STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON BELL,

Defendant-Appellant.

FOR PUBLICATION
December 9, 2003
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No. 233234
Wayne Circuit Court
LC No. 99-009228

ON RECONSIDERATION
Updated Copy
February 13, 2004

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

FITZGERALD, J.

Following a jury trial, defendant was convicted on two counts of first-degree felony murder, MCL 750.316; two counts of armed robbery, MCL 750.529; and one count of conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a, arising from the July 29, 1999, robbery and shooting deaths of Chanel Roberts and Amanda Hodges. Defendant was sentenced to concurrent terms of mandatory life imprisonment without parole for each of the felony-murder convictions and life imprisonment for the convictions of armed robbery and conspiracy to commit armed robbery. Defendant appeals as of right.

The most contested issue presented on appeal is whether the trial court's erroneous denial of defendant's statutory right to peremptorily remove two prospective jurors from the jury pool was error per se, not subject to harmless error analysis. We conclude the above described error is error per se that is not subject to harmless error analysis. We reverse and remand for a new trial.

I. Facts and Procedure

During jury selection, defendant's trial counsel attempted to exercise a peremptory challenge to strike potential juror number 10, who was Caucasian. Juror 10 stated during voir dire that three of his friends were high-ranking police officers, but that he "wouldn't think" that this fact would make a difference to him in reaching a verdict of not guilty. When defense

counsel attempted to peremptorily excuse this juror, the trial court concluded that defendant's peremptory challenge was based on race and disallowed the challenge.[1]

Later, during voir dire conducted by the trial court, defense counsel sought to strike juror number 5, another Caucasian juror, despite juror 5's statement that he promised to be fair to both sides. This prompted the prosecutor to object, claiming that defendant was attempting to strike juror 5 on the basis of his race, contrary to *Kentucky v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The trial court "disallow[ed] the challenge, for the same reasons as asserted before." Consequently, juror 5 and juror 10 sat on the jury that convicted defendant, notwithstanding defense counsel's attempts to remove these jurors peremptorily. Defendant was convicted on two counts of first-degree felony murder, two counts of armed robbery, and one count of conspiracy to commit armed robbery.[2]

II. Analysis

Defendant argues that the trial court committed error requiring reversal by sua sponte raising *Batson* to question defendant's motives for exercising his peremptory challenge to juror 10. Defendant also argues the trial court committed error requiring reversal when it denied defendant his statutory right to peremptorily remove juror 5 and juror 10. Each of these issues is addressed separately.

A. A Trial Court Can Sua Sponte Implement the *Batson* Process

Although *Batson* does not explicitly address whether a trial court may sua sponte question whether a litigant is removing jurors for an improper purpose, it is clear from the reasoning of *Batson* and its progeny that the United States Supreme Court recognizes a trial court's authority to unilaterally raise such an issue to ensure the integrity of the judicial process. Specifically, *Batson, supra* at 87-88, recognized that the Equal Protection Clause protects not only the rights of the criminally accused, but also the rights of individual jurors not to be excluded from the jury pool on account of their race, and the right of society as a whole to rely upon the integrity of the judicial system. In subsequent decisions, the Supreme Court has forcefully reiterated these points. See *Edmonson v Leesville Concrete Co, Inc*, 500 US 614, 624; 111 S Ct 2077; 114 L Ed 2d 660 (1991), on remand 943 F2d 551 (CA 5, 1991) ("By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act, but has elected to place its power, property and prestige behind the alleged discrimination" [internal quotation marks and brackets omitted]); *Georgia v McCollum*, 505 US 42, 49-50; 112 S Ct 2348; 120 L Ed 2d 33 (1992), on remand 262 GA 554; 422 SE2d 866 (1992) ("Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it

[1] Defendant is African-American, and the two victims were Caucasian.

