

No. 93408-8

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WASHINGTON STATE
SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,
Respondent,

vs.

MATTHEW ERICKSON,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PRESENTED FOR REVIEW

May defendant challenge the prosecutor's use of a peremptory juror challenge on the basis that it was racially discriminatory after the prospective juror being challenged has been excused from the jury panel and from his term of jury service, the jury panel has been sworn and the prospective juror has left the courthouse?

Where the charges against the defendant involve his confrontation with and resistance to police officers and the prosecutor uses peremptory juror challenges to excuse both of the prospective jurors who have had experiences arguing with police officers, has defendant established that the trial court's decision that he had not made a prima facie case of purposeful discrimination regarding the prosecutor's use of a peremptory challenge to remove one of those prospective jurors was clearly erroneous?

1-2

B. STATEMENT OF THE CASE

2-3

C. ARGUMENT

Defendant's failure to timely object to the prosecutor's use of a peremptory challenge to excuse juror 5 waives any error

4-9

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 excuse juror 5 was not clearly erroneous

9-19

D. CONCLUSION	20
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TABLE OF AUTHORITIES

Table of cases

<i>Arizona v. Harris</i> , 157 Ariz. 35, 754 P.2d 1139 (1988)	7
<i>Batson v. Kentucky</i> , 476 U.S. 79, 90 L.Ed.2d 69, 106 S. Ct. 1712 (1986)	4 & 6
<i>California v. Perez</i> , 48 Cal. App. 4th 1310, 56 Cal. Rptr. 2d 299, <i>review denied</i> , (1996)	7
<i>Colorado v. Mendoza</i> , 876 P.2d 98 (Colo. App. 1994)	7
<i>Georgia v. McCollum</i> , 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)	5
<i>Illinois v. Richardson</i> , 189 Ill. 2d 401, 727 N.E.2d 362, <i>cert. denied</i> , 531 U.S. 871 (2000)	7
<i>Laney v. Georgia</i> , 271 Ga. 194, 515 S.E.2d 610 (1999)	7
<i>Lewis v. Virginia</i> , 25 Va. App. 745, 492 S.E.2d 492 (1997)	7
<i>McElmurry v. Oklahoma</i> , 60 P.3d 4 (2002)	7
<i>Montana v. Ford</i> , 306 Mont. 517, 39 P.3d 108 (2001), <i>cert. denied</i> , 537 U.S. 973 (2002)	8
<i>New Mexico v. Wilson</i> , 117 N.M. 11, 868 P.2d 656 (1993), <i>writ quashed</i> , 119 N.M. 311 (1995)	7

<i>Powers v. Ohio</i> , 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)	5
<i>State v. Bennett</i> , 180 Wn. App. 484, 322 P.3d 815, <i>review denied</i> , 181 Wn.2d 1005 (2014).	5
<i>State v. Crawford</i> , 21 Wn. App. 146, 584 P.2d 442 (1978), <i>review denied</i> , 91 Wn.2d 1013 (1979)	6
<i>State v. Hicks</i> , 163 Wn.2d 477, 181 P.3d 831, <i>cert. denied</i> , 555 U.S. 919 (2008)	12 & 14
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995)	14
<i>State v. Meredith</i> , 178 Wn.2d 180, 306 P.3d 942 (2013), <i>cert. denied</i> , 134 S. Ct. 1329 (2014)	13
<i>State v. Rhone</i> , 168 Wn.2d 645, 229 P.3d 752, <i>cert. denied</i> , 131 S. Ct. 522 (2010)	4, 8, 13, 14 & 15
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326, <i>cert. denied</i> , 134 S. Ct. 831 (2013)	13 & 15
<i>State v. Thomas</i> , 166 Wn.2d 380, 208 P.3d 1107 (2009)	13
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979)	6
<i>United States v. Abou-Kassem</i> , 78 F.3d 161 (5th Cir.), <i>cert. denied</i> , 519 U.S. 818 (1996)	7
<i>United States v. Franklyn</i> , 157 F.3d 90 (2d Cir. 1998), <i>cert. denied</i> , 525 U.S. 1112 (1999)	7
<i>United States v. Maseratti</i> , 1 F.3d 330 (5th Cir. 1993), <i>cert. denied</i> , 510 U.S. 1129, 511 U.S. 1036, 513 U.S. 910 (1994)	7

