IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-510

No. COA21-573

Filed 19 July 2022

Craven County, Nos. 17CRS52440, 18CRS12-13, 20CRS583

STATE OF NORTH CAROLINA

v.

ANTHONY LAMAR JOHNSON, Defendant.

Appeal by Defendant from judgment entered 29 January 2021 by Judge Joshua W. Willey, Jr. in Craven County Superior Court. Heard in the Court of Appeals on 24 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Lisa Miles for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Anthony Lamar Johnson appeals from a judgment after a jury found him guilty of first-degree murder, conspiracy and attempt to commit armed robbery, and possession of a firearm by a convicted felon. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant asserts that the trial court improperly denied his *Batson* objection. Upon review, we find no error in

the trial court's judgment.

I. Factual and Procedural History

¶ 2 On 3 August 2017, Defendant shot and killed a man during an attempted robbery of Cove Country Store in Cove City. On 5 September 2018, Defendant was indicted for first-degree murder. Defendant was later indicted for conspiracy to commit armed robbery, attempted armed robbery, and possession of a firearm by a convicted felon. During jury selection, the clerk called three African American jurors, eight white jurors, and one "Hispanic and white" juror to the box and asked them to state their race for "statistical purposes."

¶ 3 The State asked each juror if they had been convicted, charged, or had known any family member or friend who had been convicted or charged with a crime. Juror C.C., an African American, failed to disclose a pending insurance fraud charge against her. Juror M.F., an African American, responded that her son had stolen from her, been convicted, and been incarcerated. Juror M.F. stated that her son had continuously stolen from her and she "let it go" until she pressed charges because he stole her vehicle. The State subsequently used peremptory challenges on Juror C.C. and Juror M.F.

¶ 4 Defendant asserted a *Batson* objection, *see Batson v. Kentucky*, 476 U.S. 79 (1986), by "[bringing] to the [c]ourt's attention" that the State excused two African American jurors—Juror C.C. and Juror M.F.—without cause. Defendant based his

Batson objection on the fact that two out of three African American jurors had been challenged. The State voluntarily offered explanations for the challenges, stating that Juror C.C. failed to inform the trial court that she was the subject of a pending insurance fraud investigation. The State further stated that it was not comfortable with Juror M.F. based on her occupation as a nurse and referenced her possible emotional state given her prior history as a victim of theft and her hesitation to hold others accountable for their crimes.

¶ 5 The trial court determined that the State had proffered a "sufficient nondiscriminatory basis" for the use of peremptory challenges on Juror C.C. and Juror M.F. The trial court concluded that Defendant had failed to establish a prima facie case that the peremptory challenges were based on race. At the conclusion of the trial, the jury returned a verdict finding Defendant guilty of first-degree murder, conspiracy to commit robbery with a firearm, and possession of firearm by a convicted felon. On 29 January 2021, the trial court entered judgment, sentencing Defendant to life imprisonment without the possibility of parole. Defendant gave notice of appeal in open court.

II. Analysis

¶ 6 Defendant argues that the trial court's judgment should be vacated because the trial court wrongfully denied Defendant's *Batson* objection. Defendant argues

that the trial court erred by: (1) concluding Defendant failed to make a prima facie case after the question of a prima facie showing had become moot; (2) accepting the State's excuses to the peremptory challenges at face value, rather than considering all surrounding circumstances; and (3) incorrectly stating the law when it concluded Defendant failed to show the State's peremptory challenges were exercised "on the basis" of race or gender rather than a "significant factor" in the State's use of the peremptory challenges. This Court "will uphold the trial court's determination unless [it is] convinced it is clearly erroneous." *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (citation omitted). Such a determination is "clearly erroneous" when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *State v. Clegg*, 380 N.C. 127, 2022-NCSC-11, ¶ 37 (citation omitted).

