RENDERED: APRIL 10, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001276-MR
AND
NO. 2018-CA-001330-MR

LOUISVILLE METRO GOVERNMENT APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 16-CI-000330

MARYSUSAN WARD APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

JONES, JUDGE: Appellee/cross-appellant, MarySusan Ward, initiated the underlying action in Jefferson Circuit Court against Louisville-Jefferson County Metro Government ("Louisville Metro") after she was separated from her employment following a contentious counseling meeting with her manager. Ward

sought damages for a violation of her due process rights,[1] pay-related racial discrimination, and retaliation. During trial, Ward challenged two of Louisville Metro's peremptory jury strikes as being racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court sustained one of the two *Batson* challenges.

As a remedy for this violation, the trial court placed the juror back on the panel. A fifteen-member panel, which included the subject juror, heard the case. Prior to selecting the final twelve deliberating jurors, a discussion arose regarding what to do about the *Batson* juror. Ultimately, the trial court told the parties that the subject juror would automatically be part of the deliberating jury and directed the deputy clerk to remove that juror's name from the drawdown pool. The deliberating jury, which included the subject juror, returned a verdict in favor of Louisville Metro on Ward's pay discrimination claim, but found in Ward's favor on the retaliation claim for which it awarded her a total of $880,030.80 in damages.[2]

On appeal, Louisville Metro asserts the trial court committed reversible error in: (1) failing to enter a directed verdict on the retaliation and

[1] The trial court granted Louisville Metro's motion for a directed verdict in its favor with respect to Ward's due process claim. That claim is not part of the instant appeals.

[2] The jury awarded $30,030.80 in lost wages and $850,000.00 for embarrassment, humiliation, and mental and emotional distress.

discrimination claims; (2) sustaining the *Batson* challenge; and (3) subsequently insulating the subject juror from the drawdown process. Ward filed a conditional cross-appeal arguing that in the event this Court vacates the jury's verdict, on retrial the trial court should be directed to allow evidence regarding Louisville Metro's resignation policy for the purpose of showing that Ward's purported resignation was not effective.

Following a careful review of the record and applicable law, we affirm the trial court's denial of Louisville Metro's motion for a directed verdict on the retaliation and discrimination claims as there was sufficient evidence presented to allow the jury to decide these claims; we likewise affirm the trial court's decision to sustain the *Batson* challenge insomuch as there was some evidence that the proffered reasons for the strike were pretextual and that the strike was racially motivated. However, we hold that the trial court committed reversible error when it insulated the subject juror from the drawdown process. *Batson* is designed to ensure that jurors are not unfairly discriminated against. In this case, the trial court's remedy went too far; instead of allowing the subject juror to be treated equally in terms of ability to serve, the remedy removed the element of fairness that a random draw affords. Because the verdict was rendered by a unfairly selected jury, we must vacate it in its entirety and remand for a new trial at which

Ward should be permitted to introduce evidence related to the resignation policies of Louisville Metro.

I. BACKGROUND

MarySusan Ward, an African-American female, worked in Louisville Metro's Department of Public Health and Wellness for approximately eight years, beginning in 2007, when she was hired as an Administrative Assistant. In November 2011, Tammy Anderson, a Caucasian female, was appointed as the Assistant Director of that department. Anderson became Ward's direct supervisor. Prior to November 2011, Ward received generally good reviews, including positive recognition when she successfully addressed constructive criticism regarding her customer service skills.

Ward's performance reviews remained consistent in the years following, although the only raises Ward received were annual costs of living wage increases to her salary. Eventually, with Anderson's support, Ward was promoted to an Administrative Specialist position, which was accompanied by a pay increase. Throughout the course of their working relationship, Anderson accommodated Ward's requests to work alternative hours and to use a temporarily vacant executive assistant office instead of her desk in the reception area. Anderson attempted to resolve interoffice relationship issues as they arose, although they were not always addressed to Ward's satisfaction. Ward reportedly

clashed with some of her coworkers, including two women (one African-American and one Caucasian) who successively held the Executive Assistant position in her department.

On September 30, 2015, Ward filed a complaint with Louisville Metro's Human Resources Compliance Division alleging race discrimination in the form of wage disparity and unspecified retaliation by Anderson.[3] Ward and another African-American Louisville Metro employee, Robyn Dickerson, had researched public pay records during the 2014-2016 time period and discovered that several Caucasian Louisville Metro employees had received raises and promotions. Dickerson and Ward alleged that Caucasian employees were given raises that exceeded those normally permitted by Louisville Metro's policies and that supervisors, like Anderson, advocated for raises for Caucasian employees but did not do the same for similarly situated African-American employees.

Under Louisville Metro's policy, some managers, like Anderson, have the discretion to advocate – or refuse to advocate – for employees in extraordinary wage decisions.[4] Promotions, reclassifications, and their accompanying pay raises are premised on a variety of factors including education, experience, and seniority.

