IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE WILLIAM SCANLAN, Appellant.	No. 36324-1-II consolidated with
STATE OF WASHINGTON, Respondent, v. ANTWONN DEMETRIES WASHINGTON, Appellant.	No. 36920-6-II UNPUBLISHED OPINION

Houghton, P.J. — In this consolidated action, George Scanlan appeals his conviction for first degree burglary, arguing that the charging document failed to allege the element of ownership or occupancy. Antwonn Washington appeals his conviction for first degree felony murder, first degree burglary, first degree robbery, second degree arson, and second degree assault. Washington argues that the trial court erred in denying his *Batson*[1] challenge and in making certain evidentiary rulings. He also raises additional arguments pro se. We affirm Scanlan's and

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

Washington's convictions.

FACTS

On June 14, 2003, Travis Bride held a high school graduation party for 150 guests in his brother's honor at their shared residence in Puyallup. At the party, Bride served two kegs of beer and hard liquor. At the time, he supported himself financially by selling vehicle wheels and tires and one to two pounds of marijuana daily. Because of his drug and vehicle parts sales, on the night of the party, he had approximately $8,000 in his wallet and $15,000 in one of his safes.

At around 5:00 a.m., after most of the guests had left, Bride saw the front door open and a man enter his house wearing a ski mask and wielding a shotgun. After the man entered, he approached Bride and struck him on the side of his head with the shotgun. When Bride lifted his head, he saw another man standing behind the couch wearing a bandana and carrying an AK-47 assault rifle.

The man with the shotgun ordered Bride to his knees and demanded to know the location of his safe. Bride crawled to his bedroom, opened his safe, and handed over all the money inside as well as the keys to his Chevrolet Tahoe and the money in his wallet. While this happened, Bride heard a third person rummaging through the rest of his home and a voice out of a Nextel phone or a walkie-talkie device.

The man with the shotgun then asked everyone else in the room to empty their pockets. One guest, Josh May, refused to give the man his inhaler. After arguing with May for a few seconds, the man fatally shot May. The intruders then gathered everything they intended to steal and left the house in Bride's Tahoe, which they later set on fire. Bride called the police, who

eventually arrested the men later identified at trial as Scanlan, Washington, Chris Blackwell,[2] and their accomplices.

The State charged Scanlan and Washington each with first degree felony murder, first degree burglary, second degree assault, second degree arson, and two counts of first degree robbery. The State additionally charged Scanlan with unlawful possession of a firearm.

During voir dire, the State exercised a peremptory challenge against juror 11, an African American.[3] Washington's counsel made a *Batson* challenge, and the trial court engaged in the three-part *Batson* test and denied the challenge.[4]

At trial, Washington's counsel cross-examined Bride regarding the identity of his marijuana customers and suppliers. When Bride refused to answer after the trial court ordered him to do so, it held him in contempt and instructed him to contact counsel. Later, when Washington's counsel resumed his cross-examination, Bride invoked the Fifth Amendment and refused to answer his questions. Washington's counsel objected, arguing that Bride had waived his rights during questioning, but the trial court overruled his objection. Washington's counsel then moved to strike all of Bride's testimony related to drugs. The trial court denied the motion.

The jury convicted Scanlan of first degree felony murder, first degree burglary, first degree robbery, second degree arson, and unlawful firearm possession. The jury convicted Washington

[2] Although he is not a party to this consolidated appeal, Blackwell entered a guilty plea at trial. Reviewing the record, he appears to have been the man in the ski mask armed with the shotgun.

[3] During voir dire, the juror explained that he was born in Ghana and had lived in the United States for approximately 20 years.

[4] Scanlan is an Asian Pacific Islander and Washington is Black.

of first degree murder, first degree burglary, one count of first degree robbery, and second degree arson.[5] They appeal.

ANALYSIS

Scanlan's Information Sufficiency

Scanlan contends that the State's information charging first degree burglary failed to allege the element of ownership or occupancy of the premises. He argues that the State's error rendered the information insufficient.

