73069-0

NO. 73069-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Appellant.

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

The Honorable Bruce E. Heller, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RACIAL DISCRIMINATION IN JURY SELECTION DEPRIVED BOWMAN OF A FAIR TRIAL

a. Comparative juror analysis is necessary and appropriate

The State contends a comparative jury analysis is not required in analyzing a Batson[1] challenge. Br. of Resp't at 30. But without a comparative juror analysis, the Batson rule is utterly pointless. Asking courts not to conduct a comparative juror analysis is asking them to blind themselves to the existence of racial discrimination during jury selection.

The United States Supreme Court has recognized that comparative juror analysis is a powerful tool to address the State's discriminatory practices. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). "[I]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Id.; accord Snyder v. Louisiana, 552 U.S. 472, 483, 128 S. Ct. 1203, 170 L. Ed. 2d 178 (2008) (applying comparative juror analysis to find explanation "implausible" given "prosecutor's accept of white jurors who disclosed conflicting obligations that appear to have been at least as serious as" a black juror's); State v.

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

Saintcalle, 178 Wn.2d 34, 43, 309 P.3d 326 (2013) (lead opinion) (stating comparative juror analysis is "part of the 'purposeful discrimination' analysis"). The State is thus mistaken in its assertion—which relies exclusively on a nonbinding Ninth Circuit Court of Appeals case—that no comparative juror analysis is required.

Here, one of the State's purportedly race-neutral reasons for excluding Juror 5 pertained to her comments about a nephew imprisoned for murder. 11RP 67. The State first posits that comparing Juror 2, who also had a relative in prison for much more recent murder, is unwarranted "because there is no information in the record as to Juror 2's minority status. Juror 2 may have been a minority juror." Br. of Resp't at 38-39. But, minority or not, the record is clear that Juror 2 was not black. 11RP 69 (defense counsel's representation that Juror 5 was the "only African-American woman even close to being seated in the case."). If the State's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve," there is strong evidence of purposeful discrimination. Miller-El, 545 U.S. at 241 (emphasis added).

The State also suggests that Jurors 2 and 5 were not comparable because their "opinions were markedly different. Juror 2's responses present a stark contrast to the uncertainty of Juror 5." Br. of Resp't at 39. The

State's primary basis for distinction is that Juror 2 stated his or her imprisoned relative was rightly convicted whereas Juror 5 said she did not know whether her nephew was wrongly or rightly accused. Br. of Resp't at 39-40. The State also notes, incorrectly, that "Juror appeared to be saying that she presumed that her nephew, who had been in prison for murder for 30 years, was innocent, and that she had not seen enough evidence herself to be confident of his guilt." The State's distinctions are faulty given that Juror 5 stated, "I don't believe that. I don't. I don't believe that," when asked if she believed "that there's a chance that [her] nephew is in prison unjustly." 11RP 21. Juror 5 never stated she believed her nephew was innocent or wrongfully in prison.[2] Juror 5's answers were in reality little different than Juror 2's, yet Juror 2 was not stricken by the State.[3]

The State also relies on the fact that Juror 2 explained why he or she would make a good juror as a reason for distinguishing Juror 2 from Juror 5.

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[2] The State does not acknowledge or address that, in proffering race-neutral reasons, the prosecutor contradictorily claimed that Juror 5 "thinks he probably isn't [innocent]" and that Juror 5 "believes that there are innocent people in prison for murder in her family." 11RP 67. These conflicting statements made within seconds of one another also demonstrate the State's race-neutral explanations for challenging Juror 5 were not plausible. See Br. of Appellant at 13-15.

[3] Juror 5's lengthier and more descriptive explanations about her perspective on her nephew's situation are also the result of the State's focus on Juror 5 more than on Juror 2 or on any other juror, supporting Bowman's claim that the State was fishing for race-neutral reasons to exercise a peremptory on the only black woman in the venire. Br. of Appellant at 30-32.

