An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-391

No. COA20-626

Filed 20 July 2021

Guilford County, No. 18 CRS 74175

STATE OF NORTH CAROLINA

v.

ALVIN NATHANAEL SMITH

Appeal by defendant from judgment entered 31 January 2020 by Judge Lori I. Hamilton in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General James M. Wilson, for the State.

Law Office of Lisa Miles, by Lisa Miles, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Alvin Nathanael Smith appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder. Defendant argues that the trial court erred in overruling his objection, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), to the State's exercise of peremptory challenges to two African-American prospective jurors. After careful review, we remand for the trial

court to conduct a new *Batson* inquiry.

I. Background

¶ 2 On 8 May 2018, Defendant, an African-American man, was arrested for the murder of his wife, Elizabeth Smith, a white woman. The evidence at trial tended to establish the following facts:

¶ 3 In May of 2018, Defendant lived with Mrs. Smith and her two children. On the evening of 7 May 2018, High Point Police Department officers arrived at the Smith home to conduct a welfare check. As Officer James Free approached Mrs. Smith in the backyard, he heard approximately five to eight gunshots, and Mrs. Smith collapsed. An ambulance transported Mrs. Smith to the hospital, where she was declared dead upon arrival. Mrs. Smith had sustained five gunshot wounds: two to the back of her right shoulder, one to her upper back, and two to her lower back.

¶ 4 The next day, Defendant surrendered to police and was arrested. On 13 August 2018, a Guilford County grand jury returned an indictment charging Defendant with first-degree murder.

¶ 5 Jury selection began on 27 January 2020. The State exercised one peremptory challenge and then passed the panel to Defendant, who successfully challenged two jurors for cause and exercised three peremptory challenges before returning the panel to the State. The State then exercised peremptory challenges to strike Wanda Creecy and Mildred Powell, two African-American prospective jurors. Defendant objected on

Batson grounds, arguing that two of the three peremptory challenges exercised by the State were used to strike the only African-American prospective jurors called to that point in jury selection. In response, the State offered the following explanation for the challenged peremptory strikes:

> With regard to Ms. Powell, she was stricken purely for the reason that she gave as far as her work situation. If it hadn't been for that I would have been perfectly happy to keep her on there. In order to somewhat accommodate her work situation where she said she's -- only four people work there, she's number two in command, the number -- her supervisor is the number one in command, has been called away due to a family emergency, I struck her for that limited reason. Otherwise, the State would have been satisfied with her.
>
> With regard to juror number one, Ms. Creecy, quite frankly, she was giving me a mean look the whole time. And that would be my reason for striking her, was the fact that she didn't appear very open with my questions, was very short, and appeared to my visual perception that she was looking like she was mad at me for being here. She might very well be mad at me, but that was the reason for striking her. It had nothing to do with her. That would be the showing for the State.

¶ 6 The trial court then stated:

> Well, I noticed you didn't ask Ms. Powell whether or not the job situation would make it substantially difficult for her to concentrate on what was going on in the courtroom. You didn't really ask her any follow-up questions.
>
> You didn't ask her whether or not there was a way that she could be doing that work after hours since we would be finished up at 5:00, if she could take on those

> responsibilities after five o'clock. You did not ask her whether or not, as I've already indicated, that job obligation would substantially impair her ability or interfere in her ability in any way to concentrate on what was going on in this courtroom. You did not ask her any of those follow-up questions.
>
> With regard to Ms. Creecy, I did not observe the same thing that you observed. I did not observe her giving short answers or incomplete answers or being hostile.
>
> So I -- I will accept that you have a different view of her than I do, because I'm looking at her from up here to the side. You're looking at her pretty much face on because she's facing you. But you didn't ask her any follow-up questions either. If she -- does she have a problem being called as a -- as a juror or is she unhappy about her obligation to serve, is that going to -- is she going to take that out on the -- either party in the case . . . . [T]hank you[.]

¶ 7 The trial court then heard from Defendant's counsel, announced a recess, and asked to see counsel in chambers. After a brief recess, the trial court ruled as follows:

> All right. There -- the defense has raised a *Batson* challenge to two jurors peremptorily challenged by the State in this matter. That would be juror number one, Ms. Wanda Creecy, and juror number five, Ms. Mildred Powell.
>
> The [court] will take notice that both Ms. Creecy and Ms. Powell appear to be African-American or black. They were the first African-American or black jurors to be called from the pool into the jury box. They were both called at the same time or in the same set of jurors and they were both challenged and stricken peremptorily by the State.
>
> The court further notes that there are no other African-American or black jurors currently seated on the jury. . . .