---

[3] Ward would later supplement this complaint to allege that a counseling mandated by Anderson was retaliation.

[4] Louisville Metro classifies pay increases over 10% as extraordinary.

Dickerson, a Community Heath Supervisor, belonged to a separate federally-funded division from Ward's in which supervisors lacked the flexibility regarding salaries and other budgetary matters compared with other divisions.

After their review of fellow Louisville Metro employees' salaries, Ward and Dickerson came to believe that they were being discriminatorily passed over for raises in favor of Caucasian employees. Dickerson claimed that, during the 2014-2016 period, some of Louisville Metro's Caucasian workers were receiving increases of 10-21% within a single year, despite Louisville Metro policies limiting pay increases to 10%. Dickerson herself began taking on additional duties within her department in 2015, although an internal job audit determined that her work increase did not merit a pay raise.

Ward's wage-discrimination complaint was premised primarily upon the fact that the new Executive Assistant, Linda Gillock, had received a large pay increase during the first months of her probationary period with Anderson's aid. Gillock, a Caucasian female, was newly appointed to an Executive Assistant position with different job duties and minimum requirements than Ward's Administrative Assistant position. Anderson advocated for Gillock's 10% raise, leading Ward to suspect that Anderson was advocating for Gillock in a way that she had not done for Ward. According to Louisville Metro, Gillock's raise was merited due to her low starting salary, her significant relevant experience in the

Mayor's office, and a salary comparison against similarly situated Louisville Metro employees. The resulting raise put her in the same salary range as Gillock's predecessor, who was African-American.

The Human Resources Compliance Division ultimately determined that Ward's original claims of pay disparity, race discrimination, and retaliation were unsubstantiated. The parties dispute whether Anderson was aware at the time that Ward had filed a discrimination complaint against her, although it was around that time that Anderson began to take more scrutinizing notes regarding Ward's job performance.

Late that same September, Anderson was alerted that Ward's name had appeared on an automatically generated list produced by Louisville Metro's Office of Performance Improvement, identifying Ward as an employee who demonstrated a high use of sick leave. According to Louisville Metro's policy, "high" use of sick leave is defined as nine unexcused absences and/or six "occurrences," and necessitates a formal counseling session. Under Louisville Metro policy, counseling is designed to notify an employee of minor issues that need correcting, such as attendance. The supervisor of such an employee is required to conduct a formal meeting to discuss the issue with the employee and outline steps to correct the issue. At trial, the parties disputed whether counseling was a punitive measure. While counseling itself does not entail any loss of

benefits, decrease of pay, demotion, or other change in working conditions, Ward noted that counseling is a first step toward more serious discipline.

Upon receipt of Louisville Metro's list, Anderson advised Ward that she would be required to participate in counseling as a result of her inclusion on the list. When Anderson asked Ward to provide doctors' notes for her missing days to decrease her number of unexcused absences, Ward provided notes for only some of the missed days and was again included on the October 2015 sick leave report. Despite this, Ward rebuffed Anderson's initial attempt to provide counseling, contesting the report and refusing to discuss attendance. She later agreed to meet after Anderson reviewed the data again.

That following week, on October 27, 2015, Anderson conducted Ward's counseling regarding her use of sick leave. Anderson asked Katherine Turner, the division's Communications Director, to attend Ward's counseling as an objective third party. Turner suggested recording the counseling, which she testified she did commonly to create an accurate record of meetings. Although she did not record most employee interactions, Anderson agreed. Although neither Anderson nor Turner informed Ward that the session was being recorded, Turner made no attempt to conceal the phone or her active recording.

Anderson began the meeting by reviewing with Ward the documentation of her sick leave use and doctors' notes, explaining how she

counted the absences and answering Ward's questions. Anderson also provided Ward with a written record of the counseling, which outlined Ward's attendance issues, identified applicable Louisville Metro policies, and listed corrective actions Ward could take to avoid progressive disciplinary action. The subject of the meeting then drifted as tensions rose, and Ward began to bring up issues that she had with departmental discipline, criticizing both her fellow employees and Anderson's leadership. When Ward asked for a restroom break, Anderson instructed her to come "right back." Anderson testified that she wanted Ward to come back so that so she could pay Ward a compliment and keep the meeting from ending on a bad note.

Upon Ward's return, tensions did not abate, and the conversation veered in "a whole different direction" with "one thing [leading] to another" after Ward refused to accept Anderson's compliments. Video Record ("VR") 7.11.18 4:14:10-4:15:20. Anderson deviated from the original counseling topic into other, unrelated criticism, which Ward rejected or disputed, providing her own criticisms of Anderson and their other coworkers. As the conversation wore on, Anderson informed Ward that "the whole department is complaining about you" and that Ward "never [took] responsibility" for her actions because she "thought [she] was above policy." VR 7.11.18 4:42:10-4:43:39; VR 7.11.18 4:43:52-4:44:20. At

several points in the conversation, Anderson involved Turner to reiterate her criticisms.