But Juror 5 said almost the same exact thing about her abilities to serve as a juror and the prosecutor agreed. Compare 9RP 109 (Juror 2's explanation for being a good juror) with 9RP 115 (prosecutor's remarks that Juror 5's experiences "might make [her] a good juror in this case") and with 9RP 115 (Juror 5's agreement with the prosecutor that "I think I would be as fair as I know how to be. I would. I would look at things. I would -- I'm analytical too. And I don't rush"). Contrary to the State's claims, there was very little difference between Juror 2's statements and Juror 5's. It is appropriate to compare them for Batson's purposes. Such a comparison reveals evidence of the State's discriminatory purpose.

b. All of the State's proffered race-neutral reasons must be considered together when analyzing a *Batson* claim

The State also takes issue with Bowman's suggestion that the trial court erred by not conducting a holistic, thorough analysis of the State's proffered reasons for peremptorily challenging Juror 5 when addressing the Batson challenge. Br. of Resp't at 29-30. This is just another request that courts pretend that racial discrimination in jury selection does not exist.

It is important for all of the prosecutor's purportedly race-neutral reasons to be considered together. If any given reason appears pretextual, it "naturally gives rise to an inference of discriminatory intent, even where other, potentially valid explanations are offered." Snyder, 552 U.S. at 485.

Under Snyder, even if a court accepts one or two explanations as valid, it still "should step back and evaluate all of the reasons together. The proffer of various faulty reasons and only one or two otherwise adequate reasons[] may undermine the prosecutor's credibility to such an extent that a court should sustain a Batson challenge." Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003).

The State claims that the "trial court found the State's reasons for challenging Juror 5 were not race-based and were not a pretext for race-based discrimination." Br. of Resp't at 32. This is only partially true. The trial court did not address three out of the five reasons the State gave for its peremptory—Juror 5's explanation of employment, difficulty "tracking," and reference to an Apple television commercial. Had it done so, it would have realized these proffered explanations were pretextual given that they were riddled with contradictions and inconsistencies.[4] See Br. of Appellant at 25-29. Because a majority of the State's tendered race-neutral explanations were incongruous and pretextual, the trial court erred by not considering all the explanations together. The record shows Bowman's Batson challenge should have been sustained.

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[4] As discussed, even the prosecutor's stated reasons actually addressed by the trial court were self-contradicting, revealing additional evidence of the State's discriminatory purpose to exclude the sole black woman from the jury. See 11RP 66-67; Br. of Appellant at 14-15 & n.3, 18-19, 22-25.

c. The Washington courts must adopt a new rule to address racial discrimination in jury selection

The State urges rejection of Bowman's proposed reasonably probable standard for addressing racial discrimination because the framers of the Washington Constitution did not intend "to constitutionally limit the bases upon which the State could exercise its peremptories." Br. of Resp't at 44. Bowman does not disagree that the framers were likely unconcerned about limiting the State's peremptory challenges on the basis of race or gender, given that in 1889 "racial minorities and women were completely ineligible for jury service." Saintcalle, 178 Wn.2d at 75 (González, J., concurring). Fortunately for nonwhites and nonmales, however, times change.

The "inviolate" right to jury trial under article I, section 21 should be interpreted with a contemporary understanding of the various things that violate the right. The State cannot dispute that racial discrimination is one of these things. Although the State suggests that the lack of appellate reversals under Batson "likely represents a positive state of affairs," Br. of Resp't at 50 n.14, the Washington Supreme Court disagreed in Saintcalle. Indeed, a majority of the court decried the pernicious and persistent problem of racial discrimination in jury selection and suggested new approaches, some of them quite radical, to address it. See Br. of Appellant at 41-43 (discussing

different opinions in Saintcalle decision). Although the State may prefer to remain stuck in the past, "now is the time to begin the task of formulating a new, functional method to prevent racial bias in jury selection." Saintcalle, 178 Wn.2d at 52. Bowman simply asks this court to do what the Saintcalle court requested. This court should adopt the more workable standard and reverse in cases, such as this one, where the record shows a reasonable probability that race was a factor in the exercise or a peremptory challenge. See Br. of Appellant at 43-46.

