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STATE OF MONTANA
Case Number: DA 20-0379

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0379

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLAYTON LEE WELLKNOWN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald L. Harris, Presiding

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INTRODUCTION

Shan Birdinground did not know why he did not make it on the jury. He was the only minority sitting among a panel of white potential jurors. He was the only American Indian other than Clayton. He walked out of the courtroom that day not knowing that the State used a peremptory strike to remove him. He did not know the justification the State used was his experience as a domestic violence victim. He was never given the chance to respond. His right to be on a jury was taken away from him without him even knowing.

Contrary to the State's claim that because Birdinground is not party to this action he has no standing, the United States Supreme Court specifically held over thirty years ago that "a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." (Appellee's Br. at 12, n.4); *Powers v. Ohio*, 499 U.S. 400, 415 (1991). The Court recognized that the "barriers to a suit by an excluded juror are daunting" and the excluded jurors "are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion." *Powers*, 499

U.S. at 414. The Court gave Clayton the right to raise the issue on behalf of Birdinground because the right is so important to the integrity of this system.

Not only did the procedure here violate Birdinground's rights, but it also violated Clayton's rights. The State incorrectly claimed that Clayton was required, under *Batson's* third prong, to prove racial discrimination. (Appellee's Br. at 16 ("Wellknown did not meet Batson's third prong.").) Instead, *Batson's* third prong requires the trial judge to look at the "all relevant circumstances" to determine if the strike was motivated by a discriminatory intent. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). The trial judge must act as the gate keeper to keep out discrimination. The trial judge's failure here to follow *Batson's* procedure was a structural error requiring reversal.

Next, jury instructions do not relieve a prosecutor from correctly stating the law and not misleading the jury. In a society trained to be drawn to the flashiest, most attention-grabbing argument of the moment, preventing misconduct during closing arguments is more important than ever. The repeated misconduct in the prosecutor's short closing arguments here is also grounds for reversal.

Lastly, Clayton argued three separate reasons why his 2007 DUI conviction was constitutionally infirm and cannot be used as a sentencing enhancement in this case. The State ignored Clayton's arguments that the conviction violated his right to a jury trial and that Mont. Code Ann. § 46-16-122 failed to safeguard Clayton's right to be present at trial for a stacking misdemeanor. The Court must consider Clayton's arguments well-taken and remand for resentencing as a misdemeanor.

ARGUMENT

I. The district court violated Clayton's and Birdingrounds's rights to equal protection under the law when it allowed the State to use a peremptory strike on the only minority juror.

Here, Clayton showed a prima facie case of discrimination when he objected to the State's peremptory strike on the only minority member of the venire, which raised an inference that the prosecutor excluded Birdinground based on his race. *See State v. Warren*, 2019 MT 49, ¶ 35, 395 Mont. 15, 31, 439 P.3d 357, 367 ("Warren made a prima facie showing of racial discrimination by explaining that the State

peremptorily struck the only Hispanic juror on the panel.")[1] The burden then shifted to the State to provide a race neutral reason for the strike. *Batson*, 476 U.S. at 98. After the State provided its reason, the district court erred in applying the *Batson* test.

A. When the trial judge overruled Clayton's objection without following *Batson's* procedure, it committed a structural error that requires reversal.

After the prosecutor gave the reason for the strike, the State claimed that the court should take the explanation at "face value." (Appellee's Br. at 15.) In other words, the lower court should refrain from truly evaluating the prosecutor's explanation and determining if it is pretextual. The State cited *Warren* and argued the explanation here was a "facially valid, non-discriminatory, basis" for the State's peremptory challenge. (Appellee's Br. at 15.); *Warren*, ¶ 35.