Rather abruptly, Ward announced, “I think that I’ve made my decision. I’m going to go ahead and resign at this point.” VR 7.12.18 4:08:53-58. Anderson asked if Ward wanted some time to think about her decision, which Ward declined, and Anderson accepted her verbal resignation. Ward then left the room, took her break, and worked the rest of the day without incident. She then called Human Resources, who told Ward that an official resignation needed to be in writing to be effective and that she did not have to follow through on her verbal resignation if she had changed her mind or wanted to await the outcome of the then-pending investigation into Ward’s discrimination complaint.

Ward testified that after speaking with Human Resources, she changed her mind about resigning and decided not to follow through with the process. She reported to work as usual the next morning. Upon arriving at her work station, Ward discovered that she was not able to log into her work computer. Anderson then met with Ward. Anderson told Ward that she had resigned and that she no longer worked at Louisville Metro. In response, Ward told Anderson that she had not resigned because she had not completed the written process. When Anderson pressed, Ward eventually said that she had come in with the intention of submitting her two-week notice. Anderson did not back down. She maintained

that Ward's verbal resignation was effective, that Ward did not have the option of revoking the resignation, and that Ward was no longer employed at Louisville Metro as of the prior day, making it unnecessary for her to give a two-week notice. Anderson then asked another Louisville Metro worker, a "big" man, to escort Ward from the building. VR 7.11.18 5:03:15-5:10:51. Ward called Human Resources and reported that Anderson was retaliating against her for her discrimination complaint and that she did not want to resign.

That same day, Ward authorized her attorney to transmit a letter to the Interim Director of the Health Department explaining that she had not resigned but had instead been prevented from working, which the Interim Director handed off to Anderson. There is no evidence that the accusations of retaliation contained in Ward's letter were ever investigated by anyone at Louisville Metro. Ward was met with silence once again when her attorney sent a letter to the Director of Human Resources to begin the grievance process. That process applies in situations of involuntary termination not resignation.

Ultimately, Ward filed suit against Louisville Metro on January 21, 2016, asserting three claims: (1) violation of due process for not allowing Ward to revoke her resignation; (2) race discrimination; and (3) retaliation. Trial began as scheduled on July 10, 2018.

The parties completed *voir dire* and jury selection on the first day of trial. The trial court made its random strikes first, and thirteen panel members were excused by random draw, leaving a sufficient number to seat twelve jurors and two alternates after the parties each exercised their four peremptory strikes. In exercising its peremptory strikes, Louisville Metro eliminated Jurors 4879 and 4206. Ward challenged Louisville Metro's elimination of these two jurors under *Batson*, as both jurors were African-American and comprised two of only three African-American individuals remaining on the jury after preliminary strikes.

At the court's request, Louisville Metro provided the reasoning behind its peremptory strikes. According to Louisville Metro, Juror 4206 was likely to be more inclined to view Ward's argument more favorably due to her personal ties, as she currently worked at Louisville Metro and went to church with a potential trial witness. When called upon to supply its nondiscriminatory basis for striking Juror 4879, Louisville Metro explained that Juror 4879 was a "union employee and . . . union employees are not good for the [employers] . . . and plus, he also said . . . he had a problem previously with how he was treated at a – in buying a car, or looking at a car, and . . . I got a feeling that was going to affect his behavior in this case, but the main reason he was struck was because of a union." VR 7.10.18 4:12:50-4:13:40.

Ward responded that at least five other Caucasian members of the venire were union members, two of whom were current union workers. Ward posited that Louisville Metro's failure to strike any of the other five union members was "the very definition of a pretextual reason." VR 7.10.18 4:15:02-08. Ward pointed out that another Caucasian venire member who had not been stricken by Louisville Metro had also discussed experiences of discrimination.

The trial court found in favor of Louisville Metro with regard to Juror 4206. However, the trial court then determined Ward had carried her burden of proof and demonstrated that Louisville Metro's proffered reasons for exercising its peremptory strikes against Juror 4879 were pretextual. The trial court placed Juror 4879 back on the jury, finding that Louisville Metro's actual basis for the strike was a discriminatory motive. The court specifically stated:

> I'm more concerned based on what has been presented. [Juror 4879] will be put back on the jury. I'm going to sustain the motion as it relates to [Juror 4879] because the burden of proof has been met initially. It, according to the second step, [Louisville Metro]'s put forth a race-neutral reason but the burden-shifting and the reasons – one of the ways that one can show pretext is to show that there are – in this instance – white members of the jury who were also union members and they were left on the jury. So that burden's been met.

VR 7.10.18 4:17:21-4:18:10. The trial court did not directly address Louisville Metro's additional reason for striking Juror 4879 – his prior experience of discrimination.

