STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1466

State of Minnesota,
Respondent,

vs.

Richard Dean Applequist,
Appellant.

Filed September 4, 2018
Affirmed
Stauber, Judge[*]

Hennepin County District Court
File Nos. 27-CR-17-2894; 27-CR-17-2895

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Christina I. Warren, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Stauber, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from his convictions for two counts of first-degree aggravated robbery, appellant Richard Dean Applequist argues that he is entitled to a new trial because the district court (1) committed reversible error by denying his *Batson* challenge to the state's peremptory strike of the only African-American in the jury pool, and (2) abused its discretion in denying his motion for a new trial for juror misconduct. We affirm.

FACTS

In the fall of 2016, two Minneapolis Jimmy John's stores were robbed within one month of each other. Appellant is a former employee of both locations. His mother identified him after observing a still photograph on the news that was taken from a Jimmy John's security camera and alerted the police of his identity. Appellant's mentor and a friend each identified him to the police as well.

On February 2, 2017, respondent State of Minnesota charged appellant with two counts of first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2016). A jury found appellant guilty of both charges. After the trial and upon notification of potential juror misconduct, the district court conducted a hearing, pursuant to *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

After the hearing, the district court denied appellant's request for a new trial, determined that the juror's conduct was not inherently prejudicial, and sentenced appellant to 58 months' imprisonment. This appeal follows.

D E C I S I O N

I. The district court properly denied appellant's *Batson* challenge.

Appellant argues that the district court erroneously denied his *Batson* challenge to the state's peremptory strike of the only African American in the jury pool because the exclusion was not race-neutral. We disagree.

We begin our analysis by noting that our review of appellant's argument is guided by the principle that "the existence of racial discrimination in the exercise of a peremptory challenge is a factual determination that is to be made by the district court and should be given great deference on review." *State v. Reiners*, 664 N.W.2d 826, 830 (Minn. 2003). We review this factual determination made by the district court in a *Batson* challenge for clear error. *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001).

"Peremptory challenges allow a party to strike a prospective juror that the party believes will be less fair than some others and, by this process, to select as final jurors the persons they believe will be most fair." *State v. Wilson*, 900 N.W.2d 373, 377 (Minn. 2017) (quotation omitted). However, the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes based solely on race. U.S. Const. amend. XIV, § 1; *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). We apply a three-step test to determine whether a peremptory strike was racially discriminatory. *State v. Carridine*, 812 N.W.2d 130, 136 (Minn. 2012); *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (using three-part *Batson* analysis).

First, the defendant must make "a prima facie showing that the State exercised its peremptory challenge against a prospective juror on the basis of race." *State v. Onyelobi*,

879 N.W.2d 334, 345 (Minn. 2016) (quotation omitted). To do this, the defendant must show: "(1) that one or more members of a racial minority has been peremptorily excluded and (2) that circumstances of the case raise an inference that the exclusion was based on race." *Id.* (quotations omitted).

Second, if the defendant makes a prima facie showing, the burden shifts to the state to articulate a race-neutral reason for the strike. *State v. Diggins*, 836 N.W.2d 349, 354 (Minn. 2013). This explanation "need not be persuasive or even plausible." *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009). "Unless a discriminatory intent is inherent in the . . . explanation, the reason offered [is] deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995) (quotation omitted).

Third, if the state proffers a race-neutral explanation for the strike, the district court must then determine whether the defendant carried his or her burden "of proving purposeful discrimination," or in other words, whether the defendant proved that the race-neutral reason given by the state was "merely a pretext for the discriminatory motive." *Diggins*, 836 N.W.2d at 355 (quotation omitted); *see State v. Bailey*, 732 N.W.2d 612, 618 (Minn. 2007) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. (1769))).

Here, E.L., the only African American in the jury pool, testified that the police in his Kansas hometown racially profiled him approximately ten times and falsely accused him of child molestation, robbery, and stealing radios from cars during his youth. His father had similar experiences in the same Kansas town at that time, and appellant's brother

was later racially profiled by the police in Illinois. He characterized this as "absolutely" an "extremely" negative experience. And today if E.L. is pulled over by a police officer, he "visibly shakes." He disclosed that he has "a bias toward police officers," admitted his uncertainty about his ability to set aside his unconscious bias against police officers, and stated that he will likely judge police-officer testimony with skepticism rather than neutrality.

