ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CACR08-966

March 4, 2009

	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
WILLIE CLAY SMITH APPELLANT	FIFTH DIVISION [CR 2007-3368]
V.	HONORABLE WILLARD PROCTOR, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant, Willie Clay Smith, was tried by a jury and found guilty of the offense of felony theft of property. He was sentenced to twenty-five years in prison as an habitual offender. For his sole point of appeal, he contends that "the trial court erred in requiring evidence of a pattern of discrimination during a *Batson* challenge." We affirm.

During voir dire of the jury, appellant made the following *Batson* challenge:

> DEFENSE COUNSEL: At this point I would like to make a *Batson* challenge. There were four African Americans on the jury. The State did allow two out of the four to stay. But the two that it struck were black and I would like to hear race neutral reasons for the striking of these jurors.
>
> DEPUTY PROSECUTING ATTORNEY:
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> The Court must first make a finding that the State has acted in a discriminatory pattern before the State has to articulate reasons

and so I would ask whether or not the Court is going to make that finding.

THE COURT: What would be the basis of your argument, that the strikes are being exercised in a manner that's discriminatory?

DEFENSE COUNSEL: I guess it just — the two African Americans that were struck did not give any indication that they would be pro-defendant. It seems arbitrary and capricious to get rid of these two. The two that they left on seem less, I guess, vocal or assertive.

THE COURT: The Court is going to find that out of the 12 first of all Jurors that were seated, four were African American. The State did exercise two of its strikes. Two of the strikes that they exercised were against African Americans. However, two of the strikes were — I mean, it had six strikes and there are two other African Americans that are left on the Jury. And so at this point I don't think that there is sufficient evidence to show that there is a prima facie case that the strikes are being exercised in a discriminatory manner. And so I am not going to require that they state an articulable reason for it.

On appeal, appellant contends that the trial court erred in concluding that the defense had not established a prima facie case of discrimination; that the trial court focused only upon the pattern of strikes by the prosecution and ignored appellant's argument that the State was striking "vocal" and "assertive" African- American venirepersons. We will only reverse a trial court's finding on a *Batson* objection when the trial court's decision was clearly against the preponderance of the evidence. *Ratliff v. State*, 359 Ark. 479, 199 S.W.3d 79 (2004).

In *MacIntrush v. State*, 334 Ark. 390, 397-400, 978 S.W.2d 293, 296-97 (1998), our supreme court reassessed its earlier *Batson* procedures, and set forth the following explanation:

> In light of the *Purkett* decision, we have reassessed the proper procedures for the trial courts to follow in *Batson* cases and take this opportunity to set forth those procedures. Manifestly, there is a three-step process that must be used when the

opponent of the strike makes a *prima facie* case. Furthermore, it is clear that the burden of persuasion establishing purposeful discrimination never leaves the opponent of the strike. And, finally, the *Batson* process must occur outside of the hearing of the *venire*.

Step One. Prima facie case.

The strike's opponent must present facts, at this initial step, to raise an inference of purposeful discrimination. According to the *Batson* decision, that is done by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race. In deciding whether a *prima facie* case has been made, the trial court should consider all relevant circumstances. Should the trial court determine that a *prima facie* case has been made, the inquiry proceeds to Step Two. However, if the determination by the trial court is to the contrary, that ends the inquiry.

Step Two. Racially neutral explanation.

Assuming the strike's opponent has made a *prima facie* case, the burden of producing a racially neutral explanation shifts to the proponent of the strike. (But, again, the burden of persuading the trial court that a *Batson* violation of purposeful discrimination has occurred never leaves the strike's opponent.) This explanation, according to *Batson*, must be more than a mere denial of discrimination or an assertion that a shared race would render the challenged juror partial to the one opposing the challenge. Under *Purkett*, this explanation need not be persuasive or even plausible. Indeed, it may be silly or superstitious. The reason will be deemed race neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation." *Purkett*, 514 U.S. at 768. But, according to *Purkett*, a trial court must not end the *Batson* inquiry at this stage, and, indeed, it is error to do so.

Step Three. Trial court decision on purposeful discrimination.

If a race-neutral explanation is given, the trial court must then decide whether the strike's opponent has proven purposeful discrimination. *Purkett v. Elem, supra.* Though the United States Supreme Court has not elucidated precisely what is required at this step, clearly the strike's opponent must persuade the trial court that the expressed motive of the striking party is not genuine but, rather, is the product of discriminatory intent. This may be in the form of mere argument or other proof that is relevant to the inquiry. 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.

On the point of whether a sensitive inquiry is required in every instance when a *Batson* objection is made, we must confess to some confusion over what the term means in the *Batson* context. Does it refer to the entire three-step procedure or merely to an inquiry that takes place at the third stage? And to what extent is the trial court, on its own, required to direct a further inquiry into the matter? Again, the term "sensitive inquiry" is not used by the majority in *Purkett*. Justice Stevens, in his dissent in *Purkett*, said: "A trial court must accept that neutral explanation unless a separate 'step three' inquiry leads to the conclusion that the peremptory challenge was racially motivated." *Purkett*, 514 U.S. at 775 (Stevens, J. dissenting). This suggests a separate inquiry. 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. The trial court can only inquire into evidence as may be available. *See Batson v. Kentucky*, *supra*, *Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*. If the strike's opponent does not present more evidence, no additional inquiry by the trial court is required. However, if the strike's opponent presents additional relevant evidence and circumstances to the trial court for its consideration, then the trial court must consider what has been presented, make whatever inquiry is warranted, and reach a conclusion.

Here, the trial court determined that appellant did not satisfy step one, *i.e.*, demonstrating a prima facie case. Consequently, it did not address steps two and three. Of the four African Americans on the jury panel, the State struck two and left two. There is nothing in the State's line of questioning that hinted of discriminatory purpose, and appellant does not argue that there was. The focus of appellant's argument is that the State picked two "vocal" and "assertive" African Americans, without even explaining how that demonstrated discriminatory purpose. But, as noted by the State, "[e]ven assuming that the eliminated jurors were more assertive—excluding assertive individuals is not racially motivated, but can

be motivated by the fear that more assertive personalities may unduly influence the conclusions of the other jurors." We see no clear error in the trial court's decision and therefore affirm.

Affirmed.

HART and HENRY, JJ., agree.