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NO. 96344-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

MICHAEL BIENHOFF AND KARL PIERCE,

Respondents/Cross-Petitioners.

**STATE'S ANSWER TO AMICI CURIAE BRIEF OF
FRED T. KOREMATSU CENTER FOR LAW, ET AL.**

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ADDITIONAL FACTS RELEVANT TO AMICI'S ARGUMENTS</u>	1
C. <u>ARGUMENT IN RESPONSE TO AMICI'S ARGUMENTS</u>	4
1. AMICI DOES NOT FAIRLY CHARACTERIZE THE RECORD IN ARGUING THAT THERE IS EVIDENCE THAT IMPLICIT BIAS AFFECTED THE CHALLENGE TO JUROR 6.....	4
2. THIS COURT'S REVIEW MUST BE BASED ON ALL THE RELEVANT CIRCUMSTANCES AND THE VOIR DIRE PROCESS AS A WHOLE, NOT DISCRETE SNIPPETS OF THE PROCESS VIEWED OUT OF CONTEXT	7
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Erickson, 188 Wn.2d 721,
398 P.3d 1124 (2017)..... 10

State v. Gonzales, 111 Wn. App. 276,
45 P.3d 205 (2002), review denied,
148 Wn.2d 1012 (2003) 6

State v. Jefferson, 192 Wn.2d 225,
429 P.3d 467 (2018)..... 5, 6, 7, 10, 11

Rules and Regulations

Washington State:

GR 37 5, 6, 7, 9, 10

A. INTRODUCTION

This Court prohibits the unfair exclusion of potential jurors based on race or ethnicity. However, the exercise of a peremptory challenge based on a valid and substantial reason supported by the record should not be prohibited. It is axiomatic the jurors must be able to follow the court's instructions. An objective observer could not view race as a factor in the exercise of a peremptory challenge where the State's challenge was based on the juror's sincere inability to assure the court that she could follow the court's instructions, especially when other jurors who indicated that they had similar concerns about their ability to follow the court's instructions were also challenged by the State. Viewing all the relevant circumstances, the State's peremptory challenge was properly allowed.

B. ADDITIONAL FACTS RELEVANT TO AMICI'S ARGUMENTS

At the start of voir dire in this case, five jurors, including Juror 6, but not Juror 4, requested to speak outside the presence of the other jurors. RP 444. The court noted that Juror 4 had reservations about the felony murder doctrine. RP 444. The defense requested that Juror 4 be questioned outside the presence of the other jurors as well. RP 444. Thus, both Juror 4 and 6 were initially questioned outside the presence of the other jurors.

Juror 4 had been a lawyer who had spent many years with the Judge Advocate General Corps, as well as a parish priest. RP 444, 482. The record is silent as to Juror 4's race or ethnicity. Juror 4 stated that he was "just not comfortable" following the law regarding felony murder. RP 481. He stated that he would "find it difficult" to follow the court's instructions, but never stated outright that he was unable to do so. RP 484. The State moved to challenge Juror 4 for cause, noting that Juror 4 could not assure the court that he could follow the court's instructions. RP 485. The defense objected to the challenge. RP 485-87. The court granted the challenge for cause. RP 488-89. The State noted that Juror 4 was being "thoughtful" in his answers, and had paused often and "seemed to really be struggling with how to answer the question." RP 489.

Toward the end of voir dire, the State challenged both Juror 6 and Juror 76 for cause on the basis that, like Juror 4, both indicated they would have difficulty following the court's instructions. RP 848. The court initially granted the State's "for cause" challenge to Juror 6, but changed its mind after giving the defense further opportunity to question her. RP 853-55, 870-82. In granting the challenge, the trial noted that Juror 6 "said not knowing the answer to whether it was a death penalty case or not, she could not do her job, she couldn't be on the jury." RP 854. The defendants asked for further inquiry, and the court asked Juror 6 if she

could “do the job of a juror.” RP 882. She responded, “I don’t know that—I don’t—I am not sure.” RP 881. In denying the challenge, the court explained, “I don’t think that we have got a clear statement from the juror that she can’t do the job.” RP 882.

The State ultimately exercised a peremptory challenge to Juror 6. RP 1014. The State explained that the “overriding reason” for the challenge was that Juror 6 said that “Not knowing if this might carry not just the death sentence, but a life sentence or something that might change someone’s life, she couldn’t do the job.” RP 1016-17.¹ The State also noted that Juror 6’s brother had been convicted of attempted murder. As to that, the State explained:

I am not suggesting that someone who has a family member or a close friend who is convicted of a crime or accused of a crime can’t sit as a juror. But this is something very specific. It’s attempted murder.

RP 1018. The State noted that none of the other jurors had family members charged with murder. RP 1018. In regard to the pause in one of her answers, the State added:

You then couple that with the fact that when that was brought up and she was asked whether or not she could give the State a fair trial, she paused for a very long time before she answered the question.

¹ The State maintained that the trial court had erroneously denied its “for cause” challenge against Juror 6 on that basis. RP 1017-18.

