Affirmed and Memorandum Opinion filed November 17, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00553-CV

MICHAEL MARONEY AND ANN MARONEY, Appellants

V.

MARCIA KOCH, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 92530-CV

M E M O R A N D U M O P I N I O N

Appellants Michael and Ann Maroney appeal a take-nothing judgment in favor of appellee Marcia Koch. In a single issue, they assert the trial court erred in overruling their *Batson*[1] challenge to Koch's peremptory strike of an African American juror. Because we conclude that the trial court did not abuse its discretion in denying the Maroneys' *Batson* challenge, we overrule their sole appellate issue.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

We affirm the trial court's judgment.

Background

The Maroneys sued Koch for personal injuries allegedly resulting from an automobile accident. During voir dire, Koch exercised a peremptory strike on an African American potential juror. The Maroneys timely objected to the strike based on *Batson*. Koch's counsel responded, "Your Honor, the reason I struck her is she's a retired social worker, which I tend to believe that they are more sympathetic to a plaintiff than a defendant as a juror." The trial court found that Kock's reason for striking this juror was race-neutral. The Maroneys' counsel made no further argument in support of the *Batson* challenge, and the trial court overruled the Maroneys' objection.

The jury was sworn and trial proceeded. The jury returned a take-nothing judgment in Koch's favor. The Maroneys timely appealed.

Standard of Review

We review a trial court's ruling on a *Batson* challenge for an abuse of discretion. *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 515 (Tex. 2008). "A trial court abuses its discretion if its decision 'is arbitrary, unreasonable, and without reference to guiding principles.'" *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (citing *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)). As the reviewing court, we may not substitute our judgment for that of the trial court with respect to resolution of matters committed to the trial court's discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). The abuse of discretion standard is "'demanding but not insatiable,'" and "'[d]eference does not by definition preclude relief.'" *Davis*, 268 S.W.3d at 515-16 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*")).

Applicable Law

Batson challenges are reviewed and resolved by a three-step inquiry. *Batson*, 476 U.S. at 97; *Davis*, 268 S.W.3d at 514 n.4. The first step requires the challenging party to establish a prima facie case of racial discrimination. *Batson*, 476 U.S. at 97; *Davis*, 268 S.W.3d at 514 n.4. In making its prima facie case, the challenging party may look at "the totality of the relevant facts" and draw an inference showing discriminatory purpose. *Batson*, 476 U.S. at 93-94. To satisfy its initial burden, the challenging party "must show that relevant circumstances raise an inference that the [striking party] made a race-based strike." *Jones v. State*, 531 S.W.3d 309, 318 (Tex. App.— Houston [14th Dist.] 2017, pet. ref'd).

If the challenging party makes its prima facie showing, the second step shifts the burden to the striking party to present a race-neutral explanation for the strike. *Batson*, 476 U.S. at 98; *Davis*, 268 S.W.3d at 514 n.4. The reason must be stated as articulately as possible "and stand or fall on the plausibility of the reasons [the attorney] gives." *Miller-El II*, 545 U.S. at 252. The striking party's burden, however, is merely one of production. *Murphy v. Arcos*, 615 S.W.3d 676, 686 (Tex. App.—Dallas 2020, pet. denied) (citing *Peetz v. State*, 180 S.W.3d 755, 758-59 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). "This means that the reason offered need not be 'persuasive or even plausible,' so long as it is clear, reasonably specific, and 'based on something other than the juror's race.'" *Id.* (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1995) and *Goode*, 943 S.W.2d at 445)). The trial court must determine only whether the explanation provided is facially valid. *Purkett*, 514 U.S. at 768.

If the striking party provides a race-neutral explanation, the final step requires the challenging party to prove "purposeful racial discrimination," *Davis*, 268 S.W.3d at 514 n.4, in light of "all relevant circumstances . . . ." *Miller-El II*, 545 U.S. at 232

(internal quotation omitted). Only at the third step does the "persuasiveness of the justification for the challenge become[] relevant." *Davis*, 268 S.W.3d at 514 n.4. "[A]t this stage . . . implausible justifications for striking potential jurors 'may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination.'" *Id.* (quoting *Goode*, 943 S.W.2d at 445-46). However, "'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike.'" *Id.*.

Analysis

We presume without deciding that the Maroneys satisfied *Batson*'s first step by making a prima facie showing of racial discrimination. In response, Koch's counsel offered a facially race-neutral explanation for exercising a peremptory strike against this juror: that the juror was a retired social worker who, in counsel's opinion, would be more sympathetic to the plaintiff than the defendant. At this stage, the striking party's explanation need only be race-neutral; it need not be "persuasive or even plausible," so long as it is "based on something other than the juror's race." *See Murphy*, 615 S.W.3d at 686; *see also Goode*, 943 S.W.2d at 447 (counsel's claim that he struck juror because she was an unmarried, unemployed, mother of four, apparently on welfare, whom he believed would be a "bad defense juror" was a race-neutral explanation). We hold Koch's explanation was race-neutral. Thus, Koch satisfied her burden regarding *Batson*'s second step.