A sufficient charging document alleges all essential elements of the crime charged. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Because Scanlan has challenged the charging document for the first time on appeal,[6] we construe the charging document liberally in favor of validity when the necessary elements appear in any form on the face of the document. *McCarty*, 140 Wn.2d at 425. Under *Kjorsvik*, we follow a two-part test to determine whether the necessary elements appear and, if they do, whether the defendant can show actual prejudice as a result of the inartful language. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

The State's information alleged:

> That GEORGE WILLIAM SCANLAN, in the State of Washington, on or about the 15th day of June, 2003, did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building, located at 12217 115th Avenue Court East, Puyallup, Washington, and in entering or while in such building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a firearm, a deadly weapon, contrary to RCW 9A.52.020(1)(a).

[5] For both Scanlan and Washington, the murder, burglary, robbery, and assault charges all included firearm enhancements.

[6] Scanlan concedes he failed to raise this argument at trial.

Clerk's Papers (CP) (Scanlan) at 2. Likewise, RCW 9A.52.020(1) provides:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

Here, the State's information adequately alleges the necessary elements of the crime of first degree burglary, cites to RCW 9A.52.020(1)(a), and meets the first part of the *Kjorsvik* test. 117 Wn.2d at 105-06. Scanlan argues that under *State v. Klein*, 195 Wash. 338, 341, 80 P.2d 825 (1938), the information must specifically allege ownership of the premises entered to negate Scanlan's right to enter. But even if Scanlan's reliance on *Klein* is not misplaced, he fails to show actual prejudice resulting from what he argues to be inartful or incomplete language under the second part of the *Kjorsvik* test. *Kjorsvik*, 117 Wn.2d at 105-06. Thus, his argument fails.

Washington's *Batson* Challenge

Washington first contends that the State improperly exercised a peremptory challenge against an African American juror, contrary to the equal protection requirements of *Batson*. Washington argues that the State failed to produce a satisfactory race-neutral explanation.

Under *Batson*, courts apply a three-part test to determine the propriety of a peremptory challenge. 476 U.S. at 96-98; *State v. Vreen*, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001). First, the opponent of the peremptory challenge must make out a prima facie case of racial discrimination. *Vreen*, 143 Wn.2d at 926-27. Second, if the opponent to the challenge can make such a showing, the party exercising the peremptory challenge must provide a race-neutral explanation for the challenge. *Vreen*, 143 Wn.2d at 926-27. Third, once the challenging party

tenders an explanation, the trial court must determine whether the opponent of the challenge has proved purposeful racial discrimination. *Vreen*, 143 Wn.2d at 926-27.

During voir dire, the juror recounted an incident four or five years earlier where the police came to his home and questioned him regarding a domestic violence dispute with his girl friend. He explained that the argument was verbal, that he had a bad experience with the police, and that they treated him unfairly during the process. At one point, he showed the trial court the mark the handcuffs had left on him. He also shared that he had friends in law enforcement whom he respected and that he felt the court system was fair.

At trial, the trial court apparently found a prima facie case of racial discrimination and moved directly to the second part of the *Batson* test: whether the State could provide a race-neutral explanation for exercising the challenge. *Vreen*, 143 Wn.2d at 926-27. The trial court ruled:

> It's clear to me that the peremptory challenge by the [S]tate is not racially motivated. The reason I say that is because we have the juror's own statements about his unfair treatment in his 2002 arrest for domestic violence, where he felt he had to show us the marks on his wrists from being cuffed. It's true, as [Defense Counsel] said, he does know other police officers and has them as friends, but this appears to me to be a persuasive reason to exercise a peremptory challenge against him.

3 Suppl. Report of Proceedings (RP) at 404.

The trial court's finding is consistent with the Supreme Court's holding in *Purkett*, where the Court explained that the second part of the *Batson* test does not focus on plausibility but instead on ensuring the basis for exercising the challenge does not offend equal protection. *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). Therefore,

the trial court did not err in denying the *Batson* challenge and Washington's argument fails.

Washington's Sixth Amendment Rights

Washington next contends that the trial court denied his Sixth Amendment right to confrontation by allowing Bride to assert his Fifth Amendment right to remain silent after he partially answered the State's questions. Washington argues the trial court should have stricken his testimony if it was going to allow him to assert his Fifth Amendment privilege.