Following the trial court's ruling, Louisville Metro attempted to supplement its argument for striking Juror 4879, arguing that one of the Caucasian union members had more education than the African-American union worker, and "high education favors the defendant." VR 7.10.18 4:18:10-4:19:45. The court then rejected this alternative basis for the strike, stating that Louisville Metro had been required to supply its nondiscriminatory bases up front and could not put forth additional reasons now that the court had already ruled. The court stated that allowing a post hoc explanation, "would defeat the whole purpose of *Batson* to begin with, if you were allowed to put forth additional reasons after [the court] ruled." VR 7.10.18 4:18:50-4:19:01. It further remarked that if union membership was actually a legitimate criterion on which Louisville Metro decided, Louisville Metro should have stricken some of the other union members from the panel.

After replacing Juror 4879 on the panel, the court reduced the jury further by random strike, and fifteen jurors, representing a jury of twelve and three alternates, were sworn in to hear the case. The court then decided that it could ultimately choose to insulate Juror 4879 from the final random drawdown of alternates, because if the reinstated juror could be randomly eliminated after a finding of intentional discrimination, "it would defeat the purpose for which *Batson* motions are made by eliminating a juror who was placed back on

randomly." VR 7.10.18 4:19:55-4:21:21. Juror 4879 was, in effect, guaranteed a seat on the jury.

After three days of trial, Ward rested her case and Louisville Metro moved for a directed verdict on all counts. With regard to Ward's race discrimination claim, Louisville Metro argued that for Ward to prove pay discrimination, she had to provide proof of pay disparity between similarly situated African-American and Caucasian workers. Louisville Metro argued that Ward had not come forward with any evidence of Louisville Metro paying a similarly situated employee more. As for the retaliation claim, Louisville Metro's defense was three-fold: (1) that the counseling meeting was not an adverse action; (2) that Anderson did not know about Ward's complaint at the time of her separation and thus could not have retaliated against her; and (3) that Louisville Metro's refusal to accept rescission of a resignation is not an adverse action. Finally, Louisville Metro asserted that Ward had failed to state a cognizable due process claim based on Louisville Metro's alleged failure to follow its resignation policy. The trial court granted a directed verdict in favor of Louisville Metro on the due process claim but denied its motions as related to the race discrimination and retaliation claims, finding that there was sufficient evidence presented by Ward for the jury to find in her favor on both claims.

As the trial court had previously indicated, Juror 4879 was not subjected to the random drawdown of alternates. The trial court reiterated its decision to protect Juror 4879 from the random draw of alternates as follows:

> That juror [4879] will be on the jury, on the 12-person deliberating jury. The other jurors are subject to elimination by random draw, and that juror's number . . . I'm pretty sure that that juror has been taken out and will remain out. That means he will be one of the twelve that go back to deliberate. The other fourteen are subject to elimination by random draw when the Madame Clerk comes out . . . . So we'll draw three, and those numbers will not go back with the twelve-person deliberating jury. But, yes, indeed, he's assured of being one of the numbers by the fact that he will not be in the box but three still need to be selected.

VR 7.16.18 1:00:38-1:01:46. After the drawdown eleven jurors plus Juror 4879 were left. These twelve jurors then retired to deliberate. They returned with two unanimous findings. First, the jurors found that Ward had experienced retaliation in violation of KRS[5] 344; second, they voted to award Ward $30,030.80, the full amount of lost wages she claimed. The jurors were divided on the remaining two issues. The jury rejected Ward's race discrimination claim 9-3. However, the jury also decided 9-3 to award Ward $850,000.00 for mental and emotional distress. Neither Ward nor Louisville Metro polled the jury, leaving it unknown as to

---

[5] Kentucky Revised Statutes.

whether Juror 4879 voted with or against the majority of the panelists on any of the claims.

The trial court entered a final judgment of the jury's award of $880,030.80 plus an additional $151,508.10 for costs and fees on August 17, 2018. Louisville Metro filed a timely appeal on August 21, 2018, and Ward followed with her timely notice of conditional cross-appeal on August 31, 2018.

II. ANALYSIS

A. Directed Verdict

We will first address Louisville Metro's argument concerning the trial court's failure to enter a directed verdict in its favor on all counts, as a reversal on this basis would obviate the need to consider the other arguments.

A motion for directed verdict "raises only questions of law as to whether there is *any* evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968) (emphasis added). As such, if there is any "conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts." *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 215 (Ky. App. 2009). It is not the trial court's role to consider the credibility or weight of the proffered evidence. "[A] trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-

19 (Ky. 1998) (citation and internal quotation marks omitted). This is a high burden to meet.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Peters v. Wooten, 297 S.W.3d 55, 65 (Ky. App. 2009) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)).