> The . . . defendant had made a prima facie showing requiring the State to give . . . racially-neutral reasons for exercising peremptory challenges on juror number one, Ms. Creecy, and number five, Ms. Powell.
>
> With regard to Ms. Powell, [the prosecutor] specifically mentioned answers that Ms. Powell gave or volunteered about her responsibilities for a nonprofit organization, that she was essentially the number two person in charge, that the number one person in charge was out due to a family emergency and was expected to be out and not available for work until, I think, next Tuesday, which would be February the 4th, that she was concerned the -- that the -- that her work or job would require her services.
>
> Specifically note that no follow-up questions were asked of Ms. Powell specifically to determine whether or not her work could be done after court hours or whether or not her job obligations would require her attention while she is in the courtroom making her unable to focus and attend upon what is happening in the courtroom or would impair her ability to be fair and impartial in this trial.
>
> The challenge to -- the basis for the challenge to juror number one, Ms. Creecy, according to [the prosecutor], she was making a mean face at him, gave him a mean look, short answers, and looked -- when she looked like she was mad about being here.
>
> Specifically note for the record that no follow-up questions were asked to explore with Ms. Creecy whether or not she was, in fact, dissatisfied with her obligation to serve as a juror or whether she had any experience that might cause her to identify herself for or against one party or the other. In fact, there were no -- no answers -- no questions asked [of] Ms. Creecy to determine why she might be giving the prosecutor a mean look or why she might appear to be mad about being here in court.

> Specifically note for the record that the court did not notice that she was giving any one party any sort of mean or disagreeable look; that the court did not notice any demeanor that would indicate she was mad or dissatisfied with her obligation to serve as a juror. She was a teacher. She identified herself as a teacher. She answered the questions concisely. She did not volunteer information, however did not appear to me that she was reluctant to answer any of the questions that were put to her.
>
> And so I have expressed, Counsel, my concern with the peremptory challenge. However, in looking at *Batson* and its progeny it appears that a number of cases following *Batson* have held that if the prosecutor can give a racially-neutral reason, whatever that racially-neutral reason is, then courts have upheld the trial court in denying the *Batson* challenge.
>
> And so for that reason despite my concern, because I cannot make as what I'm -- as -- as what I understand it is my -- my duty to determine whether or not the challenge peremptory was the result of purposeful race or gender discrimination. And I don't feel that I can make that determination at this time. I cannot make the determination that the peremptory was, in fact, the result of purposeful race or gender discrimination.
>
> I am going to deny the *Batson* challenge. However, I will have the record reflect and put counsel on notice, that I am paying very close attention to the questions that are asked of these jurors, their answers, their demeanor, and the exercise of their challenges.

¶ 8 The trial court excused Ms. Creecy and Ms. Powell, and jury selection continued.

¶ 9 On 31 January 2020, the jury returned a verdict finding Defendant guilty of first-degree murder. The trial court entered judgment upon the verdict and sentenced

Defendant to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal.

II. Discussion

¶ 10 Defendant's sole argument on appeal is that the trial court erred in denying his *Batson* objection to the State's use of peremptory challenges to strike two African-American prospective jurors during jury selection. Because we conclude that the trial court erred by failing to conduct the three-part inquiry required by *Batson*, we remand for rehearing.

A. Standard of Review

¶ 11 We review a *Batson* challenge with "great deference" to the trial court's determination regarding "whether the defendant has satisfied his burden of proving purposeful discrimination[,] . . . overturning it only if it is clearly erroneous." *State v. Hobbs*, 374 N.C. 345, 349, 841 S.E.2d 492, 497 (2020) (citations and internal quotation marks omitted). An appellate court will not reverse a trial court's *Batson* findings "unless on the entire evidence we are left with the definite and firm conviction that a mistake has been committed." *State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008) (citation and internal quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). We review issues of law de novo. *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497.

B. Analysis

¶ 12 Both the Fourteenth Amendment to the Constitution of the United States and article I, section 26 of the North Carolina Constitution prohibit racial discrimination in jury selection. *State v. Maness*, 363 N.C. 261, 271, 677 S.E.2d 796, 803 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010).

¶ 13 "When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson*[.]" *Hobbs*, 374 N.C. at 349–50, 841 S.E.2d at 497.