Weeks v. New York State (Div. of Parole), 273 F.3d 76
(2d Cir. 2001), *abrogated on other grounds by*
National Railroad Passenger Corp. v. Morgan,
536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) 7

Wisconsin v. Jones, 218 Wis. 2d 599, 581 N.W.2d 561
(Ct. App.), *review denied*, 219 Wis.2d 923 (1998) 7

A. ISSUES PRESENTED FOR REVIEW

1. May defendant challenge the prosecutor's use of a peremptory juror challenge on the basis that it was racially discriminatory after the prospective juror being challenged has been excused from the jury panel and from his term of jury service, the jury panel has been sworn and the prospective juror has left the courthouse?

2. The charges against the defendant involve his confrontation with and resistance to police officers. The prosecutor used peremptory juror challenges to excuse both of the prospective jurors who had had experiences arguing with police officers, the three prospective jurors excused by the prosecutor did not share race as a common characteristic, the prosecutor exercised only one challenge against an African-American, the jury that was seated was similar in racial composition to the panel from which it was selected, the prosecutor had no history of discriminatory use of peremptory challenges, the prosecutor did not use challenges to excuse minorities from the jury and the prosecutor's voir dire questions did not suggest a pretext for exercising a peremptory challenge. Has

defendant established that the trial court was clearly erroneous in deciding that he had not made a prima facie case of purposeful discrimination regarding the prosecutor's use of a peremptory challenge to excuse one of the prospective jurors who had had an experience arguing with police officers?

B. STATEMENT OF THE CASE

On June 10, 2013, Seattle police officers saw defendant walking backwards down a sidewalk in downtown Seattle waving a knife. RP at 234-35 & 332. The sidewalk was extremely crowded with pedestrians. RP at 235. Approximately five scared persons came up to the officers to report a man waving about a knife. RP at 332-36. The officers followed defendant and contacted him inside the Pacific Place mall. RP at 235-36. Persons in the mall were running away from defendant in fright. RP at 240. Defendant was eventually detained and told that he was under arrest, but he refused the officers' commands to put his hands behind his back and physically resisted their efforts to arrest him. RP at 245-49, 251-52 & 338-41. He also pushed the officers. RP at 340-41.

Defendant claimed that a crowd of youths followed him from Westlake Park and brandished skateboards, knives and other weapons. RP at 379-80. He retreated into the Pacific Place mall and pulled out a knife he had in his backpack, but denied swinging it. RP at 379-80, 383 & 399. He claimed the officers instigated the youth to hit him with a skateboard. RP at 409. Defendant agreed that the officers repeatedly told him to stop resisting, and that he refused to stop resisting. RP at 388, 410 & 412.

Defendant was convicted of Unlawful Use of Weapons and Resisting Arrest in Seattle Municipal Court. 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 Court of Appeals Commissioner denied discretionary review, the Court of Appeals denied a motion to modify that ruling, and this court granted defendant's Motion for Discretionary Review.

C. ARGUMENT

1. Defendant's failure to timely object to the prosecutor's use of a peremptory challenge to excuse juror 5 waives any error.

The prosecutor used his peremptory juror challenges to strike jurors 5, 15 and 16.¹ Defendant made no objection at that time.² The prospective jurors who were not chosen for defendant's case were excused and released from their term of jury service and left the courthouse.³ After the jury was sworn and excused for the day, defendant raised his objection that the prosecutor's peremptory challenge to juror 5 violated *Batson v. Kentucky*.⁴ The prosecutor argued that defendant's failure to timely make this objection waived any error.⁵ Defendant's untimely objection hindered the prosecutor's and the trial court's ability to recall the race and ethnicity of the prospective jurors.⁶ Relying on *State v. Rhone*,⁷ the trial court

¹ RP at 173-74.

² See RP at 173-74.

³ RP at 175-76 & 181-83.

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

⁵ RP at 184-85 & 196.

⁶ See RP at 180-85, 194-96, 200-01, 205 & 207.

