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ARKANSAS COURT OF APPEALS

DIVISIONS II, III, & IV
No. CR-18-492

	Opinion Delivered May 29, 2019
SHELBY JAMAL DAVIS APPELLANT	APPEAL FROM THE MILLER COUNTY CIRCUIT COURT [NO. 46CR-16-12]
V.	HONORABLE BRENT HALTOM, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

BRANDON J. HARRISON, Judge

A Miller County Circuit Court jury convicted African American defendant Shelby Jamal Davis of aggravated robbery and four counts of first-degree battery. The jury also found that Davis used a firearm when committing the batteries. Davis appeals his convictions and the resulting one-hundred-year sentence, raising three points. The first is that the circuit court erred by denying his race-based *Batson* challenge to the State's five peremptory strikes against five separate African American venire members. We reverse on the *Batson* argument, making it unnecessary for us to decide the other points.

I. *The Juror-Selection Process*

Jury selection began on 29 January 2018. During the first phase, the court asked the potential jurors many questions, including whether they resided in Miller County or had unpardoned felony convictions. The court excused several people for cause. It then asked

the potential jurors if they had either been a victim of a crime or accused of committing one. Fifteen people answered yes. None were excused for cause.

The circuit clerk then drew the names of thirty people. The court called the names in the order the clerk had randomly selected them. It asked each juror to stand when called. Defense counsel and the prosecutor questioned the jurors individually at that time and were given the opportunity to use peremptory challenges (or strikes); each side had six. The process continued until the jury box was filled.

Twenty-four people were individually questioned before the jury was seated. Of the twenty-four, eight were African American. And of the twenty-four, twelve survived peremptory challenges. Three African Americans made it into the jury box. Five African American prospective jurors were eliminated by the prosecutor's peremptory strikes. Stated as percentages, the State used 83 percent of its strikes against African Americans, resulting in 62.5 percent of the eligible African Americans being excluded from serving as jurors.

Here are some details that put the jury-selection dispute in context. The first two (non-African American) venire members were seated without objection; the court excused a third juror on its own motion. The defense exercised its first peremptory strike against a non-African American woman named Lauren Glover. The prosecution exercised its first strike against Rachel Purifoy, a non-African American woman.

The prosecution used its second strike against Thomas Harris, an African American male, over Davis's *Batson* objection. Having found that Davis made a prima facie case for purposeful discrimination based on his race, the court required the prosecutor to provide a race-neutral reason for the peremptory challenge, as is required under *Batson v. Kentucky*,

476 U.S. 79 (1986). (More will be said about *Batson*'s three-step process in due course.) The reason the prosecutor gave was that "Mr. Harris indicated that he knew or was aware of and was familiar with the defendant's grandfather, Mr. Davis. He is, also, the father of a child approximately the defendant's age." The third strike the State used was against an African American named Verlinda Cleveland. The prosecutor said that because Cleveland is "a single mother working with the school district," she would "tend to be sympathetic towards a young person based on [her] interactions with young people . . . of the defendant's age." When he was tried, Davis was twenty-four years old. The circuit court excused Cleveland, presumably because she was a single mother who worked for the Texarkana School District.

Next was Martha Reynolds, a non-African American woman. The defense exercised a preemptory strike against Reynolds after she had said that her home had been burglarized and that the perpetrator was successfully prosecuted.

One of the more concerning moments arrived when the prosecutor exercised the State's fourth peremptory challenge against African American panelist Joyce Muldrow. Muldrow was the third African American in a row against whom the State had exercised a strike. When she was called as a potential juror the prosecutor immediately asked the court to excuse her. When summoned to the bench the prosecutor gave three race-neutral reasons to justify the challenge: first, Muldrow was the sole caregiver to her child and a disabled brother; second, "[s]he has been accused of a crime and convicted of a misdemeanor"; third, Muldrow "knew and was familiar with" Davis's grandfather. Defense counsel responded that Muldrow was a sole caregiver, but she also "said that she would be

able to have people cover for that, certainly for these two days of this hearing." Defense counsel also argued that Muldrow had stated that she knew Davis's grandfather had a radio station but had never listened to any of the programs.

The circuit court responded:

> [O]ut of the four strikes, they used [three] of them against African Americans, so they have to state a race neutral reason at this point in time. It's not, like I say, the first one, there wasn't a pattern, but obviously, there is a pattern here . . . case law is that the reason sometimes doesn't have to be rational, they don't have to be anything other than something that they say that's race neutral.

The court then initially *agreed* with defense counsel, not the prosecutor, regarding Muldrow's ability to be seated. "I agree with you that Ms. Muldrow said she would make arrangements, and not let that be a problem[.]" And "I agree with you that her [Muldrow's] characterization of knowing Mr. Davis was minimal. . . . She didn't know him personally, never listened to the program or anything." The prosecutor then added that Muldrow's sister had been murdered in Miller County "and the individual responsible for that had never been caught or prosecuted." To which the court replied, "That's been the case with a bunch of people that's on the panel, one of them being Ms. Reynolds, who had crime that you didn't strike, which was white."

The court rejected the prosecutor's stated reasons to strike Muldrow; yet it allowed the strike, stating, "So, you've made your record, and those are race neutral reasons, *so this court can't stand in the way of it*, but that's where you are." (Emphasis added.)

The State used its fifth peremptory strike against the next juror that the clerk called, Gwendolyn Richards, an African American woman. The prosecutor challenged Richards because she has a child around twenty-three years of age, a husband who worked in the

Arkansas school system, and "contact with children." The prosecutor also told the court that Richards "made a scoffing noise and face which indicated to me that she would give them less credibility than she would anyone else."[1] Defense counsel responded, "[T]here's probably not a soul out there that has no contact whatsoever with people who are the age of the defendant[.]"

In response to the parties' arguments, the court said:

> As stated previously, the court has found that there is a pattern, and the state is required to give race neutral reasons . . . those reasons can be a variety of things, some of them not even rational as the case law, but the more members that are stricken from this case, obviously the more prejudicial that it looks in this case, but making the finding *the court does have to find* that the reasons by the state are race neutral reasons, so I will allow the strike.

(Emphasis added.) Six more potential jurors, all non-African American, were individually questioned. The State did not attempt to exercise its sixth strike against any one of them. Among the six jurors was Gerald Bogan, whom defense counsel had previously represented, and against whom the State had dismissed all criminal charges. The prosecutor accepted African American Louvenia Lee as the fourth juror to be seated. Three more non-African Americans were then seated as jurors.

The prosecutor exercised her sixth peremptory strike against Schlandra Waller, an African American woman. The prosecutor asked Waller about current criminal charges pending against Waller's brother. Waller replied, "Well, he had a, I think it was dropped

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[1]When a trial court does not expressly find that a State's peremptory strike is based on a venire member's demeanor, an appellate court cannot presume that the trial court credited the State's demeanor-based reason for the strike. *See Snyder v. Louisiana*, 552 U.S. 472, 479 (2008). Here, the circuit court did not make any express demeanor-related rulings regarding any venire member.

in Miller County." She agreed that her brother was in a nursing home. The stated reason the prosecutor gave for the court to excuse Waller was, "I am currently prosecuting her brother over a failure to register. He is a registered sex offender out of Arizona." The court responded, "[I]n this particular case, the state has stated their reason and the court does find that is a race neutral reason for the striking of this juror."

The next juror the clerk called was an African American woman named Melba Taylor. She was ultimately accepted as a juror, though the prosecutor moved to excuse her for cause. The court denied the request, stating that other jurors had expressed the same or similar problems, so Taylor would not be excused for the stated reasons. When the prosecutor asked the court to reconsider, it responded: "There was an objection this time because this juror was a black female, and you struck in this case five black members of the jury, and that's why. . . . That's the second member of that race [African American] on the jury." The prosecutor did not object to Everlene Anderson being seated on the jury, making her the third and final African American to sit in judgment of the State's case against Davis.

II. *The Law of Race-Based Peremptory Challenges*

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States "prohibits all forms of purposeful racial discrimination in selection of jurors." *Batson*, 476 U.S. at 88. Purposeful discrimination not only violates the rights of criminal defendants, it deprives prospective jurors of "a significant opportunity to participate in civic life." *Powers v. Ohio*, 499 U.S. 400, 409 (1991). "[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth

Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). Therefore, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (internal citation omitted). And "[w]hen an uncorrected *Batson* violation is properly preserved for appeal by objection, the trial court's error in permitting a discriminatory strike cannot be harmless." Wayne R. LaFave et. al. 6 *Criminal Procedure* § 22.3(d) Peremptory Challenges (4th ed.) (Nov. 2018 update) (collecting cases) (footnotes omitted).

"The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). To help ferret out discrimination, the Supreme Court of the United States set forth a three-step inquiry that courts conduct when intentional discrimination threatens to infect the juror-selection process by way of peremptory strikes. *See Batson*, 476 U.S. at 97. This appeal is primarily about the third step in the *Batson* analysis. We now set forth the three steps but will focus on the third one.