The Sixth Amendment guarantees, among other rights, a defendant's right to present a defense and cross-examine witnesses. *State v. Levy*, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). Notwithstanding these rights, a witness's valid assertion of "'Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights.'" *Levy*, 156 Wn.2d at 731 (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir. 1980)). Thus, we must determine whether the trial court properly allowed Bride to assert his Fifth Amendment rights.

We review the trial court's decision to allow Bride to assert his Fifth Amendment right against self-incrimination for abuse of discretion. *State v. Lougin*, 50 Wn. App. 376, 382, 749 P.2d 173 (1988). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

At trial, Bride refused to give the name of his marijuana supplier and customers. Over defense objection, the trial court allowed Bride to assert the privilege, reasoning that because of the possibility that his testimony could lead to a federal prosecution, it would violate the Fifth Amendment to compel him to testify. This reasoning accords with that in *Hobble*, where the court held that the testimony the witness refuses to give need only provide a link in a chain of evidence leading to a potential prosecution. *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85

(1995). Therefore, the trial court did not abuse its discretion in allowing Bride to assert his Fifth Amendment right to avoid self-incrimination and Washington's argument fails.

Without assigning error, Washington also argues, in an issue closely related to his Sixth Amendment argument, that the trial court should have granted his motion to strike Bride's testimony after it allowed him to assert his Fifth Amendment rights. But the trial court properly denied the motion because Bride's testimony involved collateral matters. The trial court explained that Washington still had the opportunity to argue that the unnamed individuals could be responsible for the crime. Thus, Washington's argument fails as the trial court did not err in refusing to strike Bride's testimony following his assertion of the Fifth Amendment.

Washington's Statement of Additional Grounds

Pro se, Washington first contends that he received ineffective assistance of counsel.[7] Washington argues that his counsel failed to ensure his speedy trial rights and that he failed to prepare for trial. Washington's arguments rely on matters outside the record on appeal, such as private conversations he had with his attorney and his knowledge of unnamed witnesses who did not testify at trial. The appropriate method to raise such arguments is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d. 1251 (1995); RAP 16.4. Thus, his first argument fails because it relies on materials outside the record on direct review.

Second, Washington contends that in personal letters to the trial court, he requested a separate trial. But these letters are also not a part of the record on appeal and cannot form the basis for reversal on direct review. RAP 16.4. Thus, his second argument fails.

[7] RAP 10.10.

Third, Washington argues that the trial court violated his speedy trial rights by holding trial after his speedy trial deadline. He references several continuances as a basis for the trial court's violation of his rights but, under CrR 3.3(e)(3), valid continuances are excluded from a defendant's speedy trial calculation. Washington does not explain why any of these continuances were inappropriate. Thus, his third argument fails.

Fourth, Washington argues that the trial court's judicial assistant and bailiff held improper ex parte communications with the jury. We note that court staff regularly interacts with the jury out of administrative necessity. Thus, his fourth argument fails.

Fifth, Washington argues insufficient evidence supported the trial court's accomplice liability instructions. Therefore, he asserts that the State committed prosecutorial misconduct by offering them.

Sufficient jury instructions allow the parties to argue their theory of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). At trial, the State presented incriminating testimony of a co-defendant who had spent the night of the crime with Scanlan, Washington, and other co-defendants. The witness testified that she saw Scanlan and Washington leave Bride's home carrying guns and a laundry basket full of stolen property. This and other similar evidence presented at trial provide a sufficient basis for the State to request, and the trial court to give, an accomplice liability instruction. Thus, Washington's fifth argument fails.

Sixth and finally, Washington argues the State committed prosecutorial misconduct when it misstated the reasonable doubt standard. At trial, the prosecutor mistakenly said that

Washington was not entitled to the "benefit of the doubt." 10 RP at 1242. After the prosecutor misstated the law, the trial court sustained Washington's objection and read the jury a curative instruction from the bench before Washington's closing argument. After closing arguments, the trial court's instructions to the jury explained:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP (Washington) at 19. Because the trial court properly sustained the objection; gave the jury a curative instruction; and provided a correct instruction for their deliberations, even if any error, it would be harmless. Therefore, Washington's sixth argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.