¶ 14 First, the defendant "must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case." *State v. Waring*, 364 N.C. 443, 474, 701 S.E.2d 615, 636 (2010) (citation and internal quotation marks omitted), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). Second, if the trial court determines that the defendant has established a prima facie case of intentional discrimination, "the burden shifts to the State to present a race-neutral explanation for the challenge." *Id.* at 474–75, 701 S.E.2d at 636. At this second step of the inquiry, "[t]he State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause." *Hobbs*, 374 N.C. at 352, 841 S.E.2d at 499 (citation omitted). If the trial court determines that the State's explanations are race-neutral "on their face, . . . then the court proceeds to the third step." *Id.* at 353, 841 S.E.2d at 499.

¶ 15 At the third step, "the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination." *Waring*, 364 N.C. at 475, 701 S.E.2d at 636 (citation and internal quotation marks omitted). "[T]he defendant bears the burden of showing purposeful discrimination." *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499. "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Id.* (citation omitted). "[T]he trial court must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* (citation and internal quotation marks omitted).

¶ 16 "In assessing the entire milieu of the voir dire, the [court] must compare [its] observations and assessments of [potential jurors] with those explained by the State, guided by [the court's] personal experiences with voir dire, trial tactics and the prosecutor and by any surrebuttal evidence offered by the defendant." *State v. Porter*, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990) (citation and internal quotation marks omitted). This determination

> involves weighing various factors such as susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.

State v. Fair, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citation and internal quotation marks omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

¶ 17 The trial court should also consider "the prosecutor's demeanor, and the explanation itself." *State v. Bond*, 345 N.C. 1, 21, 478 S.E.2d 163, 173 (1996), *reh'g denied*, 345 N.C. 355, 479 S.E.2d 210, *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). Ultimately, the trial court's determination regarding whether a defendant has proved purposeful discrimination requires an "[e]valuation of the prosecutor's state of mind based on demeanor and credibility[, which] lies peculiarly within a trial judge's province." *State v. Caporasso*, 128 N.C. App. 236, 243, 495 S.E.2d 157, 162 (citation and internal quotation marks omitted), *appeal dismissed*, 347 N.C. 674, 500 S.E.2d 91 (1998).

¶ 18 Here, the trial court acknowledged that Defendant established a prima facie case. It then correctly noted that the State provided race-neutral explanations for its peremptory challenges to Ms. Creecy and Ms. Powell at the second step of the *Batson* inquiry. However, the trial court erred in stating that a *Batson* challenge may not succeed "if the prosecutor can give a racially-neutral reason [for the peremptory challenge], *whatever that racially-neutral reason is.*" (Emphasis added).

¶ 19 As explained above, if the trial court determines that the State has offered a facially race-neutral explanation for its use of peremptory challenges, the inquiry does not end there. Instead, the trial court must proceed to the third step of the

inquiry and "consider the prosecutor's race-neutral explanations *in light of all of the relevant facts and circumstances, and in light of the arguments of the parties*." *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499 (emphasis added) (citation omitted). "[T]he trial court must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* (citation omitted).

¶ 20 Based on the transcript of the *Batson* hearing, it appears that the trial court denied Defendant's *Batson* challenge not because it determined that Defendant failed to meet his burden of proving purposeful discrimination, but solely because the State offered apparently race-neutral explanations for its challenges to the only two African-American prospective jurors yet to be called during voir dire. The trial court stated its understanding that a *Batson* claim should be denied "if the prosecutor can give a racially-neutral reason, *whatever that racially-neutral reason is,*" and denied Defendant's claim on that mistaken basis. (Emphasis added).

¶ 21 Thus, the trial court erred by failing to conduct a full *Batson* inquiry addressing each of the three steps necessary for a determination regarding whether the State exercised its peremptory challenges in a racially discriminatory manner. "Accordingly, we must remand to the trial court for a new *Batson* hearing." *Id.* at 356, 841 S.E.2d at 501.

III. Conclusion

¶ 22 Because we conclude that the trial court erred by failing to conduct a full *Batson* inquiry, we must remand for the trial court to conduct a *Batson* hearing, addressing all three steps of the inquiry. "On remand, the trial court may take additional evidence in its discretion, but shall in any event make specific findings of fact under the totality of *all* the circumstances at [each] step of its *Batson* analysis[.]" *State v. Alexander*, ___ N.C. App. ___, ___, 851 S.E.2d 411, 421–22 (2020). In particular, the trial court must consider "whether the primary reason[s] given by the State for challenging juror[s Creecy and Powell were] pretextual." *Hobbs*, 374 N.C. at 360, 841 S.E.2d at 503.

REMANDED FOR REHEARING.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).