The First Step. When challenging a peremptory strike that is allegedly racially motivated, the defendant must make a prima facie showing sufficient to infer that the prosecution exercised its strikes to exclude one or more jurors based on the defendant's race. *Batson*, 476 U.S. at 96. The defendant is entitled to the presumption that peremptory challenges allow "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. 559, 562 (1953). In this case, no one disputes that Davis satisfied this step multiple times during the jury-selection process.

The Second Step. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation" for the strike. *Batson*, 476 U.S. at 97. A prosecutor's proffered race-neutral reason does not have to be "persuasive or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). The plausibility or persuasiveness of the proffered race-neutral reason is, however, relevant during the third and final step. *Id.* Transitioning between the second and third steps can cause some confusion.

The Third Step. The most critical step in a *Batson* challenge is often the final one, during which the circuit court must decide whether the defendant has met his or her burden of demonstrating purposeful discrimination under the relevant circumstances. *Batson*, 476 U.S. at 98 ("The trial court then will have the duty to determine if the defendant has established purposeful discrimination."); *Synder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted.").

The connection between the second and third *Batson* steps is this: if the prosecutor offers a facially race-neutral reason for a peremptory strike (step two), then the court moves to the third step, which requires it to credit or reject the reason. *Snyder*, 552 U.S. at 477. A defendant's challenge to a strike can turn on whether the circuit court believes the prosecutor's race-neutral reason for the attempted strike. *See Rice v. Collins*, 546 U.S. 333 (2006) (accepting state trial court's decision to credit prosecutor's race-neutral explanation). Considerations that help a court determine whether to accept or reject a race-neutral reason are "the prosecutor's demeanor"; how reasonable or improbable the given reasons are; and whether the given explanation "has some basis in accepted trial strategy." *Miller-El v.*

Cockrell, 537 U.S. 322, 339 (2003). But a circuit court does not have to simply accept the race-neutral reason given. *Id.*

In addition to prosecutors' demeanors, the reasonableness (or improbability) of the reasons given for a strike, and whether the stated reasons have a grounding in accepted trial strategy, the Supreme Court of the United States has provided the following points courts can use when assessing whether a defendant has overcome a race-neutral reason and thereby established some "evidence tending to prove purposeful discrimination":[2]

- The strength of the prima facie case, meaning that the prosecutor exclusively or disproportionately excluded racial minorities. *Dretke*, 545 U.S. at 240.

- The statistical numbers describing the prosecution's use of peremptory strikes are relevant, especially when "[h]appenstance is unlikely to produce this disparity." *Cockrell*, 537 U.S. at 342 (noting that the "prosecutors used their peremptory strikes to exclude 91% of the eligible African American venire members").

- Side-by-side comparisons of African American panelists who were struck and "white panelist[s] allowed to serve." *Dretke*, 545 U.S. at 241. *See also Snyder*, 552 U.S. at 483 (finding prosecutor's explanation implausible when the reason for striking an African American juror would seem equally applicable to an accepted non-African American juror).

- A "racially disparate mode of examination" of potential jurors during voir dire. *Cockrell*, 537 U.S. at 332 (noting that most African American potential panelists were first given a detailed description of an execution method in Texas and were not asked about what minimum sentence they would impose as compared to non-African American potential panelists). *See also Dretke*, 545 U.S. at 255.

- A prosecutor's "mischaracterization of the record." *Foster*, 136 S. Ct. at 1753. S*ee also Dretke*, 545 U.S. at 244 (a prosecutor mischaracterizing a juror's testimony when giving a facially race-neutral reason for the peremptory strike tends to show discriminatory intent).

- A history of racial discrimination by the prosecuting office. *Dretke*, 545 U.S.

[2]*Dretke*, 545 U.S. at 241.

> at 263 (noting state prosecutor office's history of "systemically excluding blacks from juries" and a formal policy to exclude minorities from jury service).

More to the point for this case's purposes is the Supreme Court's statement on the plausibility of a prosecutor's stated reason(s) for a strike:

> It is true that peremptories are often the subjects of instinct, 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.

Dretke, 545 U.S. at 252 (internal citations and quotations omitted). Moreover, if the prosecutor's explanation is deemed pretextual, then it "gives rise to an inference of discriminatory intent," and excluding a juror for the stated race-neutral reason is unlikely to survive a *Batson* challenge. *Snyder*, 552 U.S. at 485.