However, unlike *Warren*, the State's explanation here was unsupported by the record. *See Warren*, ¶ 35. In *Warren*, the State's

[1] Although the State asserted no evidence in the record indicated Clayton's race, Clayton's Pre-Sentence Investigation states that he is an American Indian affiliated with the Crow tribe. (Appellee's Br. at 13; D.C. Doc 51.) Regardless, the State does not argue that the district court erred in finding that Clayton satisfied *Batson's* first step and therefore implicitly concedes the point.

explanation was that it struck several jurors it did not have the chance to question, which was shown by the record during voir dire. *Warren*, ¶ 35.

Because the State's explanation was based on non-record facts known only to the State, there must be some showing that the alleged explanation was true as well as race neutral. How did the district court know that the Shan Birdinground on the venire was the same victim from the domestic violence case? The State claimed that the "court was free to deem the State's explanation as credible," but the lower court made no credibility determination. (Appellee's Br. at 16.) And with the information it had, the lower court was unable to make any real credibility determination.

Under *Batson's* third prong, the trial judge must determine whether the strike was motivated by a discriminatory intent based on the "all relevant circumstances." *Batson*, 476 U.S. at 96. Failure to consider all relevant facts is therefore error. "[I]t is imperative that the trial court fully develop a record for review—a record that includes all relevant facts and information relied upon by the trial court to render

its decision, as well as a full explanation of the court's rationale." *State v. Ford*, 2001 MT 230, ¶ 18, 306 Mont. 517, 39 P.3d 108.

In order for a trial judge to be able to consider all the relevant facts, it must have all the facts before it. Thus, a judge should wait to rule on a *Batson* challenge until all of the peremptory strikes have been exercised, the race of the jurors has been established, the prosecution has given reasons for the strikes and defense has presented and argued any relevant facts.

Even though the State knew all along that it intended to strike Birdinground, it put no evidence in the record to support the truth of the purported reason for the strike—and sandbagged Clayton in the process. Its reason was based on subjective representations that Birdinground was "hostile" to the State with no objective facts to support a finding of hostility. Not wanting to return phone calls or cooperate in a domestic violence action do not equate to hostility. The State provided no explanation as to how Birdinground was hostile, which is a characterization that could easily be the product of a stereotype.

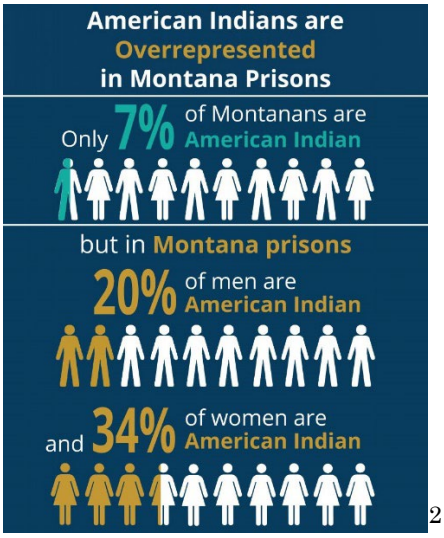
Further, the lower court did not find the prosecutor's reason was factually true or that it really struck Birdinground for that reason. Nor did it find that it was not pretextual for an actual underlying race-based reason. It made no credibility determinations and exercised no discretion at all. It simply overruled the objection without comment. The court failed to determine if the explanation was pretextual. The court failed to follow *Batson's* third step.

The United States Supreme Court discussed "the significant role peremptory challenges play in our trial procedures, but we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality." *Powers*, 499 U.S. at 415. The mandate that race discrimination be eliminated from all official acts and proceeding is most compelling in the judicial system. *See Powers*, 499 U.S. at 415. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition. *See Powers*, 499 U.S. at 416.

This Court should follow its own previous warnings and not attempt to reach the merits of a *Batson* challenge without a full record and findings. The lower court did not take seriously its affirmative duty

to ensure that racial discrimination did not invade the jury selection process in this case. Clayton's jury selection was tainted by structural error in the process and this Court must reverse.

B. Montana's expansive individual rights require this Court to modify the *Batson* test to ensure systemic racism does not infect the jury selection process in Montana.