The burden then shifted to the Maroneys to prove "purposeful racial discrimination." *Davis*, 268 S.W.3d at 514 n.4. It is at this stage that implausible justifications for striking potential jurors will likely be found by the trial court to be pretexts for purposeful discrimination. *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 916 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

In making its pretext determination, the trial court must consider "all relevant circumstances." *Batson*, 476 U.S. at 96; *see also Davis*, 268 S.W.3d at 516-24. Certain factors are especially probative, including (1) whether a statistical disparity exists between the percentage of black and non-black potential jurors who were struck, (2) whether the record supports or contradicts the striking party's explanation for its strikes, (3) whether the striking party questioned the black panelists before striking them, and (4) whether there is any disparate treatment of black panelists, i.e., whether the striking party's explanations for striking black jurors apply equally well to non-black jurors who were not struck. *See Davis*, 268 S.W.3d at 518-19; *Jackson v. Stroud*, 539 S.W.3d 502, 508 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The existence of any one of these factors tends to show that the striking party's reasons are not actually supported by the record or are an impermissible pretext. *Brumfield*, 63 S.W.3d at 917.

The record in today's case does not address any of these factors. This is because, after Koch's counsel offered a race-neutral reason for striking the potential juror at issue, the Maroneys' counsel did not advance any argument or offer any evidence challenging Koch's proffered reason for striking the potential juror. As occurred in *Davis*, the trial court accepted Koch's reason as race-neutral and denied the *Batson* challenge before hearing any rebuttal from the challenging party. *See Davis*, 268 S.W.3d at 514-15. In doing so, to be sure, the trial court overlooked *Batson*'s third step. *Id.* Even so, the Maroneys' counsel neither asked to rebut Koch's reason nor offered any additional argument or evidence (such as the juror information cards) in an effort to demonstrate that Koch's stated reason was pretextual. And, unlike in *Davis*, the Maroneys have not complained on appeal that the trial court erred in failing to afford them the opportunity to meet their burden under *Batson*'s third step. *Cf. id.* at 515 (noting party had not waived complaint

because counsel specifically asked the trial court to address Fisk's explanations for the strikes). We are therefore left with the trial court's finding that Koch's proffered explanation was race-neutral, with no evidence or argument relevant to *Batson*'s third step.[2]

In their appellate brief, the Maroneys first suggest that Koch's proffered reason was not race-neutral because her counsel did not provide any explanation "related to the facts of this case." But in *Goode*, the Supreme Court of Texas concluded that counsel's striking of a potential juror because counsel believed she was "unlikely to be a good defense juror" was a racially neutral explanation for the strike. *Goode*, 943 S.W.2d at 447. We see no material difference between the explanation offered in *Goode* and the one offered here. We agree that Koch's proffered explanation was race-neutral.

Next, the Maroneys argue that at least one factor reveals Koch's explanation as pretextual and racially motivated. The Maroneys assert that because defense counsel never questioned this particular juror, Koch did not meet her burden to show that she "treated venire member[s] with the same or similar characteristics as the challenged juror differently." However, once Koch's counsel came forward with a race-neutral explanation for striking this juror, the Maroneys—not Koch—bore the burden of proving purposeful racial discrimination. *See Davis*, 268 S.W.3d at 514 n.4.; *see also Batson*, 476 U.S. at 98; *Brumfield*, 63 S.W.3d at 919. Yet the Maroneys offered no argument or evidence in the trial court to rebut Koch's race-neutral

[2] The juror information cards are contained in our clerk's record. The juror at issue described her occupation on her information card as "retired social worker." Koch's explanation aligns with the juror card although no one discussed the cards, introduced them into evidence, or brought them to the trial court's attention. Because the record does not show that the court considered the juror information cards, we cannot assume the court took any of them into account in making its ruling. *See Adair v. State*, 336 S.W.3d 680, 689 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); *see also Cornish v. State*, 848 S.W.2d 144, 145 (Tex. Crim. App. 1993).

explanation. Any appellate argument based on the *Batson* factors must be supported by the evidence and argument presented during the hearing. *See Young v. State*, 826 S.W.2d 141, 146 (Tex. Crim. App. 1991). For example, it is unclear whether the Maroneys are attempting to advance a disparate treatment or comparative analysis on appeal. To the extent they are attempting to do so, the present record does not support it. Although a disparate treatment argument may be raised for the first time on appeal, *id.* at 145-46, such an argument must be supported by, and may be based only on, the evidence and argument presented below during the *Batson* hearing. *Id.*; *Adair*, 336 S.W.3d at 689-90. As this court has stated, "[w]hen a defendant fails to offer any rebuttal regarding the State's race-neutral explanations, he fails to satisfy his burden of persuasion." *Jetson v. State*, No. 14-11-00797-CR, 2013 WL 865562, at *3-4 (Tex. App.—Houston [14th Dist.] Mar. 7, 2013, pet. ref'd) (mem. op., not designated for publication). Because the Maroneys failed to advance any argument whatsoever in response to Koch's race-neutral explanation, they cannot meet their appellate burden to demonstrate that the trial court's ruling was an abuse of discretion.

As we stated in *Brumfield*, if potential jurors are excluded on the basis of their race and the trial court fails to prevent such injustice, that failure "tarnishes the process and discourages those who would serve if given the opportunity." *Brumfield*, 63 S.W.3d at 919. Nonetheless, here, as in *Brumfield*, the Maroneys' counsel neither asked to cross-examine Koch's attorney nor offered any rebuttal evidence following Koch's race-neutral explanation for this peremptory challenge. *See id.* Thus, the Maroneys failed to carry their ultimate burden of persuasion on their *Batson* challenge. *Davis*, 268 S.W.3d at 514 n.4; *Jetson*, 2013 WL 865562, at *3-4.

Under these circumstances, we cannot say that the trial court abused its discretion in denying the Maroneys' *Batson* challenge. We overrule their sole issue on appeal.

Conclusion

Having overruled the Maroneys' issue, we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.