The burden to sufficiently establish a *Batson* violation, however, always remains with the defendant. *Purkett*, 514 U.S. at 768. And a circuit court's ruling on a *Batson* challenge will not be reversed unless its findings are clearly against the preponderance of the evidence. *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006). But as the Supreme Court of the United States has written, "[d]eference [to the lower court's factual findings] does not by definition preclude relief." *Cockrell*, 537 U.S. at 340.

III. *The Batson Violation*

Davis argues the following as he seeks to establish that a *Batson* violation occurred:

> The trial court appeared to rely on a fundamental misunderstanding of *Batson*, noting that the State's race-neutral reasons did not even have to be rational to overcome a *Batson* challenge. The trial court essentially ignored the third step

> in the *Batson* analysis—whether the defense had proven purposeful discrimination—instead permitting the strikes solely based on presentation of any race-neutral reason at all.

The circuit court, in other words, did not go deeply enough into the *Batson* process and decide whether to accept or reject the State's stated reasons and then determine whether Davis had carried his burden to prove purposeful discrimination. The State responds that Davis failed to counter the race-neutral reasons the prosecutor gave to the court.

The parties' legal battle has therefore joined at *Batson*'s third step and whether the circuit court properly applied it. A word of caution is warranted before proceeding further. We do not decide today the ultimate questions of whether Davis sufficiently established a pattern of discriminatory intent against African American venire members and whether the circuit court's decision to reject Davis's challenges were clearly against the preponderance of the evidence. Our focus is solely on whether a constitutionally mandated *process* was correctly followed—not whether the conclusion at the end of a correctly applied process is sufficiently supported by the record. The two things are not one and the same.

As we have mentioned, the way through a *Batson* challenge has caused some confusion when proceeding from the second step to the third step. *See MacKintrush v. State*, 334 Ark. 390, 399, 978 S.W.2d 293, 297 (1998) ("[W]e must confess to some confusion over what the term [*Batson* objection] means[.]"); *see also Woods v. State*, 2017 Ark. 273, 527 S.W.3d 706 (addressing the transition from step two to three and attempting to clarify what analysis is required and when). This case is no different. Here, we agree with Davis that the circuit court seems to have believed that it had to accept the State's race-neutral reasons at their face values, which is contrary to Supreme Court precedent. "[O]bviously,

there is a pattern here . . . case law is that the reasons sometimes doesn't have to be rational, they don't have to be anything other than something that they say that's race neutral," said the circuit court. But *Batson*'s third step requires a circuit court to decide whether to credit the prosecution's race-neutral reasons or to deem them pretextual. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965)]." *Dretke*, 545 U.S. at 239–40.

Take Joyce Muldrow. When handling this strike, the court initially seemed to reject the prosecutor's facially race-neutral reasons as factual errors. The court in fact *agreed* with defense counsel in some respects. "I agree with you that Ms. Muldrow said she would make arrangements, and not let that be a problem[.]" And "I agree with you that her [Muldrow's] characterization of knowing Mr. Davis was minimal . . . She didn't know him personally, never listened to the program or anything." It also said that "lots of people" had raised their hands about past crimes and that Muldrow's sister's murder or the prior misdemeanor conviction did not disqualify her. Yet Muldrow was still struck because the prosecutor had given a race-neutral reason, the court apparently believing that "it can't stand in the way of it," the "it" being the proffered race-neutral reason. In other words, the court thought its hands were tied because the prosecutor had given a race-neutral reason; but the prevailing Supreme Court precedents place no such binding upon a circuit court's power or judgment.

Joyce Muldrow is just one example of persisting doubt that the circuit court expressed as it had to repeatedly apply the *Batson* framework to five of the prosecutor's peremptory strikes. All circumstances are relevant when determining whether discrimination entered the trial process. And when considering whether an alleged *Batson*

violation has occurred, the striking of one juror may be considered when deciding if another juror is being targeted for an improper reason. *Dretke*, *supra*. For example, that the prosecutor asked the court to excuse African American Melba Taylor for cause after the State had exhausted its six preemptory strikes is telling. And when the prosecutor moved to strike Taylor for cause, the circuit court promptly rejected the State's race-neutral reasons. But when the State moved to exclude African Americans using preemptory strikes, the court believed it had to accept the given reasons. (For example, "the court *does have to find* that the reasons by the state are race neutral reasons, so I will allow the strike.") (Emphasis added.)

All this is to say that we are persuaded the circuit court was concerned with the prosecution's course during jury selection. And though facially race-neutral reasons were given for five of the six peremptory strikes the State exercised against African Americans, the court held that it was bound to accept the reasons (even irrational ones) when it was not so bound. Moreover, the court flatly rejected a for-cause strike when the State tried to exclude an African American venire member after it had exhausted its allotted peremptory strikes. The tone of that rejection further informs our conclusion that the court may well have denied one or more of the State's peremptory challenges had the court believed the Federal Constitution empowered it to reject a race-neutral reason as being a pretext for intentional discrimination.

IV. *Conclusion*

The circuit court remained engaged with, and attuned to, the possibility of a *Batson* violation. It handled defense counsel's objections with the seriousness that they deserved.

And it gave full voice to the State's reasons for the peremptory challenges. Ultimately, however, the circuit court mistakenly thought that it could not reject a race-neutral reason given by the prosecutor. Granting that a *Batson* challenge can be difficult to superintend in real time as the trial process unfolds, we nonetheless hold that the court erred when applying *Batson*'s third step given Supreme Court precedent, which we must follow. U.S. Const. art. VI, § 1, cl. 2 (Supremacy Clause).

The judgment against Shelby Jamal Davis is hereby reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

ABRAMSON, GLADWIN, WHITEAKER, VAUGHT, and MURPHY, JJ. agree.

GRUBER, C.J., and KLAPPENBACH and HIXSON, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. I disagree with the majority's conclusion that the trial court misapplied the *Batson* protocol in this case. In my view, the trial court complied with the proper procedures for trial courts to follow in *Batson* cases as set forth by our supreme court in *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). Because the majority found merit in Davis's *Batson* argument, it found it unnecessary to discuss Davis's other two arguments. With respect to Davis's remaining points, I would hold that the State did not impermissibly comment on Davis's failure to testify, and that Davis's contention that the trial court erred by permitting the State to make improper statements to the jury during closing arguments in both phases of the trial is not preserved for review. Having concluded that no reversible error occurred below, I would affirm Davis's convictions. Therefore, I respectfully dissent.

During jury voir dire, there were thirty potential jurors in the venire pool, and twenty-four were called. Of the twenty-four prospective jurors called, eight of the jurors were African American. Of the final jury panel, three members of the jury were African American. During voir dire, the State used five of its six peremptory challenges to remove jurors who were African Americans.

There are three steps to the *Batson* procedure. These steps are: (1) the strike's opponent must make a *prima facie* case of purposeful discrimination by showing that the juror is a member of an identifiable racial group, the strike is part of a pattern to discriminate, and the strike was used to exclude the juror because of his or her race; (2) the State must provide a race-neutral explanation; and (3) if a race-neutral reason is given, the trial court must decide whether the strike's opponent proved purposeful discrimination. *MacKintrush*, *supra*. The majority holds that the trial court erred in its application, or the process, of the third *Batson* step. I cannot agree.

After each juror was struck by the State, the appellant objected and asserted that the strikes violated *Batson*. The State then provided racially neutral explanations for each of the five jurors who were struck. The five racially neutral explanations can be generally summarized as follows:

- Mr. Harris: He was familiar with defendant's grandfather and had a child who was the defendant's age.

- Ms. Cleveland: Her husband was a custodian at the high school and interacted with kids the same age as defendant, and, like the defendant's mother, she was a single mother.

- Ms. Muldrow: She was the sole caregiver to her disabled brother, had been convicted of a misdemeanor, was familiar with appellant's grandfather, and her sister had been murdered and the culprit never caught.

- Ms. Richards: Her husband worked at a school, she would give police less credibility, and she knew the defendant's attorney.

- Ms. Waller: State was prosecuting her brother for failing to register as a sex offender.

With this backdrop, we review Arkansas law as it applies to *Batson*. The leading case in Arkansas is *MacKintrush*, *supra*. In *MacKintrush*, the Arkansas Supreme Court stated that the Supreme Court of the United States left it up to the states to develop specific procedures for implementing *Batson*. This is important. Our supreme court has taken the *Batson* requirements, developed procedures that satisfy *Batson*, and has repeatedly affirmed these procedures.[1] The following excerpts from *MacKintrush* clarify the third step in *Batson*. After a racially neutral explanation is given:

> But it is crucial that the trial court weigh and assess what has been presented to it to decide whether in light of all the circumstances, the proponent's explanation is or is not pretextual. If the strike's opponent chooses to present no additional argument or proof but simply to rely on the *prima facie* case presented, then the trial court has no alternative but to make its decision based on what has been presented to it, including an assessment of credibility. *We emphasize that following step two, it is incumbent upon the strike's opponent to present additional evidence or argument, if the matter is to proceed further.*

