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67332-7

No. 67332-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE ONE

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STATE OF WASHINGTON,

Respondent,

v.

PIERRE SPENCER WADE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The prosecution confuses and misrepresents the controlling legal standards for evaluating a Batson error**

Using a mish-mash of rhetoric but with a notable absence of comparative case law, the prosecution urges the court to defer to its assertion that there was no racial discrimination at play when it peremptorily struck an African American juror. Because the prosecution misrepresents critical legal standards and mischaracterizes the trial court's ruling, the prosecution's arguments should be disregarded.

a. There was prima facie evidence of racial discrimination underlying the prosecution's peremptory strike of Juror 34

The prosecution properly concedes it was wrong when it told the trial court that a Batson challenge requires a pattern of racial discrimination, and the trial court wrongly adopted the prosecution's argument as the basis for denying Wade's Batson challenge. Resp. Brief at 15; see 9/7/10RP 94-95, 97.

Batson itself held that a pattern of discriminatory strikes is unnecessary. Batson v. Kentucky, 476 U.S. 79, 95, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) ("a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the

Equal Protection Clause”). Subsequent cases cement the principle that no pattern of discrimination is required. See Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (“the Constitution forbids striking even a single prospective juror for a discriminatory purpose” (citation and quotation marks omitted)); State v. Meredith, 163 Wn.App. 75, 84, 259 P.3d 324 (2011), rev. granted in part, \_ Wn.2d \_, 2012 WL 1537823 (April 23, 2012) (“the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate ‘a pattern of exclusion’ in order to establish a prima facie case of purposeful discrimination.”).<sup>1</sup> The court’s decision that “was reached by applying the wrong legal standard” is manifestly unreasonable. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012) (quoting *inter alia* State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Despite acknowledging the trial court’s predicate legal error, the prosecution repeatedly argues that this Court owes great deference to the trial court’s ruling and acts as if the court actually endorsed as legitimate the prosecution’s proffered reasons for

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<sup>1</sup> The Supreme Court granted review in Meredith “on the scope of the bright line rule articulated in State v. Rhone . . . in establishing a prima facie case”

striking the juror. Resp. Brief at 13, 19, 21. The trial court said that without a pattern, no reasons for the strike were required. 9/7/10RP 97. The trial court did not determine that any of the prosecution's reasons for striking Juror 34 were legitimate race-neutral reasons. There is no "great deference" given to rulings the court did not make, just as there is no deference to rulings the court made based on a misapplication of the law. Griffin, 173 Wn.2d at 473.

The prosecution complains that defense counsel's failure to give a more detailed explanation of racial bias bars his claim. However, the Supreme Court dictates a different approach. In State v. Rhone, 168 Wn.2d 645, 655, 229 P.3d 752 (2010) (C. Johnson, J., plurality), the plurality opinion faulted Rhone for failing to explain what evidence there was of racial discrimination other than the mere striking of an African American juror, but then the Court proceeded to analyze the record to see if there was "something more." 168 Wn.2d at 656. The Court explained,

Although Rhone failed to raise any circumstances evincing an inference of discrimination before the trial court, a trial court must still consider whether such circumstances exist, i.e., 'something more' than a peremptory challenge against a member of a racially cognizable group.

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under Batson. 2012 WL 1537823.

Id. at 656. The prosecution does not mention that Wade first raised his objection to the peremptory strike in an unrecorded side bar immediately after the strike, and later, after the jurors were selected, the court entertained some further discussion of the issue, so the on-the-record discussion does not show all the comments regarding the prima facie case . 9/7/10RP 90, 93. Yet it is impossible to comprehend what more defense counsel could have said. He explained that Juror 34 had no apparent anti-prosecution bias, he had positive experiences with police, had said he did not favor African Americans or distrust police, he was attentive and serious about the jury service obligation, and he gave no reason to suggest he would not be fair. 9/7/10RP 94. The absence of any valid race-neutral reason to strike the juror indicated that he was excused because he and Wade are black.

Furthermore, as the plurality explained in Rhone, when there is a Batson challenge the court “must” consider whether there are “any circumstances evincing an inference of discrimination.” Rhone, 168 Wn.2d at 656. If the court had conducted such an evaluation, it would have found evidence evincing an inference of

racial discrimination and thereby satisfying the first stage of Batson.  
Opening Brief at 12-19.