[2] At the close of the prosecution's case, the trial court granted defendant's motion for a directed verdict of acquittal on the charges of first-degree premeditated murder, MCL 750.316, and conspiracy to commit first-degree premeditated murder, MCL 750.316 and MCL 750.157a, but denied the motion with respect to the remaining charges.

is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it" [internal quotation marks and brackets omitted]).

Virtually all state courts addressing whether a trial court may sua sponte raise a *Batson* issue have concluded that, subject to the Equal Protection Clause, it is within the discretion of the trial court to conduct a *Batson* hearing, even absent an objection. See *State v Evans*, 100 Wash App 757, 767; 998 P2d 373 (2000) (a trial judge has the discretion to raise a *Batson* issue sua sponte to protect the rights secured by the Equal Protection Clause); *Commonwealth v Carson*, 559 PA 460, 477; 741 A2d 686 (1999) (to allow the trial court to sua sponte raise the issue of a discriminatory peremptory challenge would be consistent with *Batson*, because "dictum appearing in *Batson* and its progeny suggests the existence of an affirmative trial court duty to prevent the discriminatory use of peremptory challenges");[3] *Brogden v State*, 102 Md App 423, 649 A2d 1196 (1994) (a trial court may exercise its discretion in raising *Batson* sua sponte, since "[a] trial judge need not sit idly by when he or she observes what he [or she] perceives to be racial discrimination in the exercise of peremptory challenges"); *Lemley v State*, 599 So 2d 64, 69 (Ala Crim App, 1992) (the trial judge, as the presiding officer of the court, was authorized to conduct a *Batson* hearing absent an objection to ensure that discrimination did not mar the proceedings in his courtroom). The weight of authority and the persuasiveness of the reasoning clearly support the position that a trial court may sua sponte raise a *Batson* issue.

Defendant argues that *Clarke v Kmart Corp*, 220 Mich App 381, 382-384; 559 NW2d 377 (1996), holds that it is error for a trial court to raise a *Batson* issue "on its own initiative." A review of the Court's analysis, however, does not support defendant's contention. *Clarke* merely references that the trial court raised the issue on its own initiative. *Clarke* does not definitively hold that the trial court's raising of the issue sua sponte was improper. Rather, *Clarke* is premised upon the conclusion that the plaintiff did not establish a prima facie showing of discrimination.

B. The Trial Court Committed Error Requiring Reversal When It Denied Defendant His Statutory Right To Peremptorily Remove Jurors

Defendant also argues that the court committed error requiring reversal by denying him his right to peremptorily remove juror 5 and juror 10. Defendant acknowledges that the right to remove jurors peremptorily is restricted by *Batson*. However, defendant maintains that the trial court failed to follow the three-step process mandated by *Batson*.

In *Batson, supra* at 89, 96-98, the Supreme Court made clear that a prosecutor may not exercise peremptory challenges to strike jurors solely on the basis of their race and set forth a three-step process for determining whether there has been an improper exercise of peremptory

[3] Despite the Pennsylvania Supreme Court's statements regarding the trial court's sua sponte raising of the *Batson* issue, the court in *Carson, supra* at 478, declined "to step into the morass of 'peremptory challenge jurisprudence,'" and disposed of the case by concluding that any error in the trial court's sua sponte raising of *Batson* did not prejudice the defendant.

challenges in criminal or civil proceedings.[4] The United States Supreme Court has reaffirmed *Batson's* three-step process for determining whether there has been an improper exercise of peremptory challenges in criminal or civil proceedings. See, e.g., *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029; 154 L Ed 2d 931 (2003), on remand 330 F3d 690 (CA 5, 2003); *McCollum, supra*. Under *Batson, supra* at 96-98, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination (step three). *Id.*; *Hernandez v New York*, 500 US 352, 358-359; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

Defendant maintains that the first step of *Batson* was not satisfied because there was not a prima facie showing of discrimination based on race. We agree. To establish a prima facie case of discrimination based on race, the opponent of the challenge must (1) show that members of a cognizable racial group are being peremptorily removed from the jury pool and (2) articulate facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race. *Batson, supra* at 96. It is not apparent from the trial record in this case whether there was a pattern of discrimination evinced by defense counsel's exercise of peremptory challenges that would give rise to an inference that prospective Caucasian jurors were being excluded on account of race. The trial court record simply does not reveal the racial identities of the prospective jurors.[5] Thus, we are unable to determine whether a prima facie case of discrimination was established.

Even assuming that a prima facie case of discrimination was established, the trial court also failed to comply with steps two and three of the *Batson* process. The court did not give defense counsel an opportunity to state race-neutral reasons for his peremptory challenge before disallowing the peremptory challenge.[6] Rather, the court collapsed all three steps into one, ruling without a hearing that the juror had to be seated because "racism is being used in jury selection." This was error. See *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995), on remand 64 F3d 1195 (CA 8, 1995) (deciding that the court erred by combining

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[4] Although the Court declined in *Batson* to express a view "on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," *id.* at 89 n 12, later cases have held that under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove potential jurors solely on the basis of the juror's gender, ethnic origin, or race. See, e.g., *United States v Martinez-Salazar*, 528 US 304, 315; 120 S Ct 774; 145 L Ed 2d 792 (2000), on remand 278 F3d 1357 (CA 9, 2002).

[5] While the prosecution claims on appeal that there was a pattern of discrimination because "[o]f seven defense peremptory challenges made, five were against white males," we cannot find support for the conclusion that defendant's counsel was acting with a discriminatory motive because the trial court did not make a record of the racial identities of the members of the jury pool.

[6] The court did not allow defense counsel to make a record until after the court had ruled that it was denying defendant's attempts to remove the jurors in question.

Batson's second and third steps into one step). The trial court further erred by placing the burden of persuasion on defendant, the proponent of the strike. While "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation," *United States v McFerron*, 163 F3d 952, 954 (CA 6, 1998), the burden of persuasion never shifts to the party exercising the challenge. *Id.* at 955. Accordingly, we conclude that the trial court erred when it disallowed defendant's peremptory challenge of juror 10 without proper implementation of the three-step *Batson* process.

The trial court also failed to follow the *Batson* process when denying defense counsel's peremptory challenge to juror 5. The prosecutor objected to defendant's proposed strike of juror 5. The trial court denied the challenge "for the same reasons as asserted before." The trial court failed to inquire whether there was a prima facie showing of discrimination and whether defense counsel had a race-neutral explanation for striking this prospective juror.[7] In short, the trial court simply failed to apply *Batson* as mandated by the United States Supreme Court. Because the trial court failed to follow the *Batson* process, it also erred in disallowing defendant's peremptory challenge to juror 5.

Having concluded that the trial court erred in failing to adhere strictly to the three-step *Batson* process, we must next consider whether this error supports reversal of defendant's convictions. Preliminarily we note that there are two types of errors affecting the statutory right to remove jurors peremptorily. One type of error may be referred to as a dilution of the peremptory challenge right. This type of error typically occurs when the trial court erroneously modifies the jury selection process such that a litigant is denied the full array of peremptory challenges afforded by statute or court rule. The other type of error may be referred to as a denial of the right to remove a particular juror peremptorily. Under this scenario, the aggrieved litigant is afforded the full array of peremptory challenges provided by law. However, the litigant attempting to exercise a peremptory challenge is not permitted to remove the challenged juror. Thus, the challenged juror will sit in judgment of the challenging litigant's claims.[8] This case involves the wrongful denial of the right to remove a particular juror peremptorily.[9]

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[7] It was only after the trial court disallowed defendant's peremptory challenge of juror 5 that the prosecutor explained that she objected to the strike because, unlike prior peremptory challenges exercised by the defense, there was no basis for defense counsel to challenge juror 5. Even if we assume that the prosecutor's explanation established a prima facie case of discrimination, defense counsel was never given an opportunity to provide a race-neutral explanation for his strike. Instead, the trial court decided to "stand on the record" in leaving juror 5 on the jury.

[8] In order to preserve a claim of error arising from the dilution of the right to remove jurors peremptorily, the aggrieved litigant must exhaust all peremptory challenges afforded to the litigant in the jury selection process. One ought not be heard to complain of the dilution of the peremptory challenge right where it is evident from the facts of the case that the litigant would not have used the full array of challenges had they been available. However, a person alleging a wrongful denial of the right to exercise a peremptory challenge need not exhaust all peremptory challenges in order to preserve the issue, because the challenged juror will remain on the jury

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In *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), our Supreme Court addressed a challenge to the "struck jury method" of jury selection. Under this method of jury selection, the court would sit as many as eighty prospective jurors in the jury pool and require the litigants to review the entire jury pool for cause and for peremptory challenges. *Id.* at 323. Thereafter, the jury is selected in order of seating. *Id*. In *Miller, supra* at 324-325, this Court observed that this method of jury selection was inconsistent with the requirements of the then existing court rule on jury selection and amounted to a dilution of the right to exercise peremptory challenges. Nonetheless, this Court affirmed defendant's conviction in light of the overwhelming evidence of defendant's guilt. *Id.* The Supreme Court reversed this Court and granted the defendant a new trial. *Id.* at 326. The Supreme Court acknowledged that there was nothing in the trial court record that would support the conclusion the defendant was prejudiced by the jury selection method under review. *Id*. Nonetheless, the Supreme Court rejected the harmless error approach embraced by this Court, concluding: "given the fundamental nature of the right to trial by an impartial jury, and the inherent difficulty of evaluating such claims, a requirement that a defendant demonstrate prejudice would impose an often impossible burden." *Id.*

More than twenty-five years later, in *People v Schmitz*, 231 Mich App 521, 531-532; 586 NW2d 766 (1998), this Court addressed whether the erroneous denial of the right to remove a juror peremptorily amounted to error per se, not subject to harmless error analysis.[10] Relying on *Miller*, this Court reluctantly set aside the defendant's conviction. *Schmitz, supra* at 531-532. The *Schmitz* panel concluded that, pursuant to *Miller*, the wrongful denial of the right to remove a particular juror peremptorily amounts to error per se, not subject to harmless error analysis. *Schmitz, supra* at 531-532.

While this Court has subsequently questioned the *Miller* Court's conclusion that the dilution of the right of peremptory challenge is error per se, see *People v Green (On Remand)*, 241 Mich App 40, 46; 613 NW2d 744 (2000) (Griffin J., noting that in the years following *Miller* our Supreme Court has "distanced itself from the principle of error per se and embraced the notion that 'rules of automatic reversal are disfavored' " [citation omitted]), we are unaware

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regardless of whether the litigant utilizes all remaining peremptory challenges. *People v Schmitz*, 231 Mich App 521, 527; 586 NW2d 766 (1998).

[9] Generally speaking, the erroneous denial of the right to remove a specific juror peremptorily may fairly be characterized as a greater infringement on the statutory peremptory challenge right than is a dilution of that right. When a wrongful denial occurs, a juror declared undesirable for jury service by a litigant is nonetheless placed on the jury over that litigant's objection. By contrast, the dilution of the statutory peremptory challenge right, while significant, usually results in a litigant being forced to select a jury with fewer peremptory challenges than the litigant is actually entitled to exercise under the law. While a litigant subjected to a dilution of the peremptory challenge right may not draw the jury the litigant would have drawn if permitted to utilize the full array of peremptory challenges afforded by law, that litigant will rarely be required to accept a juror after the litigant declares the juror undesirable for jury service.

[10] In *Schmitz, supra* at 525, the trial court erroneously concluded, contrary to the express language of MCR 2.511(F), that the defendant could not peremptorily challenge a juror that the defendant had previously declined to remove peremptorily earlier in the selection process.

of any Michigan Supreme Court case that has overruled or otherwise expressly modified the conclusion in *Miller*.[11] In fact, as observed by Judge Griffin in *Green, supra* at 46, *Miller* "still remains viable [law.]"