Appellate review of the trial court's denial of a motion for directed verdict is not limited to evaluating the reasons proffered by the trial court for its denial. "Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous." *Brooks v. Lexington-Fayette Urban Cty. Housing. Auth.*, 132 S.W.3d 790, 798 (Ky. 2004).

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all

> reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990) (citations omitted).

KRS 344.280(1) makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person . . . because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]" A prima facie case of retaliation requires a plaintiff to demonstrate: (1) that the plaintiff engaged in a protected activity; (2) that protected activity was known by the employer; (3) that, thereafter, the employer took an adverse action against the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Brooks*, 132 S.W.3d at 803.

Louisville Metro contends that it was entitled to a directed verdict on Ward's retaliation claim because she failed to offer evidence that Louisville Metro took an adverse employment action against her or that there was any causal connection between any such action and her protected action of making a discrimination claim against Anderson. As to the adverse employment action, there was some dispute regarding the effect a counseling session would have on

Ward and whether the session she took part in would be recorded in her permanent file. Even if this were not sufficient to count as an adverse action, there remains the larger question of whether Ward resigned or was terminated. Ward contends that her verbal resignation was ineffective because she was told by Human Resources that resignations had to be in writing. As such, she contends that she was actually terminated. We believe Ward presented sufficient evidence from which a jury could conclude that she suffered some adverse employment action. As to the issue of causation, the jury was likewise presented conflicting facts regarding Anderson's knowledge of the complaint Ward filed and whether any such knowledge played into Anderson's action as related to Ward. Therefore, we must affirm the trial court's decision to deny Louisville Metro's motion for a directed verdict on the retaliation claim.

With respect to Ward's discrimination claim, Louisville Metro claims that it was entitled to a directed verdict because Ward failed to offer evidence that any similarly situated employees outside of her protected class were systematically treated better than she. To establish a prima facie case of discrimination, Ward must offer evidence demonstrating discrimination "against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race[.]" KRS 344.040(1)(a). Absent direct evidence of discrimination, Kentucky recognizes the *McDonnell Douglas Corporation v.*

Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) burden-shifting formula "as the procedural framework within which to evaluate the merits of a discrimination claim," which "allows a plaintiff . . . to establish her case through 'inferential and circumstantial proof' when direct evidence of discrimination 'is hard to come by[.]'" *Overly v. Morehead State University*, No. 2013-CA-002008-MR, 2015 WL 7422820, at *5 (Ky. App. Nov. 20, 2015) (citing *Williams v. Wal-Mart Stores, Inc*., 184 S.W.3d 492, 495–96 (Ky. 2005) (other citation omitted)). On this claim, we also agree with the trial court. Ward did present some circumstantial evidence to support her discrimination claim with respect to the advocacy and raises given to other employees during the relevant time period. The trial court did not err in allowing this claim to go to the jury.

B. Batson Challenge

"The use of peremptory challenges to remove jurors from the venire on the basis of race or gender violates the Equal Protection Clause of the Constitution." *Ross v. Commonwealth*, 455 S.W.3d 899, 906 (Ky. 2015) (citations omitted). The United States Supreme Court outlined the three-step process for evaluating equal protection challenges to jury selection practices in its 1986 decision, *Batson v. Kentucky*. *Id.*

> First, the [challenging party] must make a prima facie showing that the [other party] has exercised peremptory challenges on the basis of race. . . . Second, if the requisite showing has been made, the burden shifts to the

> [other party] to articulate a race-neutral explanation for striking the jurors in question. . . . Finally, the trial court must determine whether the [challenging party] has carried his burden of proving purposeful discrimination.

Commonwealth v. Snodgrass, 831 S.W.2d 176, 178 (Ky. 1992) (citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1722-24).

The trial court's "ultimate decision on a *Batson* challenge is akin to a finding of fact[.]" *Roe v. Commonwealth*, 493 S.W.3d 814, 827 (Ky. 2015) (citation omitted). "Because the trial court is the best 'judge' of [a party's] motives in exercising its peremptory strikes, great deference is given to the court's ruling." *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006) (citing *Wells v. Commonwealth*, 892 S.W.2d 299, 303 (Ky. 1995)). This "'[d]eference,' of course, does not mean that the appellate court is powerless to provide independent review[.]" *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757 (Ky. 2009) (citations omitted).

On review, a trial court's ruling regarding *Batson* challenges will not be disturbed absent clear error, *i.e.*, when it is not supported by substantial evidence. *Washington v. Commonwealth*, 34 S.W.3d 376, 379-80 (Ky. 2000).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a

> contrary finding, "due regard shall be given to the opportunity of the trial court to judge [] credibility . . . ."

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (citations omitted).

The trial court acknowledged Louisville Metro struck two of the three African-American venire members who remained following strikes for cause and the trial court's own random draws. However, "*Batson* requires more than a simple numerical calculation[,]" so the challenging party must "establish as complete a record of the circumstances as is feasible [and] show a strong likelihood that such persons are being challenged because of their group association rather than because of a specific bias." *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989) (citations omitted).