A. Mootness

¶ 7 Defendant argues, and we agree, that the trial court erred when it concluded that Defendant failed to make a prima facie case after the question of a prima facie showing had become moot. This conclusion, however, did not prejudice the outcome of the case. Under the first prong of the *Batson* analysis, a defendant "must establish a *prima facie* case that a peremptory challenge was exercised on the basis of race." *Golphin*, 352 N.C. at 426, 533 S.E.2d at 210 (citation omitted). A prima facie case is established when: (1) the defendant shows he is a member of a distinct racial group

and the prosecutor has used challenges to remove jurors consistent with the defendant's race; (2) the defendant relies on the undisputed fact that the challenges were discriminatory; and (3) the defendant must show the facts, and other evidence, raise an inference that the prosecutor used the challenges to excuse the juror due to the juror's race. *Batson*, 476 U.S. at 96 (1986) (citations omitted); *see State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990) (citation omitted). "[W]hen the trial court does not explicitly rule on whether the defendant made a *prima facie* case, and where the State proceeds to the second prong of *Batson* by articulating its explanation for the challenge, the question of whether the defendant established a *prima facie* case becomes moot." *Golphin*, 352 N.C. at 426, 533 S.E.2d at 211 (citations omitted).

¶ 8 The State concedes that the trial court erred when it determined that Defendant failed to establish a prima facie case, as that determination was moot. The State voluntarily provided explanations for using peremptory challenges before the trial court determined that Defendant had met the burden of producing a prima facie case. Since the State provided explanations for its use of peremptory challenges, the trial court rightly proceeded through the *Batson* analysis and made a determination based on the totality of evidence. The trial court's error was not prejudicial, as the full *Batson* analysis was completed before rendering a determination. *See State v. Campbell*, 272 N.C. App. 554, 560, 846 S.E.2d 804, 808 (2020) (citations omitted) (denying *Batson* objection and determining remand was inappropriate when "[t]he

failure of a trial court to find facts [was] not prejudicial where there is no '*material* conflict in the evidence on *voir dire*'").

B. Examination of Peremptory Challenges

¶ 9 Defendant argues that the trial court erred in accepting the State's excuses to the peremptory challenges at face value, rather than considering all surrounding circumstances. We disagree.

¶ 10 Under the second prong of the *Batson* analysis, "the burden shifts to the State to articulate a race-neutral reason for striking the particular juror." *Golphin*, 352 N.C. at 426, 533 S.E.2d at 211 (citations omitted). "The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause." *Id.* (citations omitted). The State's proffered explanations "will be deemed race neutral[,]" "unless a discriminatory intent is inherent in the prosecutor's explanation." *Id.* (citations omitted). "The defendant [has] an opportunity for surrebuttal to show the State's explanations for the challenge are merely pretextual." *State v. Hobbs*, 374 N.C. 345, 353, 841 S.E.2d 492, 499 (2020) (citations omitted).

¶ 11 The State's explanations for challenging Juror C.C. and Juror M.F. do not reference race or discrimination. The State offered a clear explanation that Juror C.C. was challenged because, after being questioned, Juror C.C. failed to disclose that

she was the subject of a pending insurance fraud investigation. The trial court's finding is similar to that in *State v. Smith*, where the Court determined a *Batson* objection were be appropriately denied if the State's explanation questioned a "juror's veracity" based on the juror's failure to disclose a prior criminal conviction. *State v. Smith*, 352 N.C. 531, 540, 532 S.E.2d 773, 780 (2000); *see State v. Robinson*, 330 N.C. 1, 19, 409 S.E.2d 288, 298 (1991) (denying *Batson* objection and accepting the State's race neutral reasons citing the jurors' failure to disclose prior criminal convictions).

¶ 12 Juror M.F. was challenged due to her prior history as a victim of crime and "possibly [her] emotions," as the State "didn't feel comfortable with her" holding others accountable for their crimes. Here, the trial court makes a similar determination to that in *State v. Fletcher*, where this Court found that a prospective juror's apprehensions against the death penalty were a sufficient explanation to overcome a *Batