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

STATE OF WASHINGTON, Respondent, v. JARVIS REMONE GIBBS, Appellant.	)))))))))	No. 65605-8-I UNPUBLISHED OPINION FILED: March 5, 2012

Schindler, J. — A jury convicted Jarvis Gibbs of two counts of robbery in the first degree and one count of identity theft in the second degree. Gibbs contends the trial court erred in rejecting his Batson[1] challenge. Gibbs also contends that an improper comment on his exercise of his constitutional right to remain silent and prosecutorial misconduct in closing argument violated his right to a fair trial. We affirm.

FACTS

In the early morning on September 1, 2009, Bradley Scott was walking on Lake City Way near 105th Street. A dark blue car pulled into a driveway in front of him and three African American men got out. As Scott walked past, one of the men asked him for gas money. Scott gave him a dollar and walked away.

The man ran after Scott and said they needed more money. When Scott said

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

that he did not have more money, the man punched him in the face. The three men then pushed Scott to the ground, kicking him in the back of the head and hitting him in the face. A woman got out of the car and began hitting Scott in the face. Scott clutched his wallet in his hand as two of the men tried to take it from him. Hitting Scott in the arm and wrist, the men and the woman wrestled the wallet away from him and drove away.

Shortly after the robbery, Scott's stolen debit card and credit card were used to buy gas at a Chevron Station and cell phones at a 7-Eleven store. The security camera at the 7-Eleven recorded three men, later identified as Jarvis Gibbs, Clovelle Harvey, Michael Alexander, and one woman, later identified as Sheena Blackburn, buying cell phones at around 3:00 a.m. the morning of the robbery.

About a week later, Tyler Grieb was walking in the Greenlake neighborhood at approximately 1:00 a.m. when two men walked around a corner in front of him and punched him in the face. Grieb fell to the ground and yelled for help as the men punched and kicked him in his face and back. As the men beat Grieb, they yelled at him to give them his cell phone and wallet. After ripping off a back pocket from Grieb's jeans to take Grieb's wallet, the men ran away.

The police arrested Gibbs, Harvey, Alexander, and Blackburn. Scott and Grieb identified Gibbs as one of the men who had attacked and robbed them.

The State charged Gibbs, Blackburn, and Harvey with three counts of robbery in the first degree. Before trial, Blackburn and Harvey pleaded guilty. By second amended information, the State charged Gibbs with two counts of robbery in the first

degree and identity theft in the second degree. Gibbs pleaded not guilty.

Scott, Grieb, lead detective Jerome Craig, and former codefendant Blackburn testified in the State's case in chief. Harvey was the only witness to testify on behalf of the defense. Harvey said that he robbed Grieb and that Gibbs was not with him during the robbery.

The jury convicted Gibbs as charged. The trial court imposed a standard-range sentence. Gibbs appeals.

ANALYSIS

Batson Challenge

Gibbs contends the State infringed his due process rights by using a peremptory challenge in violation of Batson.

A prosecutor's use of a peremptory challenge on the basis of race violates a defendant's right to equal protection. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). If the defendant makes out a prima facie case of racial motivation, the burden shifts to the State to articulate a race-neutral explanation for the peremptory challenge. Luvene, 127 Wn.2d at 699; Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

The prosecutor must provide a clear and specific explanation of the reasons for exercising the peremptory challenge. Miller-El, 545 U.S. at 239. To determine "whether a prosecutor's explanation is based on discriminatory intent, courts consider whether the prosecutor has stated a reasonably specific basis for the challenge, such

as specific responses or the demeanor of the juror during voir dire, or a particular identifiable incident in that juror's life." State v. Rhodes, 82 Wn. App. 192, 196, 917 P.2d 149 (1996) (citing State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357 (1992)).

" '[T]he best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.' " Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)[2] (quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)[3]). Moreover, "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first hand observations of even greater importance." Snyder, 552 U.S. at 477. Accordingly, the trial court's determination of a Batson challenge is given " 'great deference on appeal, and will be upheld unless clearly erroneous.' " State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008)[4] (quoting Luvene, 127 Wn.2d at 699); see also Snyder, 522 U.S. at 477.