Finally, the State's waiver argument should be rejected. See Br. of Resp't at 49. Contrary to the State's claim, if the record is sufficient to review Bowman's challenge under Batson, it is likewise sufficient to review it under the rule Bowman proposes. And discrimination in jury selection is a manifest constitutional error that may be raised for the first time on appeal. State v. Burch, 65 Wn. App. 828, 839, 830 P.2d 357 (1992). Moreover, given the concerns outlined in the Saintcalle opinions, the new rule should be addressed on its merits absent "compelling circumstances where justice demands," and the State has made no attempt to argue otherwise. RAP 1.2(a).

2. THE RECORD IS CLEAR THAT DEFENSE COUNSEL FORWENT LESSER INCLUDED INSTRUCTIONS BASED SOLELY ON BOWMAN'S DECISION; GIVEN THE DEFENSE THEORY AT TRIAL, THIS AMOUNTED TO INEFFECTIVE ASSISTANCE

Defense counsel did not exercise his own professional judgment on whether to request jury instructions on lesser included instructions, contrary to State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). 21RP 5. The State simplistically argues that defense counsel was not ineffective for merely agreeing with Bowman on an all-or-nothing approach, quoting Grier: "'it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision.'" Br. of Resp't at 56 (quoting 171 Wn.2d at 39). The State's argument ignores that the sole basis for defense counsel's agreement with Bowman's decision was that Bowman "has made it." 21RP 5. Defense counsel's statements unequivocally indicate that, even if he disagreed with Bowman's decision, he would follow it anyway. Defense counsel also stated he disagreed with Grier's holding. 21RP 5. Bowman was thus deprived of his attorney's independent judgment on whether to request lesser included instructions.

Had defense counsel exercised this independent judgment, he would have requested the lesser included instructions because manslaughter or second degree murder was much more consistent with the defense's self defense theory. See Br. of Appellant 50-53. In other words, the way that

defense counsel presented this case to the jury—as a road rage incident gone wrong—called out for lesser included instructions as a matter of logic and common sense. It was not a reasonable defense strategy to go with an all-or-nothing approach under the circumstances.

If the lesser included instructions were given, there is a reasonable probability that the outcome of trial would have differed. The State contends there is no reasonable probability based on Grier because "the jury found Bowman guilty of premeditated murder and must be presumed to have followed their instructions, so the availability of lesser offenses would not have changed the outcome." Br. of Resp't at 60. This Grier prejudice analysis is constitutionally infirm because it ignores the possibility that, if actually presented with the option, jurors might reasonably convict on a lesser included offense. See Br. of Appellant at 56-59.

When an element of the offense remains in doubt, but the accused appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. PUGET SOUND L. REV. 185, 193 (1992) ("When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.").

This is the primary rationale underpinning the common law rule that defendants are entitled to have the jury instructed on lesser included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 393 (1980). Providing the jury with the option of convicting on lesser included offense "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." Id. at 634.

Here, the jury was not convinced Bowman should be acquitted of all wrongdoing but still could have determined he acted merely negligently or recklessly rather than with premeditated intent. Cf. State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998); see also Br. of Appellant at 59-60 (discussing why lesser included instructions could have reasonably changed the outcome based on the trial evidence and defense counsel's arguments). The jury was not given the option to make this determination because of counsel's deficient failure to request lesser included instructions. As in Beck, this deprived Bowman of the full benefit of the reasonable doubt standard. Both the State and the Grier court miss this point.

Defense counsel's failure to request lesser included offense instructions constituted deficient performance. This deficient performance affected the outcome of trial within a reasonable probability. This court should therefore reverse.

B. CONCLUSION

For the reasons stated here and in his opening brief, Bowman asks this court to reverse his convictions and remand for a fair trial.

DATED this 19th day of August, 2016.

Respectfully submitted,

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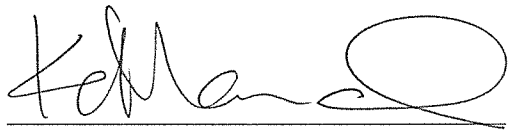

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