Initially, Ward called the trial court's attention to Juror 4879's lack of any "particular animus or bias," and noted that his only brief mention of race pertained to how he preferred to describe his own race. VR 7.10.18 4:10:48-4:13:35. Ward accompanied this explanation with the fact that Louisville Metro exercised two of its preemptory challenges to remove two of three remaining African-Americans on the pool. Having reviewed the record, we agree with Ward that the trial court acted within its discretion in finding that Ward met her burden of establishing a prima facie *Batson* violation.

Turning then to the second step of the inquiry, the trial court asked Louisville Metro to provide its "race-neutral explanation for striking a juror of a

protected class." *Roe*, 493 S.W.3d at 827 (citation omitted). "Unless a discriminatory intent is inherent in the [challenged party'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). However, our Supreme Court has also cautioned that "'[w]hile the reasons need not rise to the level justifying a challenge for cause,' self-serving explanations based on intuition or disclaimers of discriminatory motive" are insufficient. *Washington*, 34 S.W.3d at 379 (quoting *Stanford v. Commonwealth*, 793 S.W.2d 112, 114 (Ky. 1990)).

Louisville Metro then gave its two race-neutral reasons for using a peremptory strike against Juror 4879: (1) his union membership; and (2) his past experience of discrimination. Louisville Metro argued that these two characteristics would make it more likely that Juror 4879 would be sympathetic toward Ward's position and stated, "I got the feeling that was going to affect his behavior in this case, but the main reason he was struck was because of a union." VR 7.10.18 4:13:28-35. Ward countered, pointing out that Louisville Metro failed to strike any of the other five white union members or the white juror with prior experience of discrimination.

Under the final step of *Batson*, "the trial court must assess the plausibility of the [challenged party's] explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for

discrimination against the targeted class." *McPherson v. Commonwealth*, 171 S.W.3d 1, 3 (Ky. 2005) (citation omitted). The critical question at this stage is how credible the challenged party's justification is for his peremptory strike, as "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003) (citation omitted).

> "[W]hen illegitimate grounds like race are in issue, a [party] 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, 252, 125 S.Ct. 2317, 2332, 162 L.Ed.2d 196 (2005).

The credibility of the challenged party's reasons may be measured by "how reasonable, or how improbable, the explanations are[,] and by whether the proffered rationale has some basis in accepted trial strategy." *Cockrell*, 537 U.S. at 339, 123 S.Ct. at 1040. The trial court must consider "all relevant evidence," including the pattern of exercising strikes from the venire based on race or gender and the nature of the questions posed on *voir dire*. *See Johnson v. Commonwealth*,

450 S.W.3d 696, 706 (Ky. 2014), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015); *Hardy*, 775 S.W.2d at 920.

The trial court considered Louisville Metro's and Ward's explanations in turn, evaluating the credibility of the proffered reasons for purposeful discrimination. The trial court found Louisville Metro's reasons to be pretext for purposeful discrimination, explaining, "[O]ne of the ways that one can show pretext is to show that there are – in this instance – white members of the jury who were also union members and they were left on the jury. So that burden's been met." VR 7.10.18 4:17:58-4:18:10. The trial court did not directly address Louisville Metro's additional reason for striking Juror 4879 – his prior experience of discrimination. Ultimately, however, we find no clear error in the trial court's evaluation, and so we defer to the trial court's fact-finding ability.

Certainly, the statements Louisville Metro gave after the trial court rendered its judgment on the matter suggest that counsel was floundering for an additional argument that might lend credence to its earlier proffered explanations. The Supreme Court has previously commented that race-neutral reasons added after the fact "reek[] of afterthought" and should therefore be disregarded. *Dretke*, 545 U.S. at 246, 125 S.Ct. at 2328. It is for this very reason that we disregard Louisville Metro's additional clarification regarding the comparative education levels of the other venire members belonging to unions.

Both the United States and the Kentucky Constitutions establish and recognize the right to a completely impartial jury. *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013) (citing *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008)). "Those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 86-87, 106 S.Ct. at 1717-18 (citations omitted). The right to a completely impartial jury does not entitle parties to a jury of any particular composition. *Commonwealth v. Doss*, 510 S.W.3d 830, 835 (Ky. 2016).

> The right to an impartial jury, however, does not afford a litigant the right to a jury that includes one or more members of his or her ethnic or racial background, religious creed, gender, profession, or other personal characteristic by which one is identified. The impossibility of constructing a jury of 12 persons that "insure[s] representation of every distinct voice in the community" is obvious and well recognized.