MacKintrush, 334 Ark. at 399, 978 S.W.2d at 297 (emphasis added). In *MacKintrush*, the appellant argued that even if the defendant failed to present additional evidence or argument against the racially neutral explanation, the trial court was required *sua sponte* to direct further

[1] *See, e.g.*, *Woods v. State*, 2017 Ark. 273, 527 S.W.3d 706; *Ashley v. State*, 358 Ark. 414, 191 S.W.3d 520 (2004); *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

inquiry into the matter. The *MacKintrush* court specifically disagreed with this argument, and further explained:

> Nevertheless, we conclude that it is still the responsibility of the strike's opponent to move the matter forward at this stage to meet the burden of persuasion, not the trial court . . . . *If the strike's opponent does not present more evidence, no additional inquiry by the trial court is required . . . . [Here, the] defense counsel argued against the genuineness of the race-neutral explanation but presented no additional relevant proof to vitiate the strike.* It was the defense counsel's obligation to do so, if he wanted the matter to proceed further.

MacKintrush, 334 Ark. at 399–401, 978 S.W.2d at 297–98 (emphasis added). It is clear from *MacKintrush* that after the racially neutral explanation is offered by the State, the appellant has the burden of going forward if the matter is to proceed further. Failure of the strike's opponent to present more evidence or more additional relevant proof is fatal to a *Batson* objection. In the present case, I do not believe that appellant Davis met his burden of going forward at the third step of the *Batson* procedure with respect to any of the jurors challenged by the State, for which the State had provided race-neutral explanations.

With respect to three of the five jurors—Mr. Harris, Ms. Cleveland, and Ms. Waller—Davis *made no comment at all* after the State's race-neutral reasons were given, much less provide argument or more evidence or more additional relevant proof as required by *MacKintrush*. That was fatal. As to the other two jurors, Ms. Muldrow and Ms. Richards, Davis did generally respond to some (but not all) of the State's race-neutral reasons, but he failed to offer any substantive argument, more evidence, or additional relevant proof after

the trial court determined that the explanations were race-neutral.[2] Again, the failure to offer additional evidence was fatal.

Perhaps we should review what types of argument or additional evidence is required by the defendant after the State provides a racially neutral reason for the challenge. The gist of the *Batson* burden-shifting scheme is so that the court can determine from the evidence whether the State's racially neutral reasons are merely pretextual. That certainly explains why the burden is on the defendant to provide the circuit court with some additional evidence or some argument that the State's given reasons were pretextual. The defendant cannot simply sit on his hands and merely rely on his previous objection. The majority opinion actually explains the rationale for this protocol well:

> The connection between the second and third *Batson* step is this: if the prosecutor offers a facially race-neutral reason for a peremptory strike (step two), then the court moves to the third step, *which requires it to credit or reject the reason*. *Snyder v. Louisiana*, 552 U.S. 472, at 477 (2008). A defendant's challenge to a strike can turn on whether the circuit court believes the prosecutor's race-neutral reason for the strike. *See Rice v. Collins*, 546 U.S. 333 (2006). . . . Considerations that help a court determine whether to accept a race-neutral reason are 'the prosecutor's demeanor'; how reasonable or improbable the given reasons are; and whether the given explanation 'has some basis in accepted trial strategy.' *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2009).

(emphasis added). It is clear that the purpose of the third step is to give the defendant the opportunity to provide the court with additional evidence so that the court can either credit the facially neutral reason or reject it. Place yourself in the position of the trial judge. What

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[2]This opinion uses terms "State" and "defendant" to explain its *Batson* positions herein. Some cases use the term "strike's opponent." The principles set forth herein would be the same whether it is the State making the strike or the defendant making the strike; and conversely, whether the defendant is the strike's opponent or the State is the strike's opponent. We do not imply that the *Batson* challenge applies to only one party.

has he heard at this point? State: We are striking a juror. Defendant: We object because it violates *Batson*. State: And, the State provides a racially neutral explanation. At that point, the trial court has nothing to consider except the State's explanation. That is why the defendant is given the opportunity to argue to the trial court that the State's explanation is pretextual or to provide additional evidence proving the explanation is pretextual. And, that is why our supreme court said in *MacKintrush*, "*[I]t is incumbent upon the strike's opponent to present additional evidence or argument, if the matter is to proceed further.*" *Mackintrush*, 334 Ark. at 399, 978 S.W.2d at 297 (emphasis added).