Here, the prosecutor exercised a peremptory challenge against Juror 1, an African American member of the venire. Gibbs's attorney made a Batson challenge to the prosecutor's use of the peremptory challenge. The trial court accepted the prosecutor's reasons for challenging the juror and rejected Gibbs's Batson challenge.

Gibbs challenges the court's decision to accept the prosecutor's explanation for exercising the peremptory challenge against Juror 1. Assuming without deciding that Gibbs made a prima facie case of racial motivation, the record supports the trial court's ruling.[5]

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[2] (Brackets in original.)
[3] (Plurality opinion.)
[4] (Internal quotation marks and citation omitted.)
[5] If the prosecutor has offered a race-neutral explanation, on appeal, "whether or not a 'prima

During voir dire, the prosecutor asked whether any jurors "have [had] a particularly bad experience with a police officer." In response, Juror 1 described two experiences.

> A: I have a red sports car. And I'm coming out of the mountains down into Issaquah. I got a ticket. And when I went before the judge it turns out the ticket was for going one mile above the speed limit. The interaction with the policeman was minimal.
>
> Another incident in that same car right here on Pike Street, I was stopped by a police woman. And the top was down, and it was about 80 degrees. And she held me there for over 30 minutes while she checked the registration of the car. Because she found that -- the car has a special license plate. I don't have to pay -- it's an antique car, and I don't have to pay fees on it every year. And she was disturbed by that fact. And she couldn't discover the law which allowed me to drive without paying that fee. So, that was an unpleasant experience.
>
> Q. Anyone else?
>
> A. That was a very unpleasant experience. I couldn't get out of the car. And it was hot. And I felt it was dangerous to my health. But I had no recourse.

The prosecutor explained that he used a peremptory challenge because Juror 1 had indicated that he had gone through "two bad experiences with police officers," where "one was being a little aggressive" and "it was very irritating and he was annoyed." The court accepted that "bad law enforcement experiences [are] a legitimate concern for the prosecutor" to exercise a peremptory challenge.

Citing the responses of Jurors 20 and 21, Gibbs claims the prosecutor's race-neutral explanation was pretextual because these jurors said they had bad experiences but were not challenged. But the responses of Jurors 20 and 21 are distinguishable from the detailed, lengthy response of Juror 1. Defense counsel's short exchange with

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facie case was established does not need to be determined' to uphold the trial court's refusal to find a Batson violation." State v. Thomas, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting Hicks, 163 Wn.2d at 492-93); see also Luvene, 127 Wn.2d at 699 ("[I]f . . . the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary prima facie case is unnecessary.").

Juror 20 began with Juror 20 stating that none of Juror 20's experiences with police

officers "have been particularly bad."

> Q: How about just bad? Generally bad.
> A: I've been in a car that was pulled over and the cop sort of harassed the person driving. Someone in the back seat asked for his badge number. That was a lot of years ago in a different state.

Juror 21 said merely Juror 21's "[c]ar registration wasn't on the back of the car. I had the new registration in the glove compartment. It was a Seattle police officer, and he was very nasty and agitated." We conclude the trial court did not err in accepting the prosecutor's race-neutral reasons for exercising the peremptory challenge.[6]

Prosecutorial Misconduct

Gibbs also contends that the prosecutor committed reversible error during rebuttal argument by misstating the presumption of innocence. Gibbs argues that the prosecutor's misconduct violated his right to due process by shifting the State's burden of proof.

A defendant alleging prosecutorial misconduct must establish the conduct was improper and had a prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's allegedly improper remarks in the context of the issues in the case, the evidence, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To establish prejudice, the defendant has the burden of demonstrating "there is a substantial likelihood the misconduct affected the jury's verdict." Brown, 132 Wn.2d at 561.

[6] Gibbs also argues that the trial court erred in accepting three additional explanations that the prosecutor offered for the peremptory challenge. These included that Juror 1 had been deceptive about his job, admitted he was sensitive about "the race issue," and asked questions out of turn during voir dire. The record shows that the trial court did not accept "saying he is sensitive about race" as a legitimate concern. And because we conclude that the juror's two bad experiences with law enforcement constitute a clear and specific explanation of the prosecutor's reasons for the challenge, we do not reach Gibbs's arguments as to the juror's job or questions during voir dire. See Miller-El, 545 U.S. at 239.