⁷ 168 Wn.2d 645, 648-49, 229 P.3d 752, *cert. denied*, 131 S. Ct. 522 (2010).

determined that the issue had not been waived, although it disagreed with this result.⁸

Of critical importance in evaluating whether defendant's objection was timely is a determination of whose right is violated by the discriminatory use of a peremptory juror challenge. In *Powers v. Ohio*,⁹ the court held that use of a peremptory challenge to exclude a prospective juror solely by reason of his or her race violates that prospective juror's equal protection right. While a defendant has standing to raise this third-party equal protection claim of a prospective juror,¹⁰ it is still the prospective juror's equal protection right that is being violated.¹¹ In *Georgia v. McCollum*,¹² the court reiterated that the harm of a discriminatory juror challenge is to the juror, and that the prosecution had standing to raise this third-party equal protection claim.

⁸ RP at 197-200.

⁹ 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

¹⁰ *Powers*, 499 U.S. at 415.

¹¹ See also *State v. Bennett*, 180 Wn. App. 484, 488, 322 P.3d 815, review denied, 181 Wn.2d 1005 (2014) (recognizing that the juror's rights, rather than those of a party, are violated by discriminatory peremptory challenges).

¹² 505 U.S. 42, 49 & 56, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

In order to preserve an error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it.¹³ For example, where a defendant knows of the alleged prejudice of a juror and fails to challenge that juror for cause and fails to exercise a peremptory challenge, the defendant has waived any appealable error.¹⁴ In *Batson*, the court noted that a defendant's objection to the prosecutor's use of a peremptory juror challenge must be timely.¹⁵

Where a party fails to raise an objection to the use of an alleged discriminatory peremptory challenge at a time when the violation could be cured by the trial court, the objection must be deemed to have been waived. Once the prospective juror has been excused, the trial court can no longer remedy the equal protection right of that prospective juror by seating him or her on the jury. Cases in other jurisdictions have held that a *Batson* challenge must

¹³ *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979).

¹⁴ *State v. Crawford*, 21 Wn. App. 146, 151, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979).

¹⁵ *Batson*, 476 U.S. at 99-100.

be raised before the prospective jurors are excused.¹⁶ As the court noted in *Weeks v. New York State (Div. of Parole)*,¹⁷ a trial court's determination whether a prosecutor used peremptory challenges in a discriminatory fashion will often turn on the judge's observations of

¹⁶ *United States v. Franklyn*, 157 F.3d 90, 97 (2d Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999) (*Batson* challenge waived where not raised until after *voir dire* had been completed and the challenged jurors had been dismissed); *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir. 1993), *cert. denied*, 510 U.S. 1129, 511 U.S. 1036, 513 U.S. 910 (1994) (to be timely, a *Batson* objection must be made before the venire is dismissed and before the trial commences); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir.), *cert. denied*, 519 U.S. 818 (1996) (*Batson* objection untimely when raised after the venire panel was dismissed); *McElmurry v. Oklahoma*, 60 P.3d 4, 18 (2002) (*Batson* objection must be made before the prospective jurors who are alleged to have been discriminated against are finally excused); *Lewis v. Virginia*, 25 Va. App. 745, 751, 492 S.E.2d 492 (1997) (if *Batson* challenge is made after the jury is sworn and the remaining venirepersons are discharged, trial court cannot reseal a juror improperly stricken); *Colorado v. Mendoza*, 876 P.2d 98, 102 (Colo. App. 1994) (*Batson* objection must be made before the venire is dismissed and the trial begins); *Arizona v. Harris*, 157 Ariz. 35, 36, 754 P.2d 1139 (1988) (when no objection is made until after the challenged jurors have been excused, the possibility for an immediate remedy for unconstitutional action has been lost); *Wisconsin v. Jones*, 218 Wis. 2d 599, 602-03, 581 N.W.2d 561 (Ct. App.), *review denied*, 219 Wis.2d 923 (1998) (collecting cases); *see also Illinois v. Richardson*, 189 Ill. 2d 401, 409-10, 727 N.E.2d 362, *cert. denied*, 531 U.S. 871 (2000); *Laney v. Georgia*, 271 Ga. 194, 195, 515 S.E.2d 610 (1999); *California v. Perez*, 48 Cal. App. 4th 1310, 1314, 56 Cal. Rptr. 2d 299, *review denied*, (1996); *New Mexico v. Wilson*, 117 N.M. 11, 16, 868 P.2d 656 (1993), *writ quashed*, 119 N.M. 311 (1995).

