife and a switchblade knife are one and the same does not make it so--rather, the Seattle Municipal Code explicitly enumerated that only knives that deploy *automatically* with the press of a button or the flick of a wrist would qualify as a switchblade knife. No testimony educed by the City supports a finding that the knife possessed by Mr. Erickson met the plain language definition of a switchblade knife, and thus no rational trier of fact make such a finding beyond a reasonable doubt. *Roth*, 131 Wn. App. at 561.

Finally, in convicting Mr. Erickson, the jury only rendered a general verdict, rather than a specific verdict as to which definition of "dangerous weapon" they found that Mr. Erickson possessed. However,

the jury was instructed that they must be unanimous as to which prong they were convicting under--either metal knuckles or switchblade knife. VRP 461. Because it is unclear which prong the jury convicted under, and neither prong has been proven beyond a reasonable doubt by the City, thus violating Mr. Erickson's constitutional right to due process, review should be granted and Mr. Erickson's conviction should be reversed. *Zeferino-Lopez*, 179 Wn. App. at 600 (reversal of conviction and dismissal of charge mandated when there is insufficient evidence to support a conviction).

F. CONCLUSION

For the reasons stated above, Mr. Erickson requests that this motion be granted and his convictions be reversed and remanded for a new trial on the charge of resisting arrest, or any other relief that the court deems proper.

August 7, 2015

Respectfully submitted,



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