[2]

There is institutional bias in the criminal legal system in Montana. American Indians are arrested and incarcerated at a disproportionately higher rate than white Montanans. The State does not challenge this fact. If racial bias exists during arrests and incarceration, it also exists during the trial and jury selection process.

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[2] Montana Budget & Policy Center, "Criminal Justice Reinvestment in Montana: Improving Outcomes for American Indians," (2018), https://montanabudget.org/report/criminal-justice-reinvestment-in-montana-improving-outcomes-for-american-indians.

The trouble is that under the current framework, the defendant's practical burden is to make a liar out of the prosecutor. No judge wants to look a member of the bar in the eye and level an accusation of deceit or racism. Judges may not find deceit except in extreme situations. However, unconscious bias may be behind the use of a strike, so the Court's present analysis, as shown by how the lower court here responded to Clayton's objection, is not working to prevent all kinds of racial discrimination.

The State quoted *Ford*, stating that peremptory strikes are based on "instinct." (Appellee's Br. at 14); *Ford*, ¶¶ 13-14. However, the problem is when this "instinct" is grounded in stereotypes or unconscious bias. Other states have responded to this issue, as discussed in Clayton's opening brief. Racial discrimination "remains rampant in jury selection" because *Batson* recognizes purposeful discrimination, "whereas racism is often unintentional, institutional, or unconscious." *State v. Saintcalle,* 309 P.3d 326, 334 (Wash. 2013).

The State incorrectly characterized Clayton's argument as a challenge to the Montana Rules of Civil Procedure. (Appellee's Br. at 21.) Instead, Clayton asked the Court to find that Montana's expansive

individual rights require this Court to modify the *Batson* procedure. (Appellant's Br. at 29.) This Court defines rules of criminal procedure on direct appeal when evaluating constitutional issues. For example, this Court held that Montana's expansive privacy rights require law enforcement to obtain a search warrant before electronic recording of a suspect even though electronic recordings are not mentioned in the search warrant statutes. *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489. Similarly, even though *Batson* is not mentioned in the Montana Rules of Civil Procedure governing peremptory strikes, the test still applies.

Montana's Constitution provides more individual protection than the Equal Protection Clause. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987). "As long as we guarantee the minimum rights established by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution." *State v. Martinez*, 2003 MT 65, ¶ 51, 314 Mont. 434, 450, 67 P.3d 207, 220.

Just as this Court read the privacy provision of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans greater protection from government intrusion, this Court should read the dignity provision of the Montana Constitution together with the right to equal protection and an impartial jury to provide Montana citizens greater protection from systemic racism in the jury selection process. *See State v. Siegal*, 281 Mont. 250, 263, 934 P.2d 176, 183 (1997), overruled in part and on other grounds by *State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556.

This Court has acknowledged its duty to protect Montanans' constitutional rights by creating procedural safeguards. *See, e.g., Goetz.* Because of this duty, the Court should require a trial judge deny a peremptory strike where the court cannot be confident that unlawful discrimination did not occur—such as where the record indicates there is a reasonable probability that the juror's inclusion in a protected class was a factor in the State's decision to exercise the challenge. (Appellant's Br. at 29.) Additionally, reasons such as a expressing a distrust of the government or criminal justice system should be

considered presumptively invalid because they have been historically associated with unlawful discrimination. *See* Wa. R. Gen. 37(h).

The Montana Constitution mandates that this Court adopt a *Batson* analysis that better recognizes all forms of discrimination.

