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No. 64467-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIRK SAINTCALLE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

A. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. SAINTCALLE'S RIGHT TO EQUAL PROTECTION BY ALLOWING THE STATE TO STRIKE THE LONE AFRICAN-AMERICAN JUROR.

In his opening brief, Mr. Saintcalle argued that his convictions must be reversed because the trial court allowed the State to strike the lone African American juror, Anna Tolson. The State's proffered race-neutral reason was pretextual, because it would have applied to at least one white juror who was not struck. Furthermore, the prosecutors acknowledged that Ms. Tolson "may be representative of the perfect juror," because she had empathy for both victims and defendants, she was not an emotional person, and she repeatedly promised she would fairly consider all the facts. But they struck her anyway, and Mr. Saintcalle was tried by a jury consisting of none of his peers. Br. of Appellant at 12-19.

The State presents only half a page of argument defending its "race-neutral" reason for dismissing Ms. Tolson. Br. of Resp't at 26. It does not address the fact that a white juror also knew people who had been shot, but was not dismissed. See Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies

just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step"). Nor does it address the various qualities Ms. Tolson possessed that rendered her a perfect juror. Instead, it speculates that "[t]he risk of a mistrial was a concern, a valid concern," because Ms. Tolson "did not know how she would react to the evidence in this case." Br. of Resp't at 26. The State does not explain how Ms. Tolson's potential discomfort viewing crime-scene photographs would result in a mistrial. Its claim is just as speculative as that the Supreme Court rejected in Snyder v. Louisiana, 552 U.S. 472, 482, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). This Court should similarly reject the State's "race-neutral" reason as pretextual.

The State spends most of its time complaining about the Supreme Court's decision in State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010), under which a prima facie case of discrimination is established where the State strikes the sole venire member of the defendant's racial group. Br. of Resp't at 22-25. As explained in Mr. Saintcalle's opening brief, that rule applies to this case, because it is undisputed that Ms. Tolson was the sole African American venire member. Br. of Appellant at 13-14. Thus, the trial

court properly required the State to present a race-neutral reason for the strike.

The State acknowledges that five justices of the Supreme Court adopted a bright-line rule that a defendant establishes a prima facie case of purposeful discrimination where the prosecutor strikes the lone African American juror. Br. of Resp't at 23. The State argues that a plurality opinion is not binding on the lower courts, but Mr. Saintcalle is not arguing that the plurality's rule applies. The State's argument is a straw man.

The State chastises Mr. Saintcalle for "counting" votes of the dissent and concurrence, but this is the proper methodology for ascertaining a decision's impact on future cases. See, e.g., Danforth v. Minnesota, 552 U.S. 264, 286, 128 S.Ct. 1029 (2008) ("Because Justice Scalia's vote rested on his disagreement with the substantive rule announced in Scheiner – rather than with the retroactivity analysis in the dissenting opinion – there were actually five votes supporting the dissent's views on the retroactivity issue. Accordingly, it is the dissent rather than the plurality that should inform our analysis of the issue before us today.").

For example, in State v. Powell, the issue was whether aggravating factors must be alleged in the information. State v.

Powell, 167 Wn.2d 572, 223 P.3d 493 (2009). A four-justice plurality ruled against the defendant, stating, "The aggravating circumstances under RCW 9.94A.535 (3) are not elements of an offense. Therefore, they do not fall within the rule that all the elements of a crime must be set forth in the charging instrument." Id. at 682 (lead opinion of Alexander, J.). Three dissenters countered that "[p]recedent from both the United States Supreme Court and our court establishes that where a fact increases the potential punishment beyond the statutory maximum, it must be detailed in the information." Id. at 694 (Owens, J., dissenting). A two-justice concurrence ruled against the defendant in that case, but stated that the rule going forward is "the State must charge aggravating factors in the information." Id. at 690 (Stevens, J., concurring).

Following Powell, this Court has adhered to the rule set forth by the three-justice dissent and two-justice concurrence. "As the State recognizes, the two justice concurrence in Powell combined with the three justice dissent yields a majority holding affecting the procedure in post-Blakely cases: notice of aggravating factors must be given in the charging document." State v. Siers, ___ Wn. App. ___, ___ P.3d ___ 2010 WL 4813737 at *5 (2010). Similarly here,

the rule from Rhone is that set forth by the five justices comprising the concurrence and dissent. This Court should follow Rhone and hold that a prima facie case of discriminatory intent was established by the State's striking of the sole remaining African American juror.