RP 1018. The State finally noted that she had “strong opinions” that her brother was not treated fairly by the criminal justice system. RP 1019. The court allowed the peremptory challenge. RP 1020.

C. ARGUMENT IN RESPONSE TO AMICI’S ARGUMENTS

1. AMICI DOES NOT FAIRLY CHARACTERIZE THE RECORD IN ARGUING THAT THERE IS EVIDENCE THAT IMPLICIT BIAS AFFECTED THE CHALLENGE TO JUROR 6.

In arguing that Juror 6 was treated disparately from other jurors, amici rely on a comparison between Juror 4 and Juror 6. However, the record demonstrates consistency in the State’s treatment of these two jurors. The State exercised “for cause” challenges against both Juror 4 and 6. The reason for both challenges was essentially the same: neither juror could assure the court that they would be able to follow the court’s instructions. RP 485, 848. A comparison of Juror 4 to Juror 6 demonstrates consistent, not disparate treatment of those jurors.

In addition, amici incorrectly asserts that the State “relied in part on two pauses by Juror 6 to support its peremptory challenge.” Brief at 4. This is not correct. It was not the fact that Juror 6 paused in some of her answers that the State highlighted. Rather, it was the context of those pauses and what they conveyed about her thought process on the questions posed. The State noted that Juror 6 paused for a long time before

answering “I don’t know” to questions about her ability to be impartial. RP 1017, 1018. In fact, Juror 6 wavered considerably about her ability to be impartial. When defense counsel asked her “do you think you could be a fair and impartial juror in this case?” she initially answered “I would have to say no.” RP 873. In the end, Juror 6 was simply unable to assure the court that she could follow the court’s instructions, showing great hesitancy in answering the court’s question:

THE COURT: The issue obviously is whether you can do your job as a juror or not. And that’s what we are trying to determine, because before the break, it sounded like you were saying that you couldn’t, and that’s what we are trying to figure out. It’s can you—under those circumstances, can you do the job of a juror, which is to decide has the State proven its case beyond a reasonable doubt or not.

JUROR NUMBER 6: I don’t know if there is any way that I can even answer that. I don’t know how to answer it. I really don’t. I don’t that—I don’t—I’m not sure.

RP 881. Juror 6’s hesitancy and inability to assure the court that she could follow the court’s instructions is clearly demonstrated by the record.

GR 37 does not apply to this case because jury selection occurred before adoption of the rule in 2018. State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018). Nonetheless, in State v. Jefferson, this Court modified the third step of the Batson analysis to be consistent with GR 37

and applied the modified test to Jefferson's trial, which occurred in 2015. Jefferson, 192 Wn.2d at 249.

GR 37(i) notes that allegations that a prospective juror provided unintelligent or confused answers or exhibited a problematic attitude have historically been associated with improper discrimination. If a party asserts such a basis for a peremptory challenge, it must be corroborated by the judge or opposing counsel to be valid. GR 37(i). But in this case, the State's concern with Juror 6's hesitancy to affirm that she could "do her job as a juror," is of a far different character than the often pretextual conduct excuses illustrated in GR 37(i). The State's paramount reason for the peremptory challenge to Juror 6 was based, not on her demeanor, but on her substantive responses to one of the most important inquiries for any juror: are you able to follow the court's instructions? See State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003) (holding that trial court erred in not granting a defense challenge for cause where the juror did not express confidence in her ability to follow the judge's instructions regarding the presumption of innocence).

Finally, amici asserts that the State viewed Juror 6 "with suspicion," implying that the State suspected Juror 6 of some unspecified wrongdoing. Brief at 6. This is an unfair characterization. The State

never asserted that Juror 6 was anything but forthright and honest in her answers. But those answers raised serious concerns about her ability to serve as a juror in this case. A party must be able to challenge a juror who cannot assure the court that she will be able to follow the court's instructions, regardless of her race.

2. THIS COURT'S REVIEW MUST BE BASED ON ALL THE RELEVANT CIRCUMSTANCES AND THE VOIR DIRE PROCESS AS A WHOLE, NOT DISCRETE SNIPPETS OF THE PROCESS VIEWED OUT OF CONTEXT.

The modified test asks not whether the party exercising the peremptory challenge engaged in purposeful discrimination, but whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. Jefferson, 192 Wn.2d at 249. This test requires an objective inquiry based on the average reasonable person with knowledge of implicit bias. Id. "The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances." GR 37(d). An appellate court reviews the record de novo. Jefferson, 192 Wn.2d at 249.

Amici does not analyze the peremptory challenge in light of the totality of the circumstances, but rather looks at discrete snippets of the voir dire viewed out of context in attempting to demonstrate that some racial bias was at play. For example, amici argue that Juror 6 received a

different question from other jurors. Brief at 8. Amicus argues that she was the only juror asked if she could be fair to the State. Id. However, amicus ignores that this question was posed because Juror 6 self-reported that “I might be a little bit biased just because—because my brother was incarcerated for such a long time for a gun charge.” RP 495. The question was a follow-up to Juror 6’s own stated concerns about her potential bias.

