STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2010
v	No. 284857 Saginaw Circuit Court
DONALD JAMAL ISOM, Defendant-Appellant.	LC No. 07-028598-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur in the result reached by the majority. I write separately to set forth an alternate analysis regarding defendant's *Batson*[1] claim.

The prosecutor exercised his second peremptory challenge to excuse Johnny Green, an African-American venireman. Defendant timely raised a *Batson* challenge at sidebar after the prosecutor peremptorily excused a second African-American juror, Johnnie Sewell. The trial court excused the jury for the afternoon and, before defense counsel had articulated a *Batson* argument, the trial court announced, "Now, I would like for [the prosecutor] to state his nonracial reason so that I—." The prosecutor interjected that the defense "hasn't made a motion. They need to make a motion, and then I'd like some time to research the law." The trial court adjourned to give the parties and the court an opportunity to conduct legal research.

When court reconvened the next morning, defense counsel explained as follows the basis for his *Batson* challenge:

> So in . . . his first four challenges, including six passes, two of the jurors that were excluded were black males, and it just—given the tenor of the exam during voir dire and given the challenges, it certainly created an appearance for me and a concern for me that these jurors were being excluded because they were black males and that there was nothing in the record that came up during the voir

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), mod in *Powers v Ohio*, 499 US 400, 415-416; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

> dire that would . . . cause any other reason—cause me to have any other reason to form any other belief.

The prosecutor responded that "there is no prima facie showing of a discriminatory purpose and … it's not a jury constituted on race at all." The prosecutor nonetheless proceeded to relate race-neutral reasons for his exclusions of Green and Sewell. The prosecutor claimed that Sewell seemed "confused" by the concept of circumstantial evidence, had an eleventh grade education, and "looked confused" in general during the voir dire. According to the prosecutor, Green "had indicated quite candidly that as a 60-some-year-old black man raised in the south he had issues with the police," and also could not discern a distinction between "proof beyond a reasonable doubt and proof beyond any shadow of a doubt."

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991); see also *People v Bell*, 473 Mich 275, 296 (opinion by Corrigan, J.); 702 NW2d 128, mod 474 Mich 1201 (2005). Given the prosecutor's offering of reasons for his peremptory challenges, whether a prima facie case of juror discrimination existed is of no consequence, and the majority need not have considered this question.

In *Batson*, the United States Supreme Court introduced the procedure that trial courts must follow when a prosecutor elects to proceed to the second step of the three-step juror exclusion analysis, the articulation of a race-neutral ground for juror dismissal. "The prosecutor … must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id*. at 98. Step two requires the prosecutor to "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id*. at 98 n 20 (internal quotation omitted). Here, the prosecutor unquestionably supplied race-neutral and specific explanations for his strikes of the challenged minority jurors. Because the prosecutor's explanations qualify as race-neutral, "we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent." *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005), quoting *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993).

In *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the United States Supreme Court observed that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." The burden of persuasion concerning purposeful discrimination falls on and never leaves the opponent of a strike. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). In *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008), the United States Supreme Court expounded on the trial court's central role in discerning a *Batson* violation:

> On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation

> of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, 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. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court. [Internal citations and quotation omitted.]

The Michigan Supreme Court has also emphasized that reviewing courts should defer to a trial court's ultimate resolution of a *Batson* challenge. In *Knight*, 473 Mich at 344, our Supreme Court explained that appellate courts review for clear error a trial court's finding that the opponent of the peremptory challenge has proved purposeful discrimination. "[T]he trial court's ultimate factual finding is accorded great deference." *Id*.

Here, the trial court correctly recognized that step three of its *Batson* analysis obligated it to determine whether defendant had fulfilled his burden of demonstrating purposeful discrimination:

> Well, it says here, finally, if the proponent provides a race neutral explanation as a matter of law, the trial court must then determine whether the race neutral explanation is a pretext or whether the opponent of the challenge has proved purposeful discrimination. The courts strongly urge the trial courts to make clear and detailed findings on this subject.
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> So . . . it's apparent to me that most of the voir dire was taken up with reasonable doubt, circumstantial evidence and to the point where I felt that indeed it was important that I give further instruction, one at the request of the defendants [sic]. However, . . . both jurors reflected some confusion over whether they could make a decision based upon the instructions of the law and not out of the fact that they just didn't kind of like the law.
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> . . . [I]n Mr. Green's case, I think it's not inconsequential that he had had trouble apparently with the police in the past and, therefore, would have some reason sufficient other than racial to be challenged. And I might say peremptorily and not for cause because I don't mean to imply that I felt he could have been challenged successfully for cause, but we're looking for a peremptory that is non racial.
>
> As to Mr. Sewell, I have read the interchange [sic] that I think creates at least a question that he would not want to use circumstantial evidence and that in the end he would resort to his own common sensibility. Of course, we tell jurors to do that, too, but not in violation of the law.

> So I'll deny the motion under the circumstances—for those reasons that I feel after . . . in essence, particularly in light of the fact there are other blacks on the jury and there has been some passes that the challenge appropriately should be denied at this point.

The record supports the trial court's findings that the challenged jurors expressed confusion about reasonable doubt and circumstantial evidence, and that defendant failed to carry his burden of establishing as pretextual the prosecutor's explanations for the peremptory strikes. However, I take issue with the trial court's finding that the presence of "other blacks on the jury" served to rebut defendant's *Batson* challenge. *Batson* contemplates that a "single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 US at 95-96 (internal quotation omitted). In *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003), the Sixth Circuit further clarified this principle as follows:

> Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*. Recently, this Court reached precisely this conclusion when we rejected the proposition that "the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others." [Quoting *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999).]

See also *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987) ("In remanding this case, we emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.").[2]

Nonetheless, because the trial court engaged in the evaluative process contemplated by *Batson* and found persuasive justifications for the strikes supported in the record, I concur that no clear *Batson*-related error exists.

/s/ Elizabeth L. Gleicher

[2] For similar reasons, I also disagree with the majority's intimation that the sentiments of the officer-in-charge, an African-American, could rebut defendant's claim of discriminatory jury selection. See *ante* at 3. Regardless whether the African-American officer-in-charge expressed a preference for excusing two minority jurors, the prosecutor bore the burden of setting forth a *race neutral* reason for the strikes.