II. A correct jury instruction does not relieve a prosecutor from being held accountable for misstating the law and misleading the jury

"The closing argument has long been regarded as one of the most exciting areas of trial advocacy. When the time for closing argument arrives, all the evidence is in, no more witnesses are to be called, and the lawyer stands alone before the jury. This is the magical moment all trial lawyers crave; the stage is ours." James H. Roberts, Jr., *The SEC of Closing Arguments,* 23 Am. J. Trial Advoc. 203, 203 (1999). After the judge reads the long list of jury instructions, prosecutors and defense attorneys demand jurors' attention during closing arguments. Jurors look up from their notepads and nod along. In an era where our attention is trained to be drawn to the flashiest, loudest voice of the

moment, it is more important than ever that those in positions of power do not mislead those listening.[3]

First, the State here defended the prosecutor's statements vouching for the credibility of its witnesses. (Appellee's Br. at 30-31.) The State claimed that its witnesses had no stake in the outcome and therefore the comments made by the prosecutor were appropriate. (Appellee's Br. at 9; 30-31.) However, just as an arresting officer has an interest in obtaining a guilty verdict, a lay witness may have an interest in the jury believing their report to law enforcement.

Here, the State's case largely relied on the credibility of Ryan Snyder, one of the 911 callers. The State incorrectly claimed that Snyder followed Clayton into the hotel. (Appellee's Br. at 3.) Instead, Snyder testified that he parked and watched Clayton from outside the

[3] "[T]here is a strong feeling that young people, in particular, have lower attention spans than their elders, and all attention span has dropped from what it used to be. The smart phone attracts much of the blame. One only has to walk down a street to see everybody on their phones, either talking or looking things up on Google, barely paying attention to where they are going. One study claims that the average American touches their iPhone 2,617 times a day. While this gives the younger person who grew up with smart phones the ability to multi-task and switch from project to project, it may result in a shorter attention span and lower ability to focus." Hon. Richard B. Klein, *Are people's attention spans decreasing?,* TRIAL COMMUNICATION SKILLS § 64:6 (2d ed.).

hotel. (2/5 Tr. at 120.) Snyder testified he could see Clayton the entire time and Clayton was not drinking anything. (2/5 Tr. at 120.) However, Clayton testified that he started drinking after he went inside the hotel. (2/6 Tr. at 66-67.) Therefore, the jury needed to evaluate Snyder's credibility and determine if it was realistic that he could see all of Clayton's movements while parked outside.

Rather than allowing the jury to determine Snyder's credibility, the prosecutor told the jury to believe Snyder because he "[d]oesn't know any of these people. Got drug out of work literally to come here and test[ify]. No bias. No motive. No prejudice of any kind." (2/6 Tr. at 111.) These comments undermined the jury's role as sole determiners of credibility.

The State also characterized the prosecutor's comment about beyond a reasonable doubt as a response to defense counsel's closing argument. (Appellee's Br. at 25.) During voir dire, defense counsel asked the jurors about the difference between ending life support and a leg amputation, if those decisions are different and why. (2/5 Tr. at 74-79.) Some of the jurors said that they would want proof beyond a reasonable doubt for those decisions. (2/6 Tr. at 113.) Defense counsel

then argued during closing based on the jurors' own statements during voir dire. (2/6 Tr. at 113.)

On the other hand, the prosecutor argued based on his own opinion of what decisions, such as choosing "jobs" and "which college to go to," are contemplated by the beyond a reasonable doubt instruction. (2/6 Tr. at 123-124.) Additionally, he said, "This is not pulling off life support." (2/6 Tr. at 123.) The prosecutor exceeded the bounds of proper argument. You can always switch schools or find a different job. These examples minimized the weight of the jury's decision.

As this Court has recently explained, the Court will exercise plain error review if the error implicates a fundamental constitutional right and *may* result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings or compromise the integrity of the judicial process. *State v. Valenzuela*, 2021 MT 244, ¶ 10, 495 P.3d 1061, 1065. Plain error review is appropriate here because the prosecutorial misconduct implicates Clayton's right to a fair trial and may leave unsettled the question of the fundamental fairness of the proceedings or compromise the integrity of the judicial process.

Once the Court determines that plain error review is appropriate, the Court examines prosecutor misconduct and reverses for a new trial if the conduct deprived the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 258, 190 P.3d 1091, 1096. Here, the prosecutor's error cumulatively and substantially affected Clayton's right to a fair trial by lessening the burden of proof, denigrating the presumption of innocence and invaded the province of the jury. The Court should reverse the conviction.