The stricken juror and Wade are both African American, which is one factor the Rhone Court found pertinent to the inference of racial bias. 168 Wn.2d at 656. Wade was African American and the victim was white, which is also a factor that qualifies as a “circumstance evincing an inference of racial discrimination” under Rhone. Id.

Another circumstance the Rhone Court posited as a providing evidence of discrimination was the “type and manner of the prosecuting attorney’s questions during voir dire.” Id. Here, the prosecution explicitly and sua sponte raised issues of racial bias in his voir dire. 9/7/10RP 70. He pointed out Wade’s race, calling attention to it. Id. He asked all jurors whether the criminal justice system was racially unfair, and Juror 34 indicated no belief it was unfair. Id. He repeatedly asked all jurors declare that Wade’s race would not make them more lenient. Id. at 70-71. These remarkable comments show a calculated attempt by the prosecutor to weed out any juror who felt sympathy for a person of Wade’s race, and in fact, indicate an effort to trigger racial bias by calling attention to it and then demanding that jurors not consider it. See State v.

Monday, 171 Wn.2d 667, 678, 257 P.3d 551 (2011) (“Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias.”).

The court can also look to similarities between the stricken juror and jurors who were empaneled, as Wade did in his opening brief. Finally, the disproportionate striking of 50% of the African American jurors may be considered as some evidence of racial discrimination.

The trial court refused to find a prima facie case based on improper grounds, which is an independent reason to reverse the ruling. Moreover, the record shows “some evidence” supporting an inference of race-based decision-making by the prosecutor. Therefore, a searching inquiry of the prosecutor’s purported race-neutral reasons is required. This review can be made on the available record, both because the prosecutor put forward his reasons and because the lapse of time means that the judge could not offer demeanor-based decisions at this later stage or there is no reason to remand the case for further findings.

b. A searching inquiry of the prosecutor's reasons for striking an African American juror show that race was a critical component of the strike.

A premise of Batson and its progeny is that the prosecution is unlikely to admit that he used a juror's race as a reason for striking the juror. Miller-El v. Dretke, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Therefore, the prosecution's claimed reasons for striking a juror are not taken at face value. Id. Instead, the court must engage in a searching, sensitive inquiry of the proffered reasons.

The prosecution proclaims this Court must defer to the trial court's credibility determinations and any demeanor-based reasons proffered by the prosecution. Resp. Brief at 21. But the trial court made no credibility determinations and passed no judgment on the underlying motives of the prosecution. Even if a trial judge is better placed to evaluate nuances during in-court proceedings, the judge did not rule on the prosecutor's asserted reasons for striking Juror 34 and thus the deference given in other cases has no application to the case at bar. See Snyder, 552 U.S. at 479 (refusing to credit prosecutor's demeanor-based claim when trial court did not expressly agree with the prosecutor's contention about juror's demeanor).

At the outset, the prosecutor's purportedly neutral reasons for striking the juror are viewed in the context of voir dire in general. The prosecutor injected racial bias into the case, made pointed mention of Wade's race, and asked all jurors to declare they would not be "lenient" to Wade because he was a member of a racial group that suffered a history of discrimination. This acute attention to racial bias shows a calculated effort to root out jurors who might align themselves with a person of Wade's race because they shared his race.

The State concedes, as it must, that the prosecutor gave a blatantly race-based reason for striking Juror 34, although it tries to downplay its importance. Resp. Brief at 25. The prosecutor claimed he struck Juror 34 because of his prior jury service yet it was the other African American juror who had that experience. 9/7/10RP 95. Mixing up two jurors whose only commonality is that they are both African American further shows the race-based lens of the prosecutor. When a stated reason for striking a juror "does not hold up," it gives rise to an inference of discrimination. Snyder, 552 U.S. at 485.

Other reasons similarly fail the searching scrutiny required at Batson's third stage. See Kesser v. Cambra, 465 F.3d 351, 360 (9<sup>th</sup>

Cir. 2006). The prosecutor claimed Juror 34 missed a question, but was not sure which question he “missed” and many others answered those questions the same way as Juror 34. 9/7/10RP 95. The prosecution argues that other seated jurors who gave the same answer cannot be compared to Juror 34 because they were not identically situated. The Supreme Court rejected this line of argument in Miller-El v. Dretke:

None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters.