With those principles in mind, we look at the evidence herein. The only possible *Batson* violation occurred with respect to jurors Ms. Muldrow and Ms. Richards. Because in a *Batson* challenge the dialogue among the prosecutor, defense counsel, and the court is crucial, below are excerpts from the dialogue concerning Ms. Muldrow. Keep in mind that after a race-neutral explanation is provided by the State, the defendant has the burden of supplying additional evidence in opposition to the race-neutral explanation.

> THE COURT: The court will make a record that Ms. Muldrow is a black female, and that is the same race as the defendant, and this is the fourth strike of the State, three of them being against black individuals, which is the same race as the defendant, and *the court does require that the state furnish a race neutral reason for that.* (emphasis added).

At this point, the burden shifted to the State to provide a race-neutral explanation for the strike.

> MS. MITCHELL (STATE): Your Honor, Ms. Muldrow indicated in voir dire that she was the sole caregiver to her child and a disabled brother, and that she may have to leave if there was an emergency. She has been accused of a crime and

> convicted of a misdemeanor. Further, she indicated that she knew and was familiar with the defendant's grandfather, Mr. Davis, through his radio or television broadcasting.

At this point in the voir dire of Ms. Muldrow, the State has offered four race-neutral explanations for the strike: (1) Ms. Muldrow was the sole caregiver of her child and her disabled brother; (2) Ms. Muldrow was accused of a crime; (3) Ms. Muldrow was convicted of a misdemeanor; and (4) Ms. Muldrow was familiar with the defendant's grandfather. Each of these four reasons obviously has "some basis in accepted trial strategy" for the prosecution. *See Miller-El v. Cockrell*, *supra*. The burden then shifted back to the defense to offer additional evidence or some argument showing the race-neutral reasons were pretextual.

> MR. POTTER (DEFENSE): Your honor, of course she did state, make the statements that she was the sole caregiver. However, she said that she would be able to have people cover for that, certainly for these two days of this hearing. As to her knowledge of the grandfather, she said she was aware that he had a radio station but had never listened to any of his programs. Your Honor, they've exercised four strikes here.
>
> MS. MITCHELL (STATE): I'm going to ask Mr. Potter to, please, lower his voice a little bit.
>
> MR. POTTER (DEFENSE): All three, sorry about that, three of those strikes have been exercised on the first and only three blacks called upon as potential jurors in this case.

At this point in the voir dire, the only response to the State's race-neutral explanation by the defense was that Ms. Muldrow said she could find someone to care for her brother for two days and that she knew the defendant's grandfather but never listened to his radio

show. The defense did not offer any additional evidence nor did it even offer any new argument to show the race-neutral reasons were pretextual. Hence, the trial court then made its *Batson* decision based on the evidence before it as required by *MacKintrush*.

> THE COURT: Like I say, the court has made a finding that out of the four strikes, they used three of them against African Americans, so they have to state a race neutral reason at this point in time. It's not, like I say, the first one, there wasn't a pattern, but obviously, there is a pattern here that makes it necessary. Obviously, for review purposes of, that's why we make this record, and as you are well aware, case law is that the reason sometimes doesn't have to be rational, they don't have to be anything other than something that they say that's race neutral. Obviously, being convicted, having some, even though I agree with you that Ms. Muldrow said she would make arrangements, and not let that be a problem on having to take care of people, obviously, that would still be on her mind, and I agree with you that her characterization of knowing Mr. Davis was minimal. She just knew he had something. She didn't know him personally, never listened to the program or anything, just knew he had that, so that's a very minimal connection.

At that point, while it had no obligation to do so, the State offered an additional fifth race-neutral reason for its strike:

> MS. MITCHELL (STATE): I would, also, add that she indicated that her sister had been murdered here in Miller County, and the individual responsible for that had never been caught or prosecuted.

The trial court responded to the State's additional race-neutral reason:

> THE COURT: Like I say, that's been the case with a bunch of people on the panel, one of them being Ms. Reynolds, who had a crime that you didn't strike, which was white. So, you've made your record, and those are race neutral reasons, so this court can't stand in the way of it, but that's where you are.

MS. MITCHELL (STATE): Your Honor, I would add that Ms. Reynolds's case was prosecuted, whereas, Ms. Muldrow's case was not.

THE COURT: Okay. There's a lot of people that raised their hand on that question.

THE COURT: Ms. Muldrow, you are free to go.

