

FILED
SUPREME COURT
STATE OF WASHINGTON
7/24/2024 4:10 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 1031611
COA No. 57360-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

NICHOLAS JOSEPH DENHAM,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY

ANSWER TO PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN ANSWER	1
-----------------------------	---

1. Review is not warranted where the decision of the Court of Appeals did not depart from decisions of the Court of Appeals under RAP 13.4(b)(2).	1
--	---

2. The State’s dissatisfaction with the outcome of the case is not a basis upon which review should be granted, and the State’s assertion that the Court of Appeals erroneously failed to apply a “totality of the circumstances” test does not render that dissatisfaction a basis for a grant of review.	3
---	---

B. CONCLUSION.	10
---------------------	----

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). 1

STATUTES AND COURT RULES

GR 37. 3,7,11

WASHINGTON CASES

State v. Omar, 12 Wn. App. 2d 747, 460 P.3d 225 (2020).. 6,7,10

State v. Tesfasilasye, 200 Wn.2d 345, 518 P.3d 193 (2022) . 1,2

A. ARGUMENT IN ANSWER

1. Review is not warranted where the decision of the Court of Appeals did not depart from decisions of the Court of Appeals under RAP 13.4(b)(2).

The Petitioner State of Washington argues, in its contentions in support of review under both subsection (b)(2) and also (b)(4) (see infra), that the Court of Appeals decision was error because it contravened the rule that GR 37 issues must be assessed under a “totality of the circumstances” test, and that the Court of Appeals should have applied a rule of deferential rather than de novo review of GR 37 rulings. State’s PFR, at pp. 2, 13, 15.

But the State simply disagrees with the results of the Court of Appeals’ careful, thorough assessment of the record of voir dire, which the Court conducted in strict accordance with the dictates of GR 37 and case law regarding its application. First, the Petitioner, see PFR, at p. 11, incorrectly argues that the present case is distinguishable from State v. Tesfasilasye, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022), and the reasons

the Supreme Court deemed de novo review to be the appropriate standard in like cases. The Court of Appeals decision cannot rightly be so described. The Court ruled, in support of following that case's reasons for employing de novo review:

[J]ust as in Tesfasilasye, this case does not squarely present the question based on a well-developed record. Rather, the trial court's GR 37 ruling here did not involve disputed factual findings or credibility issues that require any deference. In fact, the trial court engaged in a truncated analysis. Therefore, we follow the applicable authorities and apply a de novo standard of review of the trial court's GR 37 decision.

Decision, at p. 6. Review is not warranted under RAP

13.4(b)(2). For similar reasons, review is not warranted under the substantial public interest alternative of RAP 13.4(b)(4).

The Court of Appeals properly applied our State's adoption of GR 37 and its detailed set of criteria which are designed to insure that the dictates of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) are meaningfully applied,

so that race is not seen as a factor in the selection of jurors in a criminal case in the Washington courts.

2. The State's dissatisfaction with the outcome of the case is not a basis upon which review should be granted, and the State's assertion that the Court of Appeals erroneously failed to apply a "totality of the circumstances" test does not render that dissatisfaction a basis for a grant of review.

The substance of the Court of Appeals decision is set forth in its opinion. The State argued as respondent on appeal that Juror 27 showed "an implicit bias towards [the] defense." BOR, at pp. 44-45. Mr. Denham, appellant, pointed out that Juror 27's statements plainly stated an awareness of the heavy weight of responsibility a juror assumes in a serious case which would have great impact on all involved, while also noting that Juror 27's statements commenced with recognition of the importance of the case to the victims' families, and noting that the case outcome would involve punishment of the accused if convicted. AOB, at pp. 31, 38, 40.

Below, after carefully setting out the pertinent portions of the full record of jury selection including the questioning of

Juror 27, Juror 4 and Juror 32, the Court of Appeals concluded that Juror 27 did not show the improper defendant-leaning bias which the trial deputy sought to ascribe to the juror. Decision, at pp. 10-14. Juror 27, as the Court of Appeals noted, recognized the seriousness of the responsibility to decide a case that would impact multiple people - “not just him [the defendant]” - and did so by referring to the victims’ family, while also stating, “But then also” the case would affect the accused’s “future as well.” Decision, at p. 12. The Court of Appeals properly labeled Juror 27’s understanding of the serious nature of the case as to the defendant, as a “correct statement regarding the law at issue[,] [which] cannot be a basis to infer bias.” Decision, at p. 12. Similarly, Juror 27’s awareness of the hardly surprising fact that a defendant’s guilty verdicts for two murders could be followed by punishment was also consistent with the law at issue in a criminal case and not a basis for removal. Decision, at p. 13.

The State's argument, which it has advanced from the commencement of the appeal through the motion to reconsider and the present Petition, is that the Court of Appeals should have deferred to the trial court's decision to allow the removal of juror 27 because it must have been based on some unseen, un-remarked upon demeanor of Juror 27 or of other members of the venire. PFR, at p. 13.

