In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED95498
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	Hon. Thomas J. Frawley
INES LETICA,	)	
	)	Filed:
Appellant.	)	June 21, 2011

Ines Letica appeals from the judgment upon his convictions by a jury of one count of assault in the first degree, Section 565.050, RSMo 2000, and one count of armed criminal action, Section 571.015, RSMo 2000. We would reverse and remand for a new trial. However in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Rule 83.02.

A jury found Letica guilty of one count of first-degree assault and one count of armed criminal action arising from an incident where Letica cut and stabbed the victim with a knife during an altercation. Letica claimed self-defense at trial asserting the victim was the initial aggressor. The trial court sentenced Letica to fifteen years' imprisonment for each count with the sentences to run concurrently. This appeal follows.

Because would we reverse and remand based on the error alleged in Letica's second point, we address only that point. In his second point, Letica maintains the trial court erred in sustaining the State's reverse-Batson challenge as to Venireperson Wiese

because the State failed to carry its burden of proving the defense struck Wiese for unconstitutionally discriminatory reasons.

During *voir dire*, the following exchange took place:

> [PROSECUTOR]: While I'm in the first row Miss Wiese, is that how you say your name?
> VENIREPERSON WIESE: It's Wiese.
> THE COURT: Would you stand for me please, ma'am? Thank you.
> [PROSECUTOR]: It says here you work for Express Scripts; is that correct?
> VENIREPERSON WIESE: Yes.
> [PROSECUTOR]: And how long have you been doing that?
> VENIREPERSON WIESE: Two years.
> [PROSECUTOR]: Okay. Anything that you've heard so far that you believe that you could not be fair and impartial and follow the law?
> VENIREPERSON WIESE: No.
> [PROSECUTOR]: Okay. Thank you.

Defense counsel used peremptory challenges to strike four Caucasian females, including Wiese, from the panel. The State raised a reverse-Batson objection to striking the four Caucasian females, including Wiese. The State argued that Wiese "didn't say anything," and noted that a number of the venirepersons struck through Defense counsel's peremptory challenges were Caucasians.[1] Defense counsel responded:

> Miss Wiese I thought was young, she wore glasses, she's correct. She didn't really have much interaction with anyone. But I didn't get a good vibe, it was basically because she was young.

The following exchange then took place:

> THE COURT: …. I think just young doesn't get it. And I have no notes that she said anything.
> [THE PROSECUTOR]: And age is a protected class.
> THE COURT: She works for Express Scripts, yes. I think she asked how long have you been there, she said three years maybe.
> [DEFENSE COUNSEL]: Three or four years.
> THE COURT: And that was it. So I'm going to sustain your objection to Miss Wiese.

[1] Defense counsel also used peremptory challenges to strike a Caucasian male and an African-American female.

Wiese was seated on the jury that found Letica guilty.

On a Batson or reverse-Batson challenge, we give the trial court's determination great deference, and will not set it aside unless we find clear error. State v. Chambers, 234 S.W.3d 501, 514 (Mo. App. E.D. 2007). "When reviewing for clear error, we evaluate the entire evidence to determine if we are left with a definite and firm conviction that a mistake has been made." Id. at 514-15.

In Batson v. Kentucky, 106 S.Ct. 1712, 1722-25 (1986), the United States Supreme Court held a criminal defendant's equal protection rights are violated when the State exercises peremptory strikes to remove potential jurors from the venire solely because of their race or on the assumption their race will disable them from impartially considering the State's case. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1430 (1994), the United States Supreme Court extended the Batson doctrine to prohibit the State's use of peremptory challenges to remove potential jurors solely on the basis of gender. Thus, it is a violation of the Equal Protection Clause for a party to exercise a peremptory strike to remove a potential juror solely on the basis of the juror's race, ethnic origin, or gender. Chambers, 234 S.W.3d at 515. Reverse-Batson challenges are challenges the State makes in response to a defendant's purposeful discrimination on the grounds of race in the exercise of peremptory strikes. Id.