2. ADMISSION OF THE RECORDINGS OF JAIL TELEPHONE CONVERSATIONS BETWEEN MR. SAINTCALLE AND HIS FRIEND VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

As explained in Mr. Saintcalle's opening brief, the trial court allowed the State to play recordings of telephone conversations between Mr. Saintcalle and his friend, Anna Hall. 3/30/09 RP 122. The King County Jail had recorded the calls, and Mr. Saintcalle objected to their admission under article I, section 7. CP 35-37. Because the conversations were private affairs seized without authority of law, the trial court violated Mr. Saintcalle's rights under article I, section 7 by allowing the State to play recordings of the conversations for the jury. Br. of Appellant at 19-25 (citing, inter alia, State v. Gunwall, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986)).

In response, the State relies primarily upon cases interpreting the Privacy Act or the Fourth Amendment, rather than article I, section 7. The State cites State v. Modica for the proposition that Mr. Saintcalle's calls were not private affairs, but

Modica was a statutory case, not a constitutional case. State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008) (holding recording of calls did not violate Privacy Act). It is true, of course, that this Court addressed the constitutional issue in Archie,[1] but our Supreme Court has never held that King County's warrantless recording of telephone calls comports with article I, section 7. And Archie relied on Modica for the proposition that telephone calls are not private affairs, even though Modica was not a constitutional case. See Archie, 148 Wn. App. at 203. Archie also improperly applied a balancing analysis to the question. Id. at 204; see State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (unlike Fourth Amendment, we do not engage in balancing of interests under article I, section 7).

The State wrongly argues that Mr. Saintcalle must prove his "expectation of privacy is reasonable." Br. of Resp't at 28. Reasonableness is a Fourth Amendment construct. Mr. Saintcalle did not make a Fourth Amendment argument; rather, he contends his telephone calls were "private affairs" protection by article I, section 7. Unlike under the Fourth Amendment, the question is "whether the 'private affairs' of an individual have been

[1] State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied 166 Wn.2d 1016 (2009).

unreasonably violated rather than whether a person's expectation of privacy is reasonable." State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990).

> Although they protect similar interests, "the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution." State v. McKinney, 148 Wash.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment protects only against "unreasonable searches" by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV ("The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated...."); Illinois v. Rodriguez, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) ("[W]hat is at issue ... is not whether the right to be free of searches has been *waived,* but whether the right to be free of *unreasonable* searches has been *violated.*").
>
> By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). This is because "[u]nlike in the Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution." State v. Morse, 156 Wash.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008).

After incorrectly arguing that Mr. Saintcalle must satisfy the Fourth Amendment reasonableness test, the State then argues that Mr. Saintcalle must meet the test for "private communications" under the Privacy Act. Br. of Resp't at 28-29 (citing State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)). But again, just as Mr. Saintcalle is not making a Fourth Amendment argument, he is not making a Privacy Act argument. Mr. Saintcalle argues that his telephone calls were private affairs protected by article I, section 7 of the Washington Constitution. Br. of Appellant at 19-25.

The State then claims the issue is "not properly before this Court." Br. of Resp't at 29. It says a defendant "may not lay (sic) in wait, determine how the trial went and then raise the motion." Br. of Resp't at 30.

But as the State acknowledges, Mr. Saintcalle raised the issue before trial and again before the State sought to introduce the evidence. CP 35-37; 3/5/09 RP 21; 3/30/09 RP 122. He cited article I, section 7 of the Washington Constitution and State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996). CP 35, 37. The issue was preserved.

In any event, an appellant may raise a manifest error affecting a constitutional right for the first time on appeal under RAP

2.5(a)(3). State v. Kirwin, 165 Wn.2d 818, 823-24, 203 P.3d 1044 (2009) (addressing merits of article I, section 7 issue not raised in trial court). So even if Mr. Saintcalle had not raised the issue below, it would be properly before this Court. But Mr. Saintcalle raised the issue, and correctly noted that his right to privacy was violated by the recording and playing of his private conversations. This Court should reverse the assault convictions and remand for suppression of the evidence. Br. of Appellant at 24-25.

3. THE TO-CONVICT INSTRUCTIONS FOR THE ASSAULT COUNTS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

In his opening brief, Mr. Saintcalle argued that the to-convict instructions for the assault counts violated his right to due process because they were missing the element that the State must disprove lawful use of force in defense of others. Br. of Appellant at 26-30. The State argues that "disproving that a defendant acted in the defense of others is not an element of the crime of assault." Br. of Resp't at 35. But the very case the State cites for this proposition supports the opposite conclusion: "Once the issue of self-defense is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt." State v. McCullum, 98

Wn.2d 484, 493-94, 656 P.2d 1064 (1983) (emphasis added). As the State acknowledges, "[w]here an actual element is omitted from the 'to convict' instruction, constitutional error has occurred." Br. of Resp't at 36. Thus, constitutional error has occurred here.