545 U.S. at 247 n.6. The prosecution’s claim that Juror 34 “missed” a “simple” credibility question is belied by the record and this discredited reason gives rise to an inference of discrimination that is piled on top of the discredited reason that Juror 34 was unreliable due to prior jury service, and the unusual race-based focus of numerous questions the prosecutor asked.

The “enthusiasm” of Juror 34 is also implausible. First, the court did not endorse this reason as race-neutral. It acknowledged

the juror appeared enthusiastic but did not say whether this was legitimate, or was actually premised on the fact that the two men shared the same race and the prosecutor presumed them to be aligned based on their race.

Second, the prosecutor's explanation of what Juror 34 said is wrong, taken out of context, and fails the comparability test. See Opening Brief, at 18-19. Juror 34 did not say he wanted to serve on a jury of a family member, he said he would want jurors to serve who "were interested in the process" as opposed to those who did not want to be there. 9/7/10RP 84. This remark reflects a valid concern made particularly palpable in the case where many potential jurors did not want to be jurors. It is the fact that Juror 34 was African American that the prosecution saw a connection between Juror 34 and Wade and assumed there was a bond between them.

The purported bond between Juror 34 and defense counsel must be construed in light of the other circumstances of the case. The prosecution highlighted Wade's race for the jury and requested that each juror declare she or he would not be "lenient" because he was African American. The prosecution's acute concern with Wade's race underscores the motivation behind the peremptory

strike. The court did not endorse any special bond between the juror and Wade's attorney.

The prosecution tried to save the case from reversal by claiming that it could not have used race as a motivating factor in jury selection because it permitted an African American man to serve on the jury. But as the Supreme Court said in Snyder, "the constitution forbids striking even a single prospective juror for a discriminatory purpose." 552 U.S. at 478 (quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9<sup>th</sup> Cir. 1994)). A juror's race cannot be even part of the reason the juror was excluded. United States v. Robinson, 878 A.2d 1273, 1284 (D.C. 2005). In Miller-El, the court spoke of the tactical ways that a prosecutor who intended to strike jurors based on race might allow a juror of that racial minority to remain, as a cover for discrimination against others. 545 U.S. at 253. The fact that one African American served on the jury is irrelevant to the discrimination against Juror 34. A juror's race cannot be even part of the reason the juror was excluded. United States v. Robinson, 878 A.2d 1273, 1284 (D.C. 2005). The racial discrimination at the root of the prosecutor's striking of a qualified African American juror so that he would not serve on the trial of an

African American defendant constitutes a denial of due process and equal protection.

**2. The closed courtroom and the court's private communications with the jurors during trial constitute a clear violation of the requirement of open court proceedings.**

The record shows the court ordered everyone out of the courtroom so it could speak to the jurors alone. 9/9/10RP 73. This private conference with the jurors during trial was unrecorded. No speculation is required to ascertain whether court closed the courtroom. It declared that was what it was doing and demanded everyone leave. Id.

In the context of a closed courtroom, the defendant does not bear "the burden of proving that the trial court's ruling was carried out." State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005) (citing State v. Orange, 152 Wn.2d 795, 813, 100 P.3d 291 (2004)). "Instead, 'the very existence of the mandated order create[d] a strong presumption that the order was carried out in accordance with its drafting.'" Id. (quoting Orange, 152 Wn.2d at 813). "Thus, once the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." Id. The prosecution offers no evidence

to overcome the presumption that closure in fact occurred, instead it complains that Wade was required to object.

The court has an independent obligation to conduct proceedings in public. Presley v. Georgia, \_ U.S. \_, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). Trial courts are required to consider alternatives to closure even when they are not offered by the parties, because “[t]he public has a right to be present whether or not any party has asserted the right.” *Id.* at 724-25. Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings. *Id.* at 725.

Article I, section 22 expressly guarantees the accused the right to appear and defend at all stages when his substantial rights may be affected. State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011) (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)); see also State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983) (noting that “conclusive presumption of error” may follow judge’s private communication with jurors). Similarly, article I, section 10 confers an expansive right upon the members of the public to monitor, attend, and access court proceedings. State v. Bennett, \_ Wn.App. \_, 2012 WL 1605735, \*2 (May 8, 2012) (defendant and public’s right to be present extends to

circumstances where their “mere presence *passively* contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.”).