The dialogue concluded. Where did the trial court err? The trial court followed the *Batson* and *MacKintrush* protocols. Based on the three previous strikes of African American jurors by the State, the court required the State to produce race-neutral explanations for the strike of Ms. Muldrow. The State provided four race-neutral explanations for the strike. After the race-neutral explanations were provided, the defendant did not offer any additional evidence, and the only comments the defendant made were that Ms. Muldrow said she could get someone to take care of her brother and that she did not listen to the defendant's grandfather's radio show. The State even provided another completely different fifth race-neutral reason, and the defendant did not respond at all. After hearing all of the race-neutral explanations and the defendant's limited response thereto, the trial court made its decision based on the evidence before it as it was required to do by *MacKintrush*. The trial court did not skip any steps. It did not jump to an unsupported or arbitrary decision. The trial court stated, "So, you've made your record, and those are race neutral reasons, so this court can't stand in the way of it, but that's where you are." The trial court understood the *Batson* and *MacKintrush* protocols. The trial court made the correct and proper determination. The trial court explicitly explained its decision. The majority notes that some of the other jurors who were not struck had themselves been charged with crimes, but none of those jurors had the cumulative characteristics raising the State's concerns about Ms. Muldrow.

The trial court was ultimately concerned that Ms. Muldrow could not pay undivided attention to a serious criminal case because she was the sole caregiver to her child and her disabled brother. While the majority may not agree with the trial court's decision to deny the *Batson* challenge, one certainly cannot contend the trial court did not apply the proper *Batson* and *MacKintrush* protocols regarding Ms. Muldrow. A trial court's ruling on a *Batson* challenge will not be reversed unless its finding is clearly against the preponderance of the evidence. *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006). Here, the court's denial of the *Batson* challenge was not clearly against the preponderance of the evidence.

Similarly, after the State gave its race-neutral reasons for striking Ms. Richards, Davis failed to present additional argument or proof to move the matter to the third *Batson* step. The State's explanation for striking Ms. Richards was that she had a son the same age as appellant, her husband worked with children, she was familiar with appellant's grandfather, and during jury voir dire she made a scoffing noise indicating that she would not deem a police officer credible. Again, these reasons have "some basis in accepted trial strategy." *See Miller-El v. Cockrell*, *supra*. Appellant's only response was that there is probably nobody who does not have contact with young people. Appellant made no comment on Ms. Richards's familiarity with appellant's grandfather or the scoffing noise she made when questioned about police-officer credibility. Davis stated further, "I understand all [the prosecutor has] got to do is give a race-neutral reason, and it could be they don't like her shoes. I think the court is aware of this." The trial court found the State's explanations race-neutral and removed the juror with no further comment or argument from Davis. One could not reasonably argue that the reasons given by the State—she had a son the same age as appellant,

her husband worked with children, she was familiar with appellant's grandfather, and during jury voir dire she made a scoffing noise indicating that she would not deem a police officer credible—are pretextual.

In *MacKintrush*, our supreme court emphasized that, following step two of the *Batson* procedure, it is incumbent on the strike's opponent to present additional evidence or argument if the matter is to proceed further. If the strike's opponent does not present more evidence, no additional inquiry by the trial court is required. *MacKintrush*, *supra*. Here, Davis failed in his burden of moving the matter forward to the third step of the *Batson* process. For this reason, I cannot assign error to the trial court's application of the *Batson* criteria or its denial of Davis's *Batson* challenges.

Finally, the majority opinion explains that the error by the trial judge was one "of process" and not in actually determining whether a *Batson* violation occurred. However, it is clear from the trial court's dialogue with the prosecutor and defense counsel throughout voir dire that he was very familiar with the *Batson* and *MacKintrush* protocols. He recognized a *prima facie* pattern of discrimination. He explained the burden shifting. He required the race-neutral explanation. And he listened to the defendant. That is the *Batson* protocol or process. The appellant's trial counsel even stated during Ms. Richard's voir dire: "I understand all [the prosecutor has] got to do is give a race-neutral reason, and it could be they don't like her shoes. I think the court is aware of this." Clearly, the trial court was aware of the *Batson* process, and furthermore, it applied the process properly.

Finding no error in any of the proceedings, I would affirm.

GRUBER, C.J., and KLAPPENBACH, J., join in this dissent.

James Law Firm, by: *Michael Kiel Kaiser* and *William O. "Bill" James, Jr.*, for appellant.

Leslie Rutledge, Att'y Gen., by: *David L. Eanes, Jr.*, Ass't Att'y Gen., for appellee.