There is a three-step procedure for Batson or reverse-Batson challenges. Id. For a reverse-Batson challenge, the State must first raise a Batson challenge with regard to one or more specific venirepersons struck by the defendant and identify the cognizable racial group to which the venireperson or persons belong. Id. Second, the trial court will require the defendant to come forward with a reasonably specific and clear race-neutral

or gender-neutral explanation for the strike. Id. Third, assuming the defendant is able to articulate an acceptable explanation, the State will need to show that the defendant's proffered reason for the strike was merely pretextual and that the strike was motivated by race or gender. Id. This procedure is consistent with the key principle that "the ultimate burden of persuasion regarding racial motivation rests with and never shifts from, the opponent of the strike." Purkett v. Elem, 115 S.Ct. 1769, 1771 (1995).

Here, the first two steps were followed. The State raised a Batson challenge to Wiese. Defense counsel offered her youth and that he did not get a "good vibe" from her as his race-neutral and gender-neutral reasons. Age is a race-neutral, gender-neutral factor that may be properly considered when making peremptory strikes. State v. Readman, 261 S.W.3d 697, 700 (Mo. App. W.D. 2008); State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998). Furthermore, counsel remains free to use "horse sense" and "hunches" in exercising peremptory challenges so long as the factors they rely on are race-neutral and gender-neutral. State v. Smith, 944 S.W.2d 901, 912 (Mo. banc 1997)(stating "[a]ge is a racially-neutral factor, and therefore, a proper factor on which to base a 'hunch.'")

Once defense counsel provided his race-neutral and gender-neutral reasons, the burden shifted back to the State to persuade the trial court that the reasons given were merely a pretext for intentional discrimination. The State did not present an argument as to pretext. Instead, the trial court found defense counsel's explanation for the strike unsatisfactory stating, "I just think young doesn't get it. And I have no notes that she said anything." The prosecutor agreed with the trial court asserting "age is a protected class." However, as noted above, age is a race-neutral, gender-neutral factor that may be

considered when making peremptory strikes. In addition, the trial court made no comment regarding defense counsel's explanation that he did not get a good vibe from Wiese, which is also a legitimate race-neutral and gender-neutral explanation. Therefore, the State was required to make a record that would support a finding of pretext. The trial court prematurely ruled on the reverse-Batson challenge without allowing the State to come forward with a pretext argument.[2] The trial court and the State made no attempt to satisfy the requirement of the third step of a Batson challenge, and thus, the State failed to meet its burden to show defense counsel's explanation for striking Wiese was pretextual.

Although we afford great deference to the trial judge's determination, we conclude that the trial court's ruling on the State's reverse-Batson challenge was clearly erroneous. The trial court ruled prematurely on the challenge and the State failed to meet its burden to show racial or gender discrimination was the motivating factor for defendant's challenge.

Because the trial court erred in precluding defense counsel from exercising a peremptory strike against Wiese, we must determine whether such error entitles Letica to a new trial. Letica would be entitled to a new trial if this court were to determine the error qualified as "structural error." "Structural defects" are errors that "'defy analysis by 'harmless-error' standards'" because they "'affec[t] the framework within which the trial proceeds, [and are not] simply [errors] in the trial process itself.'" State v. Johnson, 207 S.W.3d 24, 38 (Mo. banc 2006)(quoting Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991)).

[2] We note after the State gave race-neutral and gender-neutral explanations to four of its peremptory strikes to address defense counsel's Batson challenges, the trial court specifically noted that the burden shifted back to defense counsel to show pretext. Thus, in dealing with defense counsel's Batson challenges to the State's use of peremptory strikes, the trial court followed the three-step process of Batson.