Several important principles enforcing these rights are absent from the State’s brief. First, “[t]o establish waiver in the public trial context, the record must show either that the defendant gave a personal statement expressly agreeing to the waiver or that the trial judge or defense counsel discussed the issue with the defendant prior to defense counsel’s waiver.” State v. Applegate, 163 Wn.App. 460, 470, 259 P.3d 311 (2011); see also State v. Strode, 167 Wn.2d 222, 229 n.3, 217 P.3d 310 (2010). (“[T]he right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.”) The record is silent about whether a colloquy, writing, or other personal expression by Wade indicating he knew he had a right to be present when the court spoke to the jurors.

Second, a defendant “cannot waive the public’s right to open proceedings.” Strode, 167 Wn.2d at 229. This is so because “the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a Bone-

Club analysis.” *Id.* at 229-30. “The public has a right to be present whether or not any party has asserted the right.” Presley, 130 S.Ct. at 724-25. The trial courts are required to consider alternatives to closure even when the parties do not offer such alternatives. Id.

Third, there is no legitimate reason, administrative or otherwise, for the court to demand a private conference with sitting jurors in the course of a trial. The court is not free to hold a personal meeting with jurors for any reason, the court did so, and the court cannot insulate such a meeting from review by barring everyone else from the courtroom so that no record is made.

The impermissible closure of the courtroom so that the judge could speak to the jurors in private, during trial, violates the right to open court proceedings, the right to be present, and the right to due process of law.

**3. The in-court deliberations of the jury are not excused by defense counsel’s medical emergency**

When the deliberating jury asked to see the security video, the judge explained that defense attorney “Swaby is unavailable due to medical emergency.” 9/13/10RP 51. Then the court sua sponte initiated its own procedure by which the jurors would come into the courtroom and watch the videotape. Id. Swaby’s medical

emergency does not excuse the court from failing to notify counsel. Swaby's supervisor Ben Goldsmith informed the court that he would cover the case in Swaby's absence. 9/14/10RP 6. A second supervisor, David Seawell, came to court the next day to explain that he was also covering Swaby's case and helping Wade in Swaby's absence. Id. Thus, the prosecution falsely portrays the events as if the court had no defense attorney available, when in fact, several supervisors from The Defender Association were available to stand in Swaby's place as needed and had told the court as much.

The prosecution then asserts that because the prosecutor's paralegal tried not to listen to what the jury was saying, the jury did not deliberate in the courtroom in front of non-jurors. Resp. Brief at 42. But there is no question that the jurors talked among themselves while in the courtroom. 9/14/10RP 3, 4. They physically compared clothing that had been admitted in evidence to the pictures in the videotape. Id. They spoke over each other trying to see certain aspects of the videotape. Id.

The jurors would not know who was listening to them as they were in the courtroom. Instead, they would know that anyone who choose to listen could readily do so. Jury deliberations are required

to occur in private so that no subtle inferences press jurors to vote a certain way. Jurors would expect that anyone in the room could hear the sentiments of any of the jurors who spoke. Because jurors cannot be asked how they reached their verdict, the deliberative process is flawed when the process takes place in violation of the cardinal requirement that deliberations occur in private. State v. Cuziak, 85 Wn.2d 146, 148-49, 530 P.2d 288 (1975); State v. Hoff, 31 Wn.App. 809, 813, 644 P.2d 763, rev. denied, 97 Wn.2d 1031 (1982).

#### **4. The dog tracking evidence required a cautionary instruction**

The prosecution agrees that defense counsel could and should have requested an instruction cautioning the jurors against undue reliance on dog tracking. Resp. Brief at 45-46. But it asserts the lack of instruction was not prejudicial because Wade was found close to the 7-11 at night time, wore generic clothing “similar” to one robbery, and had a large number of coins. Resp. Brief at 46-47. However, identification was the central fact at issue; there was no question that a robbery occurred, only who did it. The complaining witness did not know if Wade was the perpetrator and the videotape did not show the perpetrators’ faces, or even their

races. 9/9/10RP 32; 9/13/10RP 38. The videotape was blurry. Ex. 21. The "successful" dog-tracking testimony was critical to the prosecution's case and the failure to inform the jury of the dangers of reliance on such evidence affected the outcome of the case. See 9/8/10(a.m.)RP 22, 27-28, 36.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Wade respectfully requests this Court reverse his convictions and remand his case for further proceedings.

DATED this 11<sup>th</sup> day of May 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67332-7-I
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	)	
PIERRE SPENCER-WADE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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