The argument expressly underlying the State's arguments for review under both subsection (b)(2) and subsection (b)(4) is that the Court of Appeals failed to follow a "totality of the circumstances" test. PFR, at p. 13. But the totality of the circumstances the State argues the Court of Appeals failed to consider is based on demeanor:

The mannerism, tone, and other non-verbal cues of the juror when speaking in the courtroom are not observed by a reviewer reading a cold transcript. The trial court is in the best position to observe the venire and understand the totality of the circumstances, in the courtroom, at the time of the challenge.

PFR, at p. 13. It must be made clear - the State asks the courts of this State to affirm peremptory removals based on the possibility that ‘something’ in the mannerisms, tone, and/or non-verbal cues of a juror, as to which ‘something’ no party nor the court at trial ever saw, identified, described, or remarked upon, must surely have been the reason the peremptory strike was permitted, and therefore, under a deferential review standard, appellate courts should affirm.

But GR 37 was explicitly adopted to prevent the removal of a juror based on such considerations, which are the very vehicle by which jurors have been struck in the past for reasons which actually stem from unconscious, but deeply embedded institutional and societal assumptions based on race. State v. Omar, 12 Wn. App.2d 747, 460 P.3d 225 (2020), review denied, 196 Wn.2d 1016 (2020).

In Omar, the defendant attempted to exercise a peremptory challenge and when asked for his reasons, vaguely responded that he “just didn’t like some of the responses that

[Juror 16] was giving to some of the questions.” Omar, at 749.

Division I of the Court of Appeals held that “Omar’s articulated reasons ring nearly tantamount to a characterization of Juror 16’s demeanor; and as noted above, GR 37(i) cautions that such a characterization has historically been associated with improper discrimination in jury selection.” Id. at 753.

Notably, the State’s responsive brief in the Court of Appeals relied explicitly on this same notion - that the strike should be affirmed because there surely must have been something about the juror, which never made it into the record, that might have been the reason for allowing the strike. Misemploying the rule, correctly applied in other, very different contexts, that a trial court is in the best position to assess a witness’s credibility and demeanor, the State argued:

The trial court is in the best position to observe the venire and understand the totality of the circumstances, in the courtroom, at the time of the challenge. In this case, the prosecutor’s peremptory challenge was based on a specific answer to a question that defense counsel asked to numerous jurors. The trial court was in the best position to

fully observe nonverbal cues that went with that response and differences between responses of other jurors. In reviewing the trial court's ruling, this Court should follow the line of cases that Appellate Courts owe deference to a trial court's determinations regarding its observations of jurors. The trial court was in the best place to see what the totality of the circumstances that an objective observer would rely upon in deciding whether they could view race or ethnicity as a factor in the peremptory challenge. Pure de novo review is not possible because this Court was not in the courtroom and did not have the ability to see the venire or Juror Number 27, did not have the ability to hear and see the tone and demeanor of particular responses of the jurors or attorneys, and was not in position to view the totality of the circumstances which would be seen by an objective observer in the courtroom. Deference should be given to the trial courts [sic] observations in that regard.

BOR, at pp. 50-51. Yet the State posits no aspect of demeanor, troubling or otherwise, that it asks the Court to assume was the reason for the strike or its allowance.

Even if, solely arguendo, there had been concerns regarding a juror based on demeanor - using the term broadly to include anything other than what the juror stated or answers

given in response to questioning of the venire - which a party might wish to raise, that concern was required to be pointed out in order to give notice to the court and the other party that it may be a part of a later possible challenge.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror . . . exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

GR 37(i). General Rule 37 imposes this requirement based on the recognition by the Supreme Court that the longstanding test from Batson v. Kentucky has been wholly inadequate to effect its purpose. The required question under GR 37, which the

Court of Appeals below properly relied upon, is whether an objective observer “could view” the strike as based even in part on unconscious racial stereotyping. The de novo standard is intimately related to GR 37’s objective test. State v. Omar, 12 Wn. App.2d at 751. Review by the Supreme Court is not warranted.

B. CONCLUSION

Based on the foregoing, Respondent Nicholes Denham asks that this Court deny the State’s Petition for Review.

This pleading contains 1,839 words formatted in font Times New Roman 14.

Respectfully submitted this 24th day of July, 2024.

s/ Oliver R. Davis
Washington Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98102
Telephone: (206) 587-2711
E-mail: Oliver@washapp.org

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 103161-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Joseph Jackson
Thurston County Prosecutor's Office
[PAOAppeals@co.thurston.wa.us]
[jacksoj@co.thurston.wa.us]

☐ petitioner

☐ Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: July 24, 2024

WASHINGTON APPELLATE PROJECT

July 24, 2024 - 4:10 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 103,161-1
Appellate Court Case Title: State of Washington v. Nicholes Joseph Denham
Superior Court Case Number: 20-1-00502-2

The following documents have been uploaded:

- 1031611_Answer_Reply_20240724161015SC003852_5354.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was washapp.072424-10.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- greg@washapp.org
- joseph.jackson@co.thurston.wa.us
- teri.bryant@lewiscountywa.gov
- wapofficemail@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20240724161015SC003852