Peremptory strikes are granted by statute, Section 494.480, RSMo 2000, not the constitution. State v. Hall, 955 S.W.2d 198, 204 (Mo. banc 1997). The United States Supreme Court held in Rivera v. Illinois, 129 S.Ct. 1446, 1453-54 (2009), that because there is no freestanding constitutional right to peremptory challenges, and peremptory challenges are within a State's province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the federal constitution. In Rivera, the Court affirmed the judgment of the Illinois Supreme Court finding the erroneous denial of a defendant's peremptory challenge did not qualify as structural error requiring automatic reversal, and instead applying a harmless error analysis.[3] Id. at 1452-53. In conclusion, the Court noted that "[a]bsent a federal constitutional violation, . . . States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*" as structural error, or that "the error could rank as harmless error under state law." Id. at 1456.

Thus, we must determine, under Missouri law, how we are to treat errors in the denial of a peremptory challenge. While we have found no case directly dealing with this issue, we have found guidance from the Missouri Supreme Court in the Johnson case.

In Johnson, the defendant made Batson challenges as to two of the State's peremptory strikes. Johnson, 207 S.W.3d at 36. The State provided race-neutral and gender-neutral reasons for the strikes and the trial court overruled the defendant's challenges. Id. Immediately after, the defendant made its arguments as to pretext. Id.

[3] In the underlying trial in Rivera , defense counsel sought to use a peremptory challenge to excuse a female venireperson who worked at a hospital. Rivera, 129 S.Ct. at 1451. Rather than dismissing the venireperson, the trial court called counsel to chambers, where he expressed concern that the defense was discriminating against the venireperson and without specifying the type of discrimination the trial court suspected, the trial court directed defense counsel to state his reasons for excusing the venireperson. Id. Defense counsel gave a race-neutral and gender-neutral explanation. Id. The trial court was dissatisfied with defense counsel explanation and denied the challenge, and again reaffirmed the denial of the challenge after it allowed further questioning of the venireperson. Id.

On appeal, the defendant argued the trial court's premature ruling on his Batson challenge constituted structural error requiring reversal. Id. at 38. The court found the trial court's premature ruling did not prevent it from considering the defendant's arguments as to pretext. Id. The court noted that "[w]hile the three-step process required by Batson was not followed in order, no step of the process was omitted," and the defendant was not prejudiced by the trial court's failure to follow the steps in a precise order. Id. at 39. In making its ruling, the court observed the defendant was not arguing that the trial court had applied an improper standard in deciding the issue or that he was "prevented from exercising his peremptory challenges." Id. A footnote followed this sentence where the court stated, the "[d]enial or impairment of the right to peremptory challenges has been considered a structural defect that is not reviewed for prejudice," citing Moran v. Clarke, 443 F.3d 646, 660-61 (8th Cir.2006),[4] U.S. v. Annigoni, 96 F.3d 1132, 1143 (9th Cir. en banc 1996), U.S. v. Broussard, 987 F.2d 215, 221 (5th Cir. 1993)(abrogated on other grounds by J.E.B., 114 S.Ct. at 1428), and Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1369 (7th Cir. 1990). Id. at 51 n.9.

While recognizing this footnote is dicta, we believe the court in its footnote indicated that had the defendant in Johnson raised the issue, the court would have considered it to be a structural error and would have required reversal. Thus, with this footnote in mind, we believe the trial court's erroneous denial of Letica's peremptory challenge would be structural error under the facts presented in this case requiring automatic reversal without consideration of prejudice. Therefore, we would reverse

[4] We note the Court is citing to the dissent in the Moran case to support its assertion that the denial or impairment of a peremptory challenge is structural error.

Letica's convictions and sentences and remand for a new trial. We would grant Letica's second point.[5]

In conclusion, we would reverse and remand this case for a new trial. However, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court pursuant to Rule 83.02.

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ROBERT G. DOWD, JR., Judge

Kurt S. Odenwald, P.J. and
Gary P. Kramer, Sp.J., concur.

[5] Because we would grant Letica's second point, we need not address his remaining four points on appeal.