**REL: October 16, 2020**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2020-2021**

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**CR-19-0116**

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**Kaylon R. Battles**

**v.**

**City of Huntsville**

**Appeal from Madison Circuit Court**
**(CC-18-3526)**

McCOOL, Judge.

Kaylon R. Battles appeals his conviction for second-degree unlawful possession of marijuana, a violation of § 13A-12-214, Ala. Code 1975. For the reasons set forth herein, we reverse the conviction and remand the case for a new trial.

Facts and Procedural History

On August 8, 2018, Battles was convicted in the Huntsville Municipal Court of second-degree unlawful possession of marijuana. The municipal court sentenced Battles to 30 days in the city jail but suspended the sentence and placed Battles on probation for one year. Battles appealed his conviction to the Madison Circuit Court and requested a jury trial, after which he was again convicted of second-degree unlawful possession of marijuana. The circuit court sentenced Battles to six months in the Madison County jail but suspended the sentence and placed Battles on probation for two years.

The dispositive issue in this case is whether the circuit court erred by denying Battles's claim that the City used its peremptory strikes in a racially discriminatory manner to exclude black veniremembers from the jury in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Thus, a full recitation of the facts underlying Battles's conviction is not necessary, and we set forth only those facts that are relevant to the resolution of Battles's Batson claim.

The venire in this case consisted of 29 prospective jurors, 7 of whom were black.[1] During voir dire, defense counsel asked if any of the veniremembers had "ever possessed a marijuana cigarette" (R. 47), if any of the veniremembers "know some people who smoke marijuana" (R. 54), and if any of the veniremembers had "been in the company in the last 12 months of somebody having in their possession some marijuana." (R. 55.) Six black veniremembers -- no. 9, no. 14, no. 18, no. 24, no. 27, and no. 28 -- and three white veniremembers, including no. 30, responded affirmatively to all three marijuana-related questions. (R. 47-48, 54-56.) Defense counsel also asked if any of the veniremembers had "ever been called into the boss's office, human resource office, [or] personnel director's office because ... an allegation had been made" against them (R. 59), and four black veniremembers -- no. 14, no. 18, no. 24, no. 27 -- and three white veniremembers, including no. 30, responded affirmatively. (R. 59-60.)

[1]The venire originally consisted of 30 prospective jurors, 8 of whom were black, but the circuit court removed one of the black veniremembers for cause.

The City was afforded nine peremptory strikes, and it used its first seven strikes against the seven black veniremembers and used its final two strikes against white veniremembers no. 10 and no. 25, which resulted in Battles being tried by an all-white jury. Once the jury was struck, defense counsel raised a Batson claim, arguing that the City had struck the black veniremembers based solely upon their race. After hearing arguments from defense counsel as to why he believed the City's strikes against black veniremembers no. 23 and no. 28 were racially motivated, the circuit court found that defense counsel had not established a prima facie case of racial discrimination with respect to those strikes, and Battles does not challenge the circuit court's ruling with respect to those strikes. (Battles's brief, at 21.)

As to the City's strikes against the remaining black veniremembers, defense counsel first argued that "[t]here was no ... question asked to [black veniremember no. 18] by the City or by [defense counsel] that in any way indicated by any dialogue that this witness could not be neutral, fair and impartial." (R. 83.) In response, the City argued that, "[w]hen asked the question about whether he had associated

with or been around people who used marijuana recently[,] ... [veniremember no. 18] stated even within the past 12 months -- and he raised his hand. So that was not on the basis of race." (R. 84.) Defense counsel argued, however, that the City "didn't strike any of [the white] jurors who raised their hand to indicate that they've been in the presence of ... marijuana or around marijuana" (R. 84), at which point the following colloquy occurred:

> "THE COURT: Well, ... #18, #14, #27, and #24, all four of those individuals ... indicated that they had possessed marijuana; that they had smoked marijuana; that they had possessed marijuana in the last 12 months; and that they had been called before HR or their boss based upon some sort of decision.
>
> "So all four of those individuals that were struck had all four of those indicators, and those were the only four individuals on the jury panel that had all four of those indicators. Juror #9 [indicated that he] had ... possessed marijuana, smoked marijuana, and had possessed it within the past 12 months.
>
> "So I don't find that you've made a prima facie case of racial discrimination for these strikes.
>
> "....
>
> "[DEFENSE COUNSEL]: As to those same arguments, there were some white jurors who indicated the same response, Judge. And none of those white jurors were struck. The question, have you been around someone who possessed marijuana, a good number of white jurors raised their hand. And none of those

jurors were struck at all. Not one. So if that's the basis that the City is using to strike the African-Americans from the panel, the City has to be fair and use that same basis to strike any white juror who says, 'I've been in the presence of marijuana' or 'I've been around marijuana.' And not one of those persons was struck.

"THE COURT: All right. So, ... if [the City will] give a race neutral explanation for strikes [against black veniremembers no. 9, no. 14, no. 18, no. 24, and no. 27], please. ...

"....

"[THE CITY]: With regards to Juror #18, again, the City striking that juror was not on the basis of race but based on, what, as the Court has already noted, his response to questions that he had either possessed marijuana, been around someone who's possessed it, knows someone personally who's been charged with it and also within the past 12 months. And I believe he also stated that he had been reprimanded potentially or brought before [human resources] for something of that nature based on a question that the defense counsel had asked; that's with regards to Juror #18.

"THE COURT: ... Juror #14.

"[THE CITY]: With this juror as well, Your Honor, raised her hand when asked about the question about marijuana, which obviously this is what this case pertains to. I believe answered affirmatively to all the questions that the defense counsel asked her with regards to knowing somebody and being in the company of someone and within the past 12 months. So that was the basis of that strike for Juror # 14.

"THE COURT: Juror #27 ....

> "[THE CITY]: And, Your Honor, again, the same would apply to Juror #27, female that was sitting in the back, answered affirmatively to all of the questions concerning the marijuana that the City believes would directly go against what we're trying to prove here, that she had been in the company of individuals who had smoked marijuana, had been in possession of it at some point in her life, I think personally. And also had been, I believe, reprimanded or accused of something by [human resources] or an employer. So that was the basis for striking Juror #27.
>
> "THE COURT: ... Juror #24.
>
> "[THE CITY]: Again, Your Honor, the same. And I've made notes out beside with marijuana. [No. 24] answered affirmatively as well to the questions concerning marijuana.
>
> "....
>
> "THE COURT: And then ... Juror #9.
>
> "[THE CITY]: ... Again, Your Honor, my notes indicate that [no. 9] responded affirmatively to the question of whether he had either been in possession of it himself or in the company of someone who possessed marijuana within the past 12 months and so that was the basis for that strike.
>
> "THE COURT: All right, ... I find that purposeful discrimination has not been proven in this matter."

(R. 85-90.) After he was subsequently convicted and sentenced, Battles filed a timely notice of appeal.

## Analysis

On appeal, Battles argues that the circuit court erred by denying his Batson claim.

> "In evaluating a Batson claim, a three-step process must be followed. See Foster v. Chatman, 584 U.S. ___, ___, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016); Snyder v. Louisiana, 552 U.S. 472, 476-77, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); and Batson, 476 U.S. at 96-98, 106 S. Ct. 1712.
>
> > "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson,] 476 U.S. at 96-97, 106 S. Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98, 106 S. Ct. 1712. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98, 106 S. Ct. 1712.'
>
> "Miller-El, 537 U.S. at 328-29, 123 S. Ct. 1029.
>
> "When a trial court does not make an express finding that the defendant has established a prima facie case of discrimination under the first step of the process but the prosecution nonetheless provides reasons for its strikes under the second step of the process, 'this Court will review the reasons given and the trial court's ultimate decision on the Batson motion without any determination of whether the moving party met its burden of proving a prima facie case of discrimination.' Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997)."

DeBlase v. State, 294 So. 3d 154, 201 (Ala. Crim. App. 2018).

Here, the circuit court did not make an express finding that defense counsel had established a prima facie case of racial discrimination against black veniremembers no. 9, no. 14, no. 18, no. 24, and no. 27 -- the threshold step for a party raising a Batson claim. DeBlase, supra. In fact, the circuit court made an express finding that defense counsel had not established a prima facie case of discrimination as to those veniremembers. However, after hearing arguments from defense counsel, the circuit court instructed the City to provide race-neutral reasons for its peremptory strikes, which arguably supports the inference that the circuit court reconsidered its previous ruling. Regardless, because the circuit court required the City to provide race-neutral reasons for its peremptory strikes against the black veniremembers, this Court need not determine whether Battles established a prima facie case of discrimination but, instead, will proceed to the second and third steps of a Batson inquiry. See DeBlase, 294 So. 3d at 201 ("In this case, the trial court did not make a finding that DeBlase had established a prima facie case of discrimination; the State, however, provided reasons for its strikes. Therefore, we need

not determine whether DeBlase established a prima facie case of discrimination under the first step of the process; instead, we turn to the second and third steps of the process.").

The second step in reviewing a Batson claim is to determine whether the party alleged to have engaged in discriminatory jury selection provided race-neutral reasons for its peremptory strikes. DeBlase, supra. Regarding the burden necessary to satisfy that step, this Court has stated:

> "'Within the context of Batson, a "race-neutral" explanation "means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991).'
>
> "Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994) (emphasis added)."

DeBlase, 294 So. 3d at 201.

Here, Battles does not challenge the facial neutrality of the City's reasons for its peremptory strikes against the black veniremembers. Nevertheless, we note in the interest of

thoroughness that the City's reasons for its peremptory strikes -- affirmative responses to the marijuana-related questions and the question regarding allegations of misconduct against the veniremembers at their places of employment -- were facially race-neutral, i.e., were not inherently discriminatory. See DeBlase, 294 So. 3d at 201-02 ("Although DeBlase does not challenge on appeal the facial neutrality of the State's reasons for its strikes, we note that all of its reasons were facially race-neutral, i.e., based on something other than the race of the juror."). Thus, we turn to the third step of the Batson inquiry, i.e., whether Battles demonstrated purposeful racial discrimination in the City's use of its peremptory strikes. DeBlase, supra.

Regarding the third step in reviewing a Batson claim, this Court has stated:

> "'Once the prosecutor has articulated a nondiscriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. [People v.] Wheeler, 22 Cal. 3d [258] at 282, 583 P.2d [748] at 763–64, 148 Cal. Rptr. [890] at 906 [(1978)]. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:

> "'....
>
> "'3. Disparate treatment -- persons with the same or similar characteristics as the challenged juror were not struck ....
>
> "'....
>
> "'5. The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire ....
>
> "'....

> "Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). '"The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and as well, in light of the strength of the prima facie case."' Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991) (quoting Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987)). In other words, all relevant circumstances must be considered in determining whether purposeful discrimination has been shown. See Snyder, 552 U.S. at 478, 128 S. Ct. 1203 ('[I]n reviewing a ruling claimed to be a Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.')."

DeBlase, 294 So. 2d at 202. Other factors that can support a finding of purposeful racial discrimination include "'[a] pattern of strikes against black jurors,'" the fact that "'all or most of the challenges were used to strike blacks from the jury,'" and the fact that "'peremptory challenges [were used] to dismiss all or most black jurors.'" Yancey v. State, 813

So. 2d 1, 2-3 (Ala. Crim. App. 2001) (quoting Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987)).

> "'[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike....'" Miller-El, 537 U.S. at 339, 123 S. Ct. 1029 .... Because '"[t]he trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses,"' Harris v. State, 2 So. 3d 880, 899 (Ala. Crim. App. 2007) (quoting Heard v. State, 584 So. 2d 556, 561 (Ala. Crim. App. 1991)), an appellate court must give deference to a trial court's findings and '"reverse the circuit court's ruling on the Batson motion only if it is 'clearly erroneous.'"' Johnson v. State, 43 So. 3d 7, 12 (Ala. Crim. App. 2009) (quoting Cooper v. State, 611 So. 2d 460, 463 (Ala. Crim. App. 1992), quoting in turn Jackson v. State, 549 So. 2d 616, 619 (Ala. Crim. App. 1989))."

DeBlase, 294 So. 3d at 202. However, although the trial court's ruling on a Batson claim is entitled to substantial deference, it is not inviolable and will be reversed when this Court is convinced that the ruling is clearly erroneous. See, e.g., Yancey, 813 So. 2d at 8 ("A ruling is clearly erroneous if a reviewing court is left with the belief that a mistake has been committed. The record supports Yancey's claim that a mistake has been committed; therefore, the trial court's ruling [on Yancey's Batson claim] was clearly erroneous." (internal citation omitted)).

According to Battles, the circuit court erred by finding that the City did not engage in purposeful racial discrimination in the use of its peremptory strikes. In support of that claim, Battles argues that the City's race-neutral reasons for striking black veniremembers no. 14, no. 18, no. 24, and no. 27 were pretextual, i.e., were a sham, because, he says, the City did not strike similarly situated white veniremembers. In further support of his claim, Battles notes that the City used its first seven peremptory strikes, and seven of its nine total strikes, to strike all the black veniremembers from the jury. We are inclined to agree with Battles's claim that the City purposefully used its peremptory strikes in a racially discriminatory manner because it appears from the record before us that the City struck black veniremembers from the jury for reasons that were equally applicable to a white veniremember whom the City did not strike from the jury, i.e., that the City engaged in disparate treatment of similarly situated black veniremembers and white veniremembers. See DeBlase, 813 So. 3d at 202 (noting that a party raising a Batson claim can establish that the opposing party's reasons for striking certain veniremembers were

pretextual by demonstrating that "'persons with the same or similar characteristics as the challenged juror were not struck'" (quoting Ex parte Branch, 526 So. 2d at 624)); and Yancey, 813 So. 2d at 3 (noting that an inference of discrimination exists where there is evidence of "'[d]isparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner'" (quoting Ex parte Branch, 526 So. 2d at 623)).

As noted, the City informed the circuit court that it struck black veniremembers no. 18 and no. 27 because they responded affirmatively to each of the marijuana-related questions and to the question regarding allegations of misconduct against them at their places of employment. We note that black veniremembers no. 14 and no. 24 also responded affirmatively to all four of those questions, although the City apparently mistakenly failed to cite their affirmative responses to the allegations-of-misconduct question as a reason for striking them. Regardless, it is apparent from the City's arguments at trial that it intended to strike all black veniremembers who responded affirmatively to each of the

marijuana-related questions and to the allegations-of-misconduct question. Indeed, the City concedes as much on appeal. (City's brief, at 8.) However, white veniremember no. 30 also responded affirmatively to each of the marijuana-related questions and to the allegations-of-misconduct question, yet the City did not strike him from the jury. Thus, the City struck all four black veniremembers who responded affirmatively to each of the marijuana-related questions and to the allegations-of-misconduct question, but the City did not strike the one white veniremember who also responded affirmatively to those same questions.

Based on the foregoing, the record indicates that the City's reasons for striking black veniremembers no. 14, no. 18, no. 24, and no. 27 were pretextual because the City did not strike the white veniremember to whom those reasons were equally applicable. That is to say, the record indicates that the City engaged in disparate treatment of similarly situated black veniremembers and white veniremembers, which "furnishes strong evidence of discriminatory intent," Rice v. State, 84 So. 3d 144, 150 (Ala. Crim. App. 2010), and "[t]his Court has never tolerated the strike of an African-American juror when

a similarly situated Caucasian juror is allowed to remain seated on the jury." McElemore v. State, 798 So. 2d 693, 700 (Ala. Crim. App. 2000). See Rice, 84 So. 3d at 150 (noting that this Court "has condemned the failure to strike white venirepersons who share the same characteristics as black venirepersons who were struck" (citations omitted)); Yancey, supra (holding that the State engaged in disparate treatment, and thus violated Batson, by striking black veniremembers on the basis that they had prior traffic and misdemeanor offenses but not striking white veniremembers who also had prior traffic and misdemeanor offenses); Carter v. State, 603 So. 2d 1137 (Ala. Crim. App. 1992) (holding that the State engaged in disparate treatment, and thus violated Batson, where the State struck two black veniremembers because they were unemployed but did not strike two white veniremembers who were also unemployed); Powell v. State, 548 So. 2d 590, 593 (Ala. Crim. App. 1988) (holding, in a case where seven jurors had prior traffic offenses "equally as serious as those of the black venirepersons who were struck by the State," that the State had violated Batson by "engag[ing] in ... 'disparate treatment,'" given that "[w]hite 'persons with the same or

similar characteristics as the challenged [black] juror[s] were not struck'" (quoting Ex parte Branch, 526 So. 2d at 624)); and Bishop v. State, 690 So. 2d 498 (Ala. Crim. App. 1995) (holding that the defendant established a prima facie case of discrimination where "[s]everal of the black jurors who were struck shared characteristics with white jurors who were not struck and we can find no reason for striking these jurors other than their race"). Compare Currin v. State, 535 So. 2d 221 (Ala. Crim. App. 1988) (holding that the defendant's Batson claim was properly denied where "the State's last strike was used to remove a white female for some of the same reasons given by the State to remove blacks" because "'[a] reasonable conclusion ... is that [the prosecutor] applied the racially-neutral criteria of education, employment, and demeanor to all jurors, whether black, [or] white'" (quoting United States v. Allen, 666 F. Supp. 847, 854 (E.D. Va. 1987))).

We recognize, as the City notes, that this Court has held that,

> "'[w]hile disparate treatment is strong evidence of discriminatory intent, it is not necessarily dispositive of discriminatory treatment. Lynch [v.

> State], 877 So. 2d [1254] at 1274 [(Miss. 2004)] (citing Berry v. State, 802 So. 2d 1033, 1039 (Miss. 2001)); see also Chamberlin v. State, 55 So. 3d 1046, 1050-51 (Miss. 2011). "Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual." Lynch, 877 So. 2d at 1274 (quoting Berry [v. State], 802 So. 2d [1033] at 1040 [(Miss. 2001)]).'

"Hughes v. State, 90 So. 3d 613, 626 (Miss. 2012).

> "'"As recently noted by the Court of Criminal Appeals, 'disparate treatment' cannot automatically be imputed in every situation where one of the State's bases for striking a venireperson would technically apply to another venireperson whom the State found acceptable. Cantu v. State, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992). The State's use of its peremptory challenges is not subject to rigid quantification. Id. Potential jurors may possess the same objectionable characteristics, yet in varying degrees. Id. The fact that jurors remaining on the panel possess one of more of the same characteristics as a juror that was stricken, does not establish disparate treatment."
>
> "'Barnes v. State, 855 S.W.2d 173, 174 (Tex. App. 1993).'"

Loung v. State, 199 So. 3d 173, 191 (Ala. Crim. App. 2015) (quoting Wiggins v. State, 193 So. 3d 765, 790 (Ala. Crim. App. 2014)).

Here, however, white veniremember no. 30 did not share some of the same characteristics that led the City to strike black veniremembers no. 14, no. 18, no. 24, and no. 27; he shared all of them, and the City did not cite below any characteristic that distinguished white veniremember no. 30 from those four black veniremembers it struck. We note that the City argues on appeal that those black veniremembers were distinguishable from white veniremember no. 30 because, the City says, when those black veniremembers responded affirmatively to the allegations-of-misconduct question, "the City observed [them] to be head nodding in a manner suggesting that this was an unpleasant experience for them, and arguably from the viewpoint of the [City], those jurors appeared to be connecting with Battles's attorney." (City's brief, at 8.) To be sure, a veniremember's demeanor during voir dire can constitute a valid race-neutral reason for a peremptory strike, Sharp v. State, 151 So. 3d 342, 360 (Ala. Crim. App. 2010), and thus could have provided a basis in this case for

finding that black veniremembers no. 14, no. 18, no. 24, and no. 27 were not so similarly situated to white veniremember no. 30 that the striking of those black veniremembers constituted disparate treatment.

The problem for the City, however, is that it did not provide in the trial court the black veniremembers' demeanor as a reason for striking them from the jury, and, although, while characteristics or actions of jurors that are observed by a prosecutor at trial need not be proven in the record by sworn testimony, nonetheless they must at least appear of record through the stated reasons of the prosecutor at the time those reasons are required by the trial court. As the United States Supreme Court has stated:

> "[T]he rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it ... is true that peremptories are often the subjects of instinct, Batson v. Kentucky, supra, at 106, 106 S. Ct. 1712 (Marshall, J., concurring), and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."

Miller-El v. Dretke, 545 U.S. 231, 251 (2005) (emphasis added). In other words, a race-neutral reason that is first raised on appeal will not satisfy the requirement of a race-neutral strike of a black veniremember; rather, the prosecuting authority must "use it or lose it" at trial.[2] Thus, because the only reasons the City provided below for striking black veniremembers no. 14, no. 18, no. 24, and no. 27 were their affirmative responses to each of the marijuana-related questions and to the allegations-of-misconduct question, the City must "stand or fall on the plausibility of [those] reasons." Id. As we have already concluded, those reasons were equally applicable to white veniremember no. 30, whom the City did not strike from the jury. As a result, because the black veniremembers the City struck were similarly situated to a white veniremember the City did not strike, the City's disparate treatment of those similarly situated veniremembers is "'strong evidence of discriminatory intent.'" Loung, 199 So. 3d at 191 (citations omitted).

[2]We are not concerned in this case with plain-error review, which is applicable only in cases involving the death penalty. See Rule 45A, Ala. R. App. P.

In addition, the City's discriminatory intent in the use of its peremptory strikes is reinforced in this case by other evidence. To begin with, the City used almost all of its peremptory strikes -- seven of nine -- to remove all the black veniremembers from the jury, providing further evidence of the City's discriminatory treatment of black veniremembers. See Yancey, 813 So. 2d at 3 (noting that discriminatory intent may be proven by the fact that "'all or most of the challenges were used to strike blacks from the jury'" or that "'peremptory challenges [were used] to dismiss all or most black jurors'" (quoting Ex parte Branch, 526 So. 2d at 623)). Furthermore, the City not only struck all the black veniremembers but also used its first seven strikes to strike all the black veniremembers, which tends to establish "'[a] pattern of strikes against black jurors,'" 813 So. 2d at 2 (quoting Ex parte Branch, 526 So. 2d at 623), and which is therefore further evidence of discriminatory treatment of black veniremembers.[3] To be clear, such statistics do not in

[3]The City argues on appeal that its peremptory strikes "were certainly proportional to the composition of the jury venire." (City's brief, at 10.) We fail to see how the City reaches that conclusion, given that approximately 24% of the venire was black and that the City used approximately 78% of its peremptory strikes to remove every black veniremember from

and of themselves establish purposeful discriminatory treatment. Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). However, they are factors to be considered in reviewing a Batson claim, Largin v. State, 233 So. 3d 374, 404 (Ala. Crim. App. 2015), and they are particularly persuasive in a case such as this one, where we have already found evidence tending to establish the City's disparate treatment of similarly situated black veniremembers and a white veniremember. That is to say, the fact that the City used seven of nine peremptory strikes to remove all black veniremembers from the jury and used its first seven strikes against the black veniremembers is not sufficient, in and of itself, to establish discriminatory treatment of black veniremembers; however, those statistics, when considered in conjunction with the other evidence, clearly bolster our finding of discriminatory treatment in this case. See Yancey, 813 So. 2d at 8 (finding it "relevant when examining the merits of this Batson claim" that the State used 12 of its 15 peremptory strikes against black veniremembers); J & W Promotion, Inc. v. Newton, 604 So. 2d

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the jury.

345 (Ala. 1992) (holding that the record "amply supports the finding of a Batson violation" where the plaintiff used the first 7 of his 10 peremptory strikes to strike all black veniremembers from the jury and did not provide sufficient race-neutral reasons for the strikes); Ex parte Floyd, 571 So. 2d 1234, 1236 n.4 (Ala. 1990) (holding that the defendant established a prima facie Batson violation where the State used its first 11 peremptory strikes to remove all 11 black veniremembers from the jury and where "[w]hite jurors with the same characteristics as struck black jurors were left on the jury"); and Acres v. State, 548 So. 2d 459 (Ala. Crim. App. 1987) (holding that a Batson violation occurred where the State used 11 of its 12 peremptory strikes against black veniremembers and failed to provide race-neutral reasons for the strikes).

As noted earlier, "'[i]t is well settled that the ruling of the trial court on a Batson hearing is entitled to substantial deference and will not be disturbed on review unless it is "clearly erroneous."'" Rice, 84 So. 3d at 151 (quoting Ex parte Bankhead, 625 So. 2d 1146, 1148 (Ala. 1993), quoting in turn Scales v. State, 539 So. 2d 1074 (Ala. 1988)).

However, in this case, the City relied upon certain characteristics of black veniremembers to justify its strikes against them while ignoring those exact characteristics in a white veniremember who served on the jury. That is to say, the record indicates that the City engaged in disparate treatment of similarly situated black veniremembers and a white veniremember. In addition, the City used its first seven peremptory strikes, which constituted all but two of its strikes, to remove every black veniremember from the jury -- a fact that tends to establish a pattern of strikes against black veniremembers. Thus, given the facts of this case, we can reach no other conclusion than that the circuit court clearly erred by concluding that the City did not use its peremptory strikes in a racially discriminatory manner in violation of Batson. See Yancey, 813 So. 2d at 8 ("A ruling is clearly erroneous if a reviewing court is left with the belief that a mistake has been committed. The record supports Yancey's claim that a mistake has been committed; therefore, the trial court's ruling was clearly erroneous.").

Accordingly, we reverse the judgment of the circuit court and remand the case for a new trial.[4]

REVERSED AND REMANDED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur. McCool, J., concurs specially.

[4]Because Battles's Batson claim is dispositive, we pretermit discussion of the other claims Battles raises on appeal.

McCOOL, Judge, concurring specially.

I authored the Court's opinion and thus concur fully with its analysis and conclusion. I write specially, however, to emphasize and elaborate on a couple of points contained within the main opinion.

First of all, it is of paramount importance to recognize a crucial holding of this case, which is that, when required by the trial court, the party defending against a Batson claim must state all of its reasons for striking minority jurors on the record; otherwise, even if there appears on review of the record that there is a nondiscriminatory reason for striking a particular veniremember, that reason will not be available to the defending party on appeal. In other words, as the main opinion holds, the party must "use it or lose it" when it comes to reasons to strike any particular juror in a Batson challenge.[5] ___ So. 3d ___.

As an example of this principle, my review of the record in this case revealed that there was a potentially valid race-

[5]As the main opinion notes, we are not concerned in this case with plain-error review, which is applicable only in cases involving the death penalty. See ___ So. 3d at ___ n. 2.

neutral reason for striking black veniremember no. 18 that the City did not cite below and has not cited on appeal. During defense counsel's voir dire examination, the following colloquy occurred:

> "[DEFENSE COUNSEL]: Stand up for me, Mr. 18. Have you ever had an argument with a girlfriend?
>
> "PROSPECTIVE JUROR [No. 18]: Of course.
>
> "[DEFENSE COUNSEL]: Are you married?
>
> "PROSPECTIVE JUROR [No. 18]: No, I'm single.
>
> "[DEFENSE COUNSEL]: When you had your argument with the girlfriend -- this applies to everybody, I'm just picking on him, Mr. 18 -- was she trying to give you her point of view in those arguments?
>
> "PROSPECTIVE JUROR [No. 18]: Yeah.
>
> "[DEFENSE COUNSEL]: And were you trying to not listen to those points of views lots of times?
>
> "PROSPECTIVE JUROR [No. 18]: You really have no choice.
>
> "[DEFENSE COUNSEL]: But the point is, you were trying to give her your points of view, right?
>
> "PROSPECTIVE JUROR [No. 18]: Uh-huh.
>
> "[DEFENSE COUNSEL]: And she was trying to give you her points of view?
>
> "PROSPECTIVE JUROR [No. 18]: Uh-huh.
>
> "[DEFENSE COUNSEL]: That makes for open discussion, doesn't it?

> "PROSPECTIVE JUROR [No. 18]: Yes, sir.
>
> "[DEFENSE COUNSEL]: Now, Mr. Juror No. 18, do you think there would have been much open debate and discussion if you just sat there and just looked at her and listened to her?
>
> "PROSPECTIVE JUROR [No. 18]: Kind of makes it worse.
>
> "[DEFENSE COUNSEL]: That would've made it worse, wouldn't it? Thank you, Mr. Juror No. 18."

(R. 41-42.) Defense counsel did not engage in similar questioning with any other veniremember.

As a trial attorney for over 25 years before taking the bench, I struck dozens of juries and participated in hundreds of hours of voir dire. Because this is the only portion of a trial which permits a lawyer and the potential jurors to interact, it was always a concern to me that a particular veniremember might establish a "rapport" with opposing counsel during voir dire. Almost without exception, I would use a peremptory strike to remove any juror from the panel, regardless of race, who had engaged in a question-and-answer scenario similar to the one that occurred in this case involving veniremember no. 18. Thus, it appears to me from the record on appeal that the colloquy quoted above could have been cited by the City as the basis for a genuine concern that

defense counsel had established a rapport with veniremember no. 18, which I believe would have been a valid race-neutral reason for striking veniremember no. 18. See Walker v. United States, 982 A.2d 723, 733 (D.C. 2009) ("[C]oncern about a juror's rapport with opposing counsel can be a legitimate, race-neutral basis for a peremptory strike." (citation omitted)); State v. Weatherspoon, 514 N.W.2d 266, 269 (Minn. Ct. App. 1994) ("[T]he prosecutor's concern that a 'certain rapport' was developing between Weatherspoon's attorney and Alexander ... constitutes a facially race-neutral explanation."); Blackman v. State, 414 S.W.3d 757, 770 (Tex. Crim. App. 2013) (holding that there was no error in the trial court's finding that the prosecutor provided a race-neutral reason for a peremptory strike where the prosecutor stated that he believed the stricken juror had established "a stronger rapport with the defense than with the State"); United States v. Webster, 162 F.3d 308, 349 (5th Cir. 1998) (holding that the prosecutor provided a race-neutral reason for striking a prospective juror where the prosecutor cited "concerns [of] a juror's ... rapport with defense counsel"); and State v. LeBlanc, 618 So. 2d 949, 956 (La. Ct. App. 1993)

(holding that the prosecutor provided a race-neutral reason for striking a prospective juror where the prosecutor cited the juror's rapport with defense counsel during voir dire examination).

However, because the City did not cite this as one of its reasons for striking veniremember no. 18, we must assume that the concern I would have had about rapport was not shared by the prosecutor in this case. Thus, the City cannot now use that reason as a justification for its strike of this black veniremember. Likewise, the otherwise race-neutral reason put forth by the City in its brief on appeal ("head nodding") cannot now be used in hindsight as a valid reason justifying an apparently discriminatory strike against this veniremember. Put another way, although there might have potentially been other nondiscriminatory reasons for striking this black veniremember, the City waived those reasons by not citing them at trial, and the City's disparate treatment of this black veniremember and the white veniremember discussed in the main opinion leads us to conclude that this strike (along with others) was made with discriminatory intent.

To be clear, even if the City had cited veniremember no. 18's rapport with defense counsel as a reason for striking him from the jury, the result in this case would be the same. As the main opinion concludes, the record supports the conclusion that the City used its peremptory strikes against black veniremembers no. 14, no. 24, and no. 27 in a racially discriminatory manner, and "[t]he removal of even one juror for a non-race-neutral reason violates the United States Supreme Court's holding in Batson." Williams v. State, 620 So. 2d 82, 85 (Ala. Crim. App. 1992). Thus, the Court would have found a Batson violation in this case even if the City had cited veniremember no. 18's rapport with defense counsel as a reason for striking him from the jury, although I do not believe the Court would have found a Batson violation as to veniremember no. 18 had the City cited that reason below.

Secondly, I want to emphasize that the process for establishing a Batson violation has not changed by virtue of this opinion. As the main opinion notes, the evaluation of a Batson claim is a three-step process, Battles, ___ So. 3d ___, ___ (Ala. Crim. App. 2020), the first step of which requires the trial court to determine whether the claimant has made out

a prima facie Batson case. Until such a finding is made, the party alleged to have violated Batson should not be required to state reasons for specific strikes.[6]

I mention this because in this case, the trial court initially found that the defendant had not made a prima facie case of the discriminatory exercise by the City of peremptory strikes. Nonetheless, the trial court -- without making a specific finding of a prima facie case -- required the City to state its reasons on the record. Based on the fact that the trial court instructed the City to provide race-neutral reasons for its strikes, the main opinion properly holds that there was an implied reversal of the trial court's original express finding that there was no prima facie case of discrimination. In my opinion, the better practice with regard to Batson analyses is for the trial court to make an express finding that the defendant has established a prima facie case of racial discrimination before requiring the

[6]Speaking of the burden of establishing a prima facie case of discriminatory intent, I reiterate the main opinion's conclusion that statistics generally are not sufficient in and of themselves to establish a prima facie case. However, they are a factor to consider in establishing a prima facie case, and they may be used with other evidence to support a finding of a Batson violation.

prosecution to state race-neutral reasons for its peremptory strikes. In this case, I believe the main opinion correctly holds, under the circumstances, that there was an implied reconsideration of the trial court's initial finding.