Id. (citing *Williams v. Florida*, 399 U.S. 78, 102, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)). The only point at which parties are entitled to a fair cross-section of the community is when the jurors assemble in the jury pool on the first day of jury service. *Commonwealth v. Stevens*, 489 S.W.3d 755, 763 (Ky. App. 2016); *Stanford v. Commonwealth*, 734 S.W.2d 781, 785 (Ky. 1987) (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967)).

In the eyes of the Supreme Court of Kentucky, random selection is one of the most effective tools for avoiding the effects of both overt and subconscious bias and ensuring trial by an impartial jury. *Doss*, 510 S.W.3d at 836. Randomness is embedded at multiple stages of jury selection – selection of the *voir dire* panel, random draws excusing excess venire members, and the additional random draw of alternates at the close of proof. CR[6] 47.02, 47.03. Randomness ensures that "at no time at all, will anyone involved be able to know in advance, or manipulate, the list of names who will eventually compose the empaneled jury." *Hayes v. Commonwealth*, 320 S.W.3d 93, 99 (Ky. 2010) (quoting *Williams v. Commonwealth*, 734 S.W.2d 810, 812 (Ky. App. 1987)).

Although federal civil proceedings have done away with the practice of seating alternate jurors in civil trials, Kentucky trial courts continue to permit the practice in combination with a final random jury selection. After an enlarged jury panel hears a case through closing, the jurors' names are put in the box from which the panel is drawn at random, and a fair cross-section can no longer be guaranteed. CR 47.02.

Ward argues that designating a specific juror for the final panel above the other jurors is within the trial court's discretion as an appropriate remedy for a *Batson* violation. In doing so, she attempts to draw a parallel between *Hubbard v.*

---

[6] Kentucky Rules of Civil Procedure.

Commonwealth and the present case. *Hubbard v. Commonwealth*, 932 S.W.2d 381, 382 (Ky. App. 1996). In that case, the trial court dismissed one of thirteen jurors impaneled when she revealed to the court after the conclusion of evidence that her religious convictions prevented her from judging any person guilty. *Id*. The trial judge was forced to reconsider the appropriateness of her serving on the jury and decided to dismiss the juror, bypassing the final random drawdown. *Id*. This Court affirmed that decision, stating that "[t]he trial court's dismissal of the juror by designating her as the alternate did not interfere with the randomness of the jury selection process." *Id*. at 383 (citing *George v. Commonwealth*, 885 S.W.2d 938, 941 (Ky. 1994)).

The distinction between *Hubbard* and the present appeal lies in the difference between preserving the impartiality of the jury and preserving the makeup of the jury. The *Hubbard* court removed an unsuitable juror from the drawdown because she would be unable to render a fair and impartial verdict, whereas the trial court in Ward's case guaranteed one juror a spot on the deciding panel while other suitable jurors were still subject to random drawdown. *See id*. The trial court did not act to preserve the impartiality of the jury but rather to preserve what it deemed to be a fair cross-section of the community, a practice previously condemned by the Supreme Court of Kentucky. *Doss*, 510 S.W.3d at 836 ("No one would reasonably argue that a judge could properly strike a qualified

individual juror from the petit jury panel simply to make room for a different juror of another race or ethnicity.”).

It is true that trial courts are granted wide latitude in rectifying *Batson* violations. *Batson*, 476 U.S. at 99 n.24, 106 S.Ct. at 1725 n.24. However, when remedying such a violation, a trial court must always strive to maintain impartiality among the jury. The Supreme Court suggested two remedies for *Batson* violations while considering the preservation of random impartiality, although it declined to provide any definite list of solutions. *Id*. According to the Supreme Court, “whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire” depends entirely on the particular case before the trial court. *Id.* (citations omitted).

As Ward points out in her brief, Kentucky courts are not required by CR 47.02 to use alternate jurors. They may impanel exactly as many jurors as will serve on the panel. However, the rule explicitly provides that where there are more members on the jury than “exceeds the number required by law,” all jurors will be subject to random drawdown. Ward’s comparison between Federal Rule of Civil Procedure 47, which abstains from the practice of seating alternate jurors, and CR

47.02, which allows for alternate jurors and explicitly provides for the procedure by which they are eventually trimmed from the deciding jury, is simply inapposite. If the court had not been using alternate jurors, guaranteeing Juror 4879 a seat on the jury would have been unquestionably appropriate as one of the remedies explicitly provided by the *Batson* court.

In the absence of beginning with an entire new panel, the trial court had the remedy of simply placing Juror 4879 back on the jury.[7] Once back on the panel, the juror would have the same opportunity to serve on the deliberating jury as the other fourteen empaneled jurors through the random drawdown process. This is not what happened. Instead, the trial court crafted an overbroad remedy that went beyond *Batson*'s purpose of treating all jurors equally. The trial court's remedy insulated Juror 4879 from the drawdown. Its remedy for the *Batson* violation was to ensure Juror 4879 was treated differently from the other panel members by guaranteeing that juror the right to serve on the deliberating jury without having to first go through the drawdown process required of the other panel members.

---

[7] Ward further contends that Louisville Metro ought to be penalized for its *Batson* violation. Louisville Metro essentially forfeited its peremptory strike when Juror 4879 was placed back on the jury. That, in and of itself, is a method of penalizing an impermissive use of peremptory challenges.

Had there been no *Batson* violation, the full random drawdown might still have completely stripped the jury of non-white members, a possibility our Court has previously recognized as constitutional. *Stevens*, 489 S.W.3d at 763-64 ("Until our Supreme Court says otherwise, the law requires that the pool from which a jury panel is selected represent a fair cross-section; however, it does not require that the jury panel itself accurately reflect the community."). Placing Juror 4879 back on the jury subject to random drawdown restored Juror 4879 to the exact position he would have been in had there been no *Batson* violation. The trial court's further actions of guaranteeing Juror 4879 a spot on the final jury acted as proverbial belt and suspenders to ensure what the court saw as a fair cross-section of the community, a result that might not have come to fruition had the court respected the practice of final drawdown.

By bypassing the random selection process mandated by CR 47.02 when dealing with alternate jurors, the trial court exceeded its discretion in fashioning a remedy for a *Batson* challenge. Having determined that the trial court erred, we must next decide whether Louisville Metro is required to show that the error actually prejudiced this case. We do not believe a showing of actual prejudice is required in this instance. As a matter of practicality, this would be exceedingly difficult. There is no way to know whether Juror 4879 would have been excluded through the drawdown process. Likewise, there is no way to be

certain how his presence affected the jury's deliberations and ultimate verdict. What is certain is that the trial court's actions interfered with the randomness and equality of treatment our rules and caselaw require in jury selection.

> On reflection as to how disparate procedures for jury selection might affect our whole system of justice, we have decided that it is in the interest of justice that the statutes and rules for jury selection be closely followed, and that no substantial deviation be allowed, regardless of prejudice. The matter of jury selection is too important a part of our judicial system to permit variations, from one court to another, in compliance with controlling statutes.

Allen v. Commonwealth, 596 S.W.2d 21, 22 (Ky. App. 1979).

Accordingly, we must presume the trial court's error was prejudicial, vacate the jury's entire verdict, and remand this case for a new trial on the counts submitted to the jury for decision. While this conclusion renders the remaining arguments moot, we will briefly address the evidentiary issue related to exclusion of Louisville Metro's statements regarding its resignation policy because this issue is likely to arise on retrial.

C. Louisville Metro's Resignation Policy

On cross-appeal, Ward asserts that the trial court erred in excluding documents, which include Louisville Metro's resignation policy and its responses to her unemployment claim with respect to those policies. She argues that these documents are permissive as party-opponent statements demonstrating that

Louisville Metro knew that its resignation policy had not been complied with by Louisville Metro agents following Ward's separation.

Under KRE[8] 801A(b)(1), "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity[.]" According to Ward, these documents function as an admission by Louisville Metro about the operation of its policies and show Louisville Metro's knowledge that its rules had been broken.

Louisville Metro counters, stating that Ward's argument that these documents constitute an admission against interest is factually and legally incorrect because Louisville Metro's policy was permissive with respect to written notice. Furthermore, Louisville Metro posits that the policy does not establish written notice to be the sole trigger of an employee's resignation. Louisville Metro adds that in addition to being inadmissible hearsay, the documents posed significant risk of confusing the jury and inviting a verdict based on speculation.

We believe the documents are relevant and that their probative nature outweighs any undue prejudice. One of the central issues in this case was whether Ward's verbal resignation was effective or whether she was terminated. After the meeting, Ward contends that she was advised by Human Resources that a verbal

---

[8] Kentucky Rules of Evidence.

resignation alone was not effective and that she could change her mind by not completing the process. According to Ward, she elected not to follow through on her verbal resignation meaning that she was terminated as opposed to having voluntarily resigned. We believe Louisville Metro's policies and its statements related thereto are relevant to this issue. We believe the jury is capable of understanding the policies and Louisville Metro's statements concerning them without becoming unduly confused. They should be admitted subject to appropriate objections during any retrial of this matter.

III. CONCLUSION

In light of the foregoing, we affirm in part, vacate the jury's judgment in its entirety, and remand for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

Patricia C. Le Meur
Louisville, Kentucky

J. Denis Ogburn
Jefferson County Attorney's Office
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT:

Robyn Smith
Louisville, Kentucky

AMICUS CURIAE BRIEF FOR
BRANDEIS SCHOOL OF LAW
BLACK LAW STUDENTS
ASSOCIATION AND THE
AMERICAN CIVIL LIBERTIES
UNION OF KENTUCKY:

John S. Friend
Louisville, Kentucky

Samuel A. Marcosson
Pro Hac Vice
Louisville, Kentucky