Here, the State concedes that the prosecutor misstated the presumption of innocence but argues that, as in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), Gibbs cannot show prejudice because the trial court gave a curative instruction.

> [PROSECUTOR]: [Defense counsel]'s right with one thing. The defendant is presumed innocent. Not right now though. He was presumed innocent at the beginning of this trial. And you owe that to him. But the minute the State started producing evidence, the minute that Tyler Gr[i]eb came in on a Thursday morning and testified, he was guilty.
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> [DEFENSE COUNSEL]: Your Honor, I'll object to the suggestion made as to (inaudible) instruction disregard and counsel cautioned.
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> [PROSECUTOR]: Basis?
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> THE COURT: All right. Jurors, as I instructed you earlier, a defendant is presumed innocent. This presumption continues throughout the entire trial, unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt. The State has the burden of proving that a [sic] reasonable doubt exists.

In determining the effectiveness of a curative instruction, the trial court is given great deference, "[s]ince the trial judge is best suited to determine the prejudice of the statements." State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). The jury is presumed to follow a curative instruction. Warren, 165 Wn.2d at 28.

In Warren, the prosecutor told jurors three times in closing argument that " '[r]easonable doubt does not mean [that you] give the defendant the benefit of the doubt.' " Warren, 165 Wn.2d at 23-24. Each time, defense counsel objected and the trial court gave a curative instruction. Warren, 165 Wn. 2d at 28. The supreme court held that the trial court's instructions cured the prosecutor's "flagrant" misconduct, which "sought to undermine the State's burden of proof beyond a reasonable doubt," and the defendant could not show prejudice. Warren, 165 Wn. 2d at 27-28.

We conclude that, as in Warren, Gibbs cannot show prejudice.

Detective's Testimony

Gibbs also claims that he is entitled to a new trial because the detective made an improper comment on Gibbs's exercise of his constitutional right to remain silent. Detective Craig characterized Gibbs as someone who "didn't want to talk to us about the robbery."

> Q. And your [interview] style is based upon your experience and your training?
>
> A. Yes. And the case and people involved, yes.
>
> Q. And you modify the tone of your voice, the phrasing of questions and how you present yourself, and what opportunities you give the speaker to speak depending on the case and individual, fair enough?
>
> A. Well, no, it's not painting a picture, that's not really -- actually, I'm just honest with people and let them know what I've got and try to find out what they want to tell me.
>
> Some people, in this particular case like Mr. Gibbs, didn't want to talk to us about the robbery.
>
> THE COURT: Ask another question.
>
> [DEFENSE COUNSEL]: Your honor, I will reserve a motion, and I'd ask the Court to instruct the jury to disregard the last remark.
>
> THE COURT: The jury is instructed to disregard the last comment.

The defense made a motion for mistrial on the basis that the testimony was an improper comment on Gibbs's constitutional right to remain silent. The court reserved ruling on the motion. When the jury returned, the court read a curative instruction proposed by defense counsel.

> THE COURT: The jury is reminded that a defendant in a criminal case is not required to answer a question asked by a police officer or to give evidence in a criminal case. Disregard any inference to the contrary derived from the last question and answer by this witness.

Gibbs later withdrew the motion for mistrial.

By affirmatively withdrawing the motion for mistrial, Gibbs waived his claim to a

new trial on the basis that the detective made an improper comment on Gibbs's exercise of his constitutional right to remain silent. "The constitutional challenge having been waived or abandoned, we will not consider it further." State v. Valladares, 99 Wn.2d 663, 672, P.2d 508 (1983).

Statement of Additional Grounds

In a statement of additional grounds, Gibbs argues that he received ineffective assistance of counsel because his attorney did not move to sever the codefendants' trials. In the first amended information filed in September 2009, the State charged Gibbs, Blackburn, and Harvey as codefendants. In January 2010, Blackburn and Harvey pleaded guilty. In May 2010, the case proceeded to trial against Gibbs alone. Gibbs thus does not show that he was prejudiced by his counsel's failure to file a motion to sever. Gibbs cannot establish ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).[7]

Affirmed.

WE CONCUR:

[7] Gibbs also asserts a claim in his statement of additional grounds that defense counsel did not conduct a complete investigation regarding alibis. Because this claim relates to matters outside the record, we cannot address it on direct appeal. State v. McFarland, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).