After the state struck E.L. and appellant made his *Baston* challenge, the district court correctly stated that appellant had met his burden under prong one. The exclusion of a member of a racial minority does not necessarily establish a prima facie case of discrimination. *Reiners*, 664 N.W.2d at 831. But the district court may properly draw an inference of racial discrimination when the prosecutor completely excludes one group of people from the venire. *State v. Moore*, 438 N.W.2d 101, 107 (Minn. 1989). Here, E.L. was the only African American in the jury pool.

In providing its race-neutral reasons to the district court, the prosecution argued that E.L. is biased toward law enforcement because of his past experiences with the police. It also noted that appellant would likely assert a defense of misidentification, and that E.L. had been misidentified and falsely accused of child molestation and stealing radios out of vehicles when he lived in Kansas, as well as robbery—the same crime for which appellant was on trial. E.L. was also the only member of the jury pool who had been misidentified by the police as a perpetrator of a crime. In response, defense counsel argued that the prosecution's race-neutral reasons were pretextual because they were mere "skepticisms that any healthy skeptical mind would bring to the evaluation," of the police. The district

court then denied appellant's *Batson* challenge and determined that appellant had failed to show pretext.

We agree with the district court's analysis that appellant's claim fails on the third prong. One of the state's reasons for exercising its peremptory strike of E.L. was because E.L. was falsely accused as the perpetrator of numerous crimes. This is a lawful, non-discriminatory basis for exercising a peremptory challenge. *See Onyelobi*, 879 N.W.2d at 349 (recognizing a juror's belief that she was wrongfully convicted is a lawful, race-neutral reason for the state's (or the prosecution's) exercise of peremptory strike). Therefore, the district court's finding that appellant did not prove pretext was not clearly erroneous. *See Martin*, 773 N.W.2d at 104.

II. The district court did not abuse its discretion in denying appellant's motion for a new trial.

Appellant next argues that the district court abused its discretion in denying his motion for a new trial based on juror misconduct detailed during the *Schwartz* hearing. We disagree.

The purpose of a *Schwartz* hearing "is to determine whether a jury verdict is the product of misconduct." *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001). At a *Schwartz* hearing, the moving party bears the burden of demonstrating actual bias, *State v. Kelley*, 517 N.W.2d 905, 910 (Minn. 1994), which refers to "a state of mind on the part of the juror, in reference to the case or to either party, which would prevent the juror from trying the issue impartially and without prejudice to the substantial rights of either party." *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). The district court is in

the best position to evaluate bias. *Evans*, 756 N.W.2d at 870. The district court's denial of a motion for a new trial on the basis of juror misconduct will not be overturned absent an abuse of discretion. *State v. Landro*, 504 N.W.2d 741, 745 (Minn. 1993).

At the close of trial, the district court judge invited the jurors into chambers to discuss the trial process. At that time, Juror B commented that she had asked her mother how long a jury deliberates before it is considered a hung jury. Upon appellant's request, the district court conducted a *Schwartz* hearing. *Remmer v. U.S.*, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954) ("In a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury . . . [is] deemed presumptively prejudicial" (quotation omitted)). After questioning each juror about the misconduct, the district court denied appellant's motion for a new trial.

Juror B's contact with her mother was misconduct. *See Landro*, 504 N.W.2d at 744. But it is clear that this misconduct did not affect the jury's verdict. Based on the *Schwartz* hearing transcript, it is evident that the district court did not err in determining that Juror B was the only juror exposed to the question's answer because, in fact, none of the other jurors knew the answer to the question that Juror B asked her mother. In addition, it is unclear whether the other jurors learned of Juror B's misconduct sometime during the trial or afterward during debriefing in the judge's chambers because each juror said that he or she heard of the misconduct only once. For these reasons, the district court did not abuse its discretion in denying appellant's motion for a new trial.

Affirmed.