III. The State failed to show that Clayton's 2007 DUI conviction was not obtained in violation of his constitutional rights and this constitutionally infirm conviction cannot be used to support an enhanced punishment.

Clayton argued that his 2007 DUI violated his right to be present and his right to a jury trial.[4] (Appellant's Br. at 42-45; 48-51.) Additionally, Clayton argued that Mont. Code Ann. § 46-16-122 is unconstitutional as applied to stacking misdemeanors that could result in a felony conviction. (Appellant's Br. at 45-48.)

[4] The State incorrectly asserts that Clayton is challenging a DUI conviction from 17 years ago. (Appellee's Br. at 35.) Clayton clarifies that although he was first convicted of DUI in 2002, he is not challenging that conviction. He is only challenging the 2007 conviction.

A. Because the State failed to address two of Clayton's arguments, the Court must remand for resentencing as a misdemeanor.

The State failed to address Clayton's argument that the conviction violated his right to a jury trial when the justice court set the case for a bench trial at his first appearance. The State also failed to discuss Clayton's argument concerning Mont. Code Ann. § 46-16-122.

The Court cannot develop the State's response. "It is not this Court's job to conduct legal research on a party's behalf, to guess as to a party's precise position, or to develop legal analysis that may lend support to that position." *Osman v. Cavalier*, 2011 MT 60, ¶ 8, 360 Mont. 17, 19, 251 P.3d 686, 688 (internal citations omitted). Because the State failed to respond, it implicitly conceded that the felony sentence cannot stand.

B. Regardless, the State still failed to show that Clayton was adequately informed of his trial date.

Instead, the State only argued that the State produced evidence below to rebut Clayton's claim that he was not adequately informed of his trial date; therefore, the conviction did not violate his right to be present. (Appellee's Br. at 36-43.) The State said that the justice court

informed Clayton of his trial date. (Appellee's Br. at 33.) However, there was no evidence that the justice court verbally informed Clayton of anything. The only evidence was Clayton's signed conditions of release, which show an ineligible trial date. (State's Ex. 3 at 4.) Unlike the cases cited by the State, the 2007 court documents admitted at the hearing support Clayton's argument of irregularity.

The State also claimed that Clayton's attorney was authorized to proceed in his absence. Clayton testified that he never even knew who his attorney was. (4/27 Tr. 6-7.) Therefore, it was impossible that his attorney was authorized by Clayton to proceed without him.

Further, the State provided no other evidence that the conviction was not obtained in violation of Clayton's rights. The prosecution did not call the presiding judge, defense attorney, prosecutor, or clerk to testify as to the normal practice at the time. The State failed to provide any affidavits from those present. There was no testimony from anyone who was there, except from Clayton.

Because Clayton has a constitutional right not to be sentenced based on misinformation, the Court must confirm that the prior convictions were valid. The State has an interest in convictions being

final, but Clayton is not challenging the finality of his 2007 conviction—he is challenging whether that conviction can be used as a sentencing enhancement in the present case. If prior convictions are used as a sentencing enhancement, this opens the door to the possibility of a prior conviction being proven incorrect. That is the case here. The Court must remand for resentencing.

CONCLUSION

The Court should reverse Clayton's conviction because his right to equal protection of the laws was violated when the lower court overruled his *Batson* objection. Additionally, the Court should address the issue of racial discrimination in peremptory strikes and clarify how *Batson* can be successfully used by defendants to stop discrimination in the jury selection process.

Alternatively, the Court should reverse because the State's comments substantially prejudiced Clayton's right to a fair trial and undermined confidence in the jury's verdict.

Regardless, this case must be remanded for resentencing because Clayton's 2007 DUI conviction violated Clayton's constitutional rights and cannot be used to support a felony sentencing enhancement.

Respectfully submitted this 4th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,748, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeavon C. Lang
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CERTIFICATE OF SERVICE

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