The State then argues that the Supreme Court rejected a similar argument in the self-defense context in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). Br. of Resp't at 37. It argues that under Hoffman, the separate defense-of-others instruction cured the omission in the to-convict instruction. But the State neglects to mention that Hoffman has been abrogated by several subsequent cases, each of which emphasized that jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). "A jury is not required to search other instructions to see if another element should have been included in the instruction defining the crime." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). "Moreover, a reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Finally, as explained in Mr. Saintcalle's opening brief, the State cannot prove the error was harmless beyond a reasonable doubt. The response brief simply makes the conclusory statement that the error was harmless, without discussing any pertinent facts. Br. of Resp't at 38. This may be because the State cannot muster enough facts to prove the absence of prejudice beyond a reasonable doubt, and therefore resorts to citing no facts at all.

Mr. Saintcalle's theory of the case was that he was trying to protect the three roommates upstairs from suffering the same fate as Anthony Johnson, and therefore he was not guilty of assaulting them. 3/31/09 RP 69-71. The defense was plausible because Mr. Saintcalle was a friend and former roommate of Ms. Brown, both Ms. Brown and Ms. Ellis testified that they were not afraid of Mr. Saintcalle that evening, and Mr. Saintcalle even called Ms. Brown "Mom" because he respected her and she looked out for him. 3/12/09 RP 15, 63; 3/30/09 RP 43-44. But the to-convict instructions did not indicate that any of this was relevant, let alone that it went to an element of the crime. The State cannot prove beyond a reasonable doubt that the verdicts would have been the same had the element been included in the to-convict instructions.

Thus, the convictions on the assault counts should be reversed, and the case remanded for a new trial.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

Finally, Mr. Saintcalle's convictions should be reversed because the prosecutor committed misconduct in closing argument. She vouched for her witnesses, stated her personal opinions, mischaracterized the jury's role, and infringed on Mr. Saintcalle's constitutional right to trial by jury. Br. of Appellant at 30-35.

The State argues it was not misconduct for the prosecutor to argue that the jury should believe the co-defendants because 'they took responsibility. ... They pled guilty." But a prosecutor may not encourage the jury to draw adverse inferences from the defendant's exercise of a constitutional right. State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (prosecutor committed misconduct by commenting in closing argument about the defendant's exercise of his constitutional right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor improperly infringed upon defendants' election to remain silent by stating in closing, "you would hope that if the

defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence").

The prosecutor implied that the co-defendants were credible because they pled guilty, in contrast to Mr. Saintcalle, who went to trial. The State now argues that Moreno and Fleming are inapposite, simply because in those cases the prosecutor encouraged the jury to draw adverse inferences from the exercise of a different constitutional right. Br. of Resp't at 40. But the State fails to explain its novel theory that the rule applies only to some constitutional rights. The State cannot plausibly argue that there is no constitutional right to a jury trial. Const. art. I, § 22. Accordingly, under Moreno and Fleming, the prosecutor committed misconduct by encouraging the jury to believe the co-defendants over Mr. Saintcalle because the co-defendants pled guilty and Mr. Saintcalle exercised his constitutional right to a trial by jury.

The State then argues that the prosecutor "was not ... attempt[ing] to express a personal opinion" when stating "I think she's honestly trying to tell you the truth" and twice stating "here's my impression." Br. of Resp't at 43; see Br. of Appellant at 34. The prosecutor's own statements belie the State's argument on appeal.

Finally, the prosecutor wrongly told the jury its job was "tell the truth of what happened." This Court has held that such statements are improper and constitute misconduct. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). In Anderson, the prosecutor stated, "by your verdict in this case, you will declare the truth about what happened." Id. at 424. He later argued, "Folks, the truth of what happened is the only thing that really matters in this case." Id. at 425. This Court held, "The prosecutor's repeated requests that the jury 'declare the truth' ... were improper" because the "jury's job is not to 'solve' a case," but "to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id. at 429.

The State argues that Anderson is not on point, apparently because there the prosecutor said the jury's job was "to declare the truth about what happened" whereas here the prosecutor said the jury's job was "to tell the truth of what happened." Br. of Resp't at 45. It goes without saying that "declare" and "tell" are synonyms, as are "about" and "of."

In sum, the prosecutor committed misconduct by vouching for her witnesses, stating her personal opinions, mischaracterizing the jury's role, and commenting on Mr. Saintcalle's exercise of his

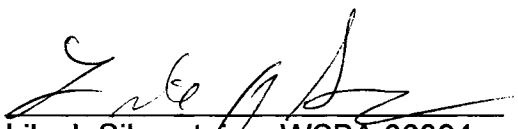
right to trial by jury. For this reason, too, the convictions should be reversed and the case remanded for a new trial.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Saintcalle asks this Court to reverse his convictions and remand for a new trial.

DATED this 27th day of December, 2010.

Respectfully submitted,



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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2010, 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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