¹⁷ 273 F.3d 76, 89-90 (2d Cir. 2001), *abrogated on other grounds by National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

prospective jurors and the attorneys during voir dire and an assessment of their credibility, and it is nearly impossible for the judge to rule on such objections intelligently unless the challenged juror either is still before the court or was very recently observed. Similarly, the court in *Montana v. Ford*¹⁸ noted that allowing a *Batson* challenge to be raised after the jury is impaneled and sworn and the venire dismissed impairs the ability of the challenged attorney to effectively defend his or her strikes and also deprives the trial court of the ability to correct any error in the proceedings in a timely fashion.

As the trial court noted, this court in *State v. Rhone*¹⁹ considered a *Batson* challenge that was raised after prospective juror was dismissed and the jury was sworn. But, the prosecutor in *Rhone* did not object to the timeliness of the *Batson* challenge,²⁰ whereas the prosecutor in defendant's case clearly did so object.²¹ Defendant's failure to raise his *Batson* objection to the prosecutor's

¹⁸ 306 Mont. 517, 524, 39 P.3d 108 (2001), *cert. denied*, 537 U.S. 973 (2002).

¹⁹ 168 Wn.2d at 648-49.

²⁰ *Rhone*, 168 Wn.2d at 652 n 5.

use of a peremptory challenge to remove juror 5 at a point where that prospective juror's equal protection right could have been vindicated by seating him on the jury waived defendant's standing to raise this third-party claim.

2. 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 excuse juror 5 was not clearly erroneous.

After the prosecutor unsuccessfully urged the trial court not to consider defendant's *Batson* challenge, he argued that defendant had not established a prima facie case.²² Although not required to do so by the trial court, the prosecutor also stated that he excused juror 5 because he had been stopped by police officers and argued with them about the reason for the stop and was upset and angry about the experience.²³ Although the prosecutor did not discuss his other peremptory challenges, he also excused juror 16²⁴ for exactly the same reason – she had been involved in an encounter with police

²¹ See RP at 184-85 & 196.

²² RP at 200-01.

²³ RP at 202-03; *see also* RP at 152.

²⁴ Juror 16 was a long-time animal activist and also had been in a situation where she had argued with a police officer. RP at 153 & 164.

officers and had argued with them.²⁵ In response to the prosecutor's statement, defense counsel simply noted that the only black male on the jury panel had been excused and that he had failed to inquire further of other prospective jurors who had experiences with the police.²⁶

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 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

²⁵ RP at 151-52. The prosecutor obviously struck juror 15 because he believed the 2nd Amendment protected not just firearms but weapons in general and that a knife was a tool no more dangerous than a screwdriver. See RP at 155-56.

²⁶ RP at 203-04.

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.²⁷

The determination whether a peremptory juror challenge is race 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 race.²⁸

²⁷ RP at 205-07.

²⁸ *State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831, *cert. denied*, 555 U.S. 919 (2008) (citations and quotations omitted).

In *State v. Meredith*,²⁹ this 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.³⁰ In *Meredith*,³¹ *State v. Saintcalle*,³² *State v. Rhone*³³ and *State v. Thomas*,³⁴ this 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*³⁵ and *Rhone*,³⁶ the struck prospective juror was of the same race as the defendant.

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

³⁰ *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).

³¹ 178 Wn.2d at 182.

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

³³ 168 Wn.2d at 649-50.

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

³⁵ 178 Wn.2d at 35.

³⁶ 168 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.³⁷

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."³⁸

As the court noted in *Rhone*,³⁹ 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.⁴⁰ Also, deference is important because trial judges must have some assurance that the rest of the

³⁷ *Rhone*, 168 Wn.2d at 651.

³⁸ *Hicks*, 163 Wn.2d at 493 (citations and quotations omitted).

³⁹ 168 Wn.2d at 657.

⁴⁰ See also *State v. Luvane*, 127 Wn.2d 690, 700, 903 P.2d 960 (1995) (where there are two permissible views of the evidence, a trial court's choice between them cannot be clearly erroneous).

trial will not be an exercise in futility if it turns out an appellate court would have ruled on a *Batson* challenge differently.⁴¹

Factors that a trial court can consider in determining whether circumstances exist to establish a prima facie case, *i.e.*, “something more” than a peremptory challenge against a member of a racially cognizable group, include a striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, a disproportionate use of strikes against a group, the level of a group’s representation in the venire as compared to the jury, past discriminatory use of peremptory challenges by the prosecuting attorney, the type and manner of the prosecuting attorney’s questions during voir dire, the disparate impact of using all or most of the challenges to remove minorities from the jury and similarities between those individuals who remain on the jury and those who have been struck.⁴²

In making its decision, the trial court evaluated the composition of the jury to determine whether the prosecutor had

⁴¹ *Saintcalle*, 178 Wn.2d at 56.