Moreover, the United States Supreme Court long ago observed that "[t]he denial or impairment of the right [of peremptory challenge] is reversible error without a showing of prejudice." *Swain v Alabama*, 380 US 202, 219; 85 S Ct 824; 13 L Ed 2d 759 (1965), overruled on other grounds by *Batson*, 476 US at 92-93.[12] Additionally, the great weight of federal authority addressing this issue suggests that errors relating to the right to remove jurors peremptorily are not subject to harmless error analysis. See, e.g., *United States v Gibbs*, 182 F3d 408, 435 (CA 6, 1999) (denial of right to peremptory challenge "amounts to reversible error, there is no requirement of a showing of prejudice" [citation omitted]); *United States v Hall*, 152 F3d 381, 408 (CA 5, 1998), abrogated on other grounds by *United States v Martinez-Salazar*, 528 US 304; 120 S Ct 774; 145 L Ed 2d 792 (2000)[13] (noting circuits that hold that harmless error does not apply to denial or impairment of right to exercise peremptory challenges); *Tankleff v Senkowski*, 135 F3d 235, 248 (CA 2, 1998) (holding that harmless error analysis is inappropriate for *Batson* errors); *United States v Annigoni*, 96 F3d 1132, 1141 (CA 9, 1996) (declining to adopt a harmless error standard for the erroneous deprivation of the right to peremptory challenge); *Ford v Norris*, 67 F3d 162, 170 (CA 8, 1995) (holding that *Batson* error is not amenable to harmless error review); cf. *Kirk v Raymark Industries, Inc*, 61 F3d 147, 159 (CA 3, 1995) (holding that remedy for impairment or denial of right to peremptory challenges is reversal).

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[11] In *Green, supra* at 42, this Court originally concluded that that it was duty-bound by MCR 7.215(H)(1), now 7.215(J)(1), to follow *People v Colon*, 233 Mich App 295; 591 NW2d 692 (1998). *Colon* relied on *Miller* to conclude that a deviation in the jury selection process provided in MCR 2.511(F) required reversal even in the absence of actual prejudice. The Supreme Court vacated this Court's original opinion in *Green*, and remanded for consideration "of whether the jury selection method utilized was fair and impartial under MCR 2.511(A)(4)." *People v Green*, 461 Mich 975 (2000). On remand, this Court observed that the jury selection court rule at issue in *Miller* was different from the jury selection court rule at issue in *Green*. *Green, supra* at 47. This Court further concluded that the jury selection process at issue in *Green* was indeed fair and impartial and thus complied with MCR 2.511(F). *Green, supra* at 47-48. Thus, while the Supreme Court's remand order in *Green* adds fuel to the debate whether *Miller* remains viable law, the remand order does not vacate, modify, or otherwise change the rule of law established in *Miller*.

[12] Although *Batson* reversed parts of *Swain*, *Batson* never addressed this issue. For that reason, *Batson* left intact that portion of *Swain* that set forth the remedial rule for such errors.

[13] *Martinez-Salazar* abrogated the holding in *Hall* that a defendant's rights under a rule governing entitlement to peremptory strikes were not diluted when the defendant exercised a peremptory challenge to remove a potential juror after the trial court erroneously refused to dismiss the potential juror for cause.

We therefore conclude that the trial court's wrongful disallowance of the exercise of peremptory challenges to remove juror 5 and juror 10 was error requiring reversal, even in the absence of a showing of prejudice. Defendant's convictions are vacated.[14]

Reversed and remanded for a new trial. We do not retain jurisdiction.

Wilder, P.J., and Zahra, J., concurred.

/s/ E. Thomas Fitzgerald

[14] In light of our disposition above, we need not address defendant's other arguments on appeal.