Moreover, in modern voir dire each prospective juror receives different questions from the parties, and they do not uniformly receive the same number of questions. One legitimate goal of voir dire is to create a dialogue among the prospective jurors about general concepts that they will be applying when deliberating, such as the burden of proof, the presumption of innocence, the concept of self-defense and the credibility of accomplice testimony. This dialogue can provide the parties with important insight into the jurors’ biases as well as their ability to understand relevant concepts and correctly apply them when they deliberate. As the lawyers endeavor to create this dialogue among a large group of complete strangers, some jurors will be forthcoming and some will be reticent. The forthcoming jurors are often asked more questions simply because of their willingness to talk. For example, Jurors 89 and 125 each volunteered responses at least four times during group

discussions. RP 658, 659, 732, 741-42, 900, 927, 954, 965. As a result, Juror 89 was asked 12 questions by the State and five questions by the defense during those discussions, and Juror 125 was asked three questions by the State and 13 questions by the defense. RP 658-59, 661-62, 681, 724-26, 732, 741-43, 926-27, 954-56, 1001-02. In comparison, Juror 6 volunteered responses three times during general discussions, and was asked 23 questions by the State during group discussions, while the defense asked her one question. RP 650-61, 712-15, 746, 827-28. Juror 6 was not questioned far more than the other jurors during the group discussions.² While an inordinate focus on a minority juror by one party could lead an objective observer to believe that racial bias is at play, GR 37 cannot be interpreted to mean that anytime a minority juror has received more questions than some of the other jurors, a peremptory challenge is disallowed. Indeed, GR 37 may increase questioning of some jurors because its requirements demand that a party have a substantial and well-supported reason for the exercise of peremptory challenge. As

² Additional questions were asked of Juror 6 individually at two points during jury selection: 1) when she asked to be questioned outside the presence of the other jurors, and 2) when defense counsel later asked that she be again questioned outside the presence of the other jurors. RP 494, 854. During the initial individual questioning, Juror 6 was asked nine questions by the State. RP 496-97. During the subsequent individual questioning, the State asked four additional questions and the defense asked 10 questions. RP 872-81. In contrast, Juror 36 received 26 questions from the defense outside the presence of the other jurors based on the fact that English was not her first language. RP 504-11. The court “reluctantly” excused Juror 36 for cause at the defense request although the court noted that she spoke English “very well.” RP 512, 515.

Justice Yu noted in her concurrence in State v. Erickson, 188 Wn.2d 721, 741, 398 P.3d 1124 (2017), “ample time for thoughtful questioning of prospective jurors” should be allowed. Because the totality of the circumstances standard requires the trial court and the reviewing court to view all the circumstances, the number of questions asked cannot be the sole measurement.

Viewing the totality of the circumstances, an objective observer as described in GR 37 could not view race as being a factor in the peremptory challenge of Juror 6. Juror 6 was unable to assure the court that she could follow the court’s instructions. She was unable to affirm that she could convict the defendants if the State had proven the elements beyond a reasonable doubt. She was the only juror who indicated she was uncomfortable serving on a jury where the defendants could face a life sentence. She believed that the State and the police had treated her brother unfairly when he was accused of attempted murder. Other jurors who reported significant negative interactions with the police were also challenged by the State. These facts would lead any objective observer to conclude that race was not a factor in the exercise of the State’s peremptory challenge.

Because these facts are well-supported by the record, this case is distinguishable from Jefferson. In Jefferson, this Court concluded that the

three reasons presented by the State for its peremptory challenge were either equally applicable to jurors not challenged or not supported by the record. For example, this Court noted that in regard to the first two reasons, Juror 10's answers about the value of voir dire and the movie *12 Angry Men* were similar to other jurors whom the State did not challenge. Jefferson, 192 Wn.2d at 235-36. As to the third proffered reason, it was not supported by the record. Id. at 237. Moreover, in Jefferson, the State challenged the last African American juror in a murder case with an African American defendant. Id. at 230, 239 n.8.

In this case, the reasons relied upon by the State are supported by the record. The record does not support a claim of differential treatment. The State appropriately challenged other jurors, like Jurors 4 and 76, who could not assure the court that they would be able to follow the court's instructions. RP 488, 837. The State also appropriately challenged other jurors, like Jurors 95 and 108, who had substantially negative interactions with the police. RP 642, 660-61, 664, 1029, 1031. Finally, Juror 6 was not the sole remaining African American juror, and the defendants were not African American. The troubling dynamics that concerned this Court in Jefferson are simply not present in this case.

D. CONCLUSION

This Court should conclude that no objective observer could view race as a factor in the State's exercise of peremptory challenge to Juror 6 given the totality of the circumstances. There was no error in jury selection. The defendants' convictions should be affirmed.

DATED this 14th day of May, 2019.

Respectfully submitted,

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