⁴² *Rhone*, 168 Wn.2d at 656.

used his peremptory challenges to remove members of any racially cognizable group, which is exactly what a trial court should do. The trial court had to examine not only which prospective jurors had been excused, but which prospective jurors had not been excused and who ultimately served on defendant's jury. The three prospective jurors challenged by the prosecutor did not share race as a common characteristic, the prosecutor exercised only one challenge against an African-American, there were zero African-Americans on the first jury panel called in defendant's case and only one on the second jury panel,⁴³ this prosecutor had no history of discriminatory use of peremptory challenges,⁴⁴ the prosecutor's questions during voir dire could not reasonably be interpreted as providing a pretext to exercising a peremptory challenge, the prosecutor did not use challenges to remove minorities from the jury, and no person who sat on defendant's jury had been involved in an argument with police

⁴³ See RP at 204 (He previously mentioned, or I mentioned on his behalf, that on the first panel there weren't any black members of the jury. On the second panel, there was only one. And now that person has been stricken.)

⁴⁴ 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.)

officers. 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 show discrimination was that juror 5 was the only black member of the jury panel.⁴⁵ This assertion certainly is not supported by the trial court's ruling.⁴⁶ Also, as shown by the cases previously discussed, this circumstance alone 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 juror 5 was.⁴⁷ This claim borders on the absurd. The prosecutor did not ask a single question about any prospective juror's personal experience with the police.⁴⁸ Defense counsel himself raised this subject, elicited the response from juror 5

⁴⁵ RP at 180, 193 & 204.

⁴⁶ 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.)

⁴⁷ RP at 204.

⁴⁸ See RP at 137-50.

and then dropped the matter.⁴⁹ The prosecutor obviously did not have an opportunity thereafter to further question juror 5 or any other prospective juror. Defense counsel admitted that he himself had not inquired further of the prospective jurors about their experience with police officers.⁵⁰ Defendant presented to the trial court no valid basis for a *Batson* challenge.

In his Motion for Discretionary Review, defendant claimed that the “strike itself was based on a race based experience of Juror 5”⁵¹ and “Juror 5 was stricken from the venire for sharing a relevant life experience steeped wholly in racism and racial tension.”⁵² This claim is not supported by the record. Nothing in juror 5’s explanation of the experience he had with the police⁵³ even suggested that his race was a factor. He thought the investigative stop might have been based on the length of his hair.⁵⁴

In his Motion for Discretionary Review, defendant also claimed that “Juror 5 was struck because he had an experience

⁴⁹ RP at 151-53.

⁵⁰ See RP at 204.

⁵¹ Motion for Discretionary Review, at 10.

⁵² Motion for Discretionary Review, at 10-11.

unique to a black male facing racial profiling by the police.”⁵⁵ In addition to mischaracterizing juror 5’s contact with the police, this claim erroneously assumes, from a silent record, that none of the other prospective jurors had ever faced or witnessed racial or ethnic 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 personal experience with the police.

⁵³ See RP at 152.

⁵⁴ RP at 152.

⁵⁵ Motion for Discretionary Review, at 10.

D. CONCLUSION

Based on the foregoing argument, this court should affirm the defendant's conviction for Unlawful Use of Weapons and Resisting Arrest.

Respectfully submitted this 2nd day of February, 2017.

Richard Greene

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Assistant City Attorney
WSBA #13496

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WASHINGTON STATE
SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

No. 93408-8

**CERTIFICATE OF PROOF
OF SERVICE**

I am an Assistant City Attorney representing respondent City of Seattle in this case.

On February 2, 2017, I served a true copy of the Supplemental Brief of Respondent on counsel for petitioner by mailing the same to them, postage prepaid, at the following addresses:

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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 2nd day of February, 2017 at Seattle, Washington.

Richard Greene
Richard Greene

**CERTIFICATE OF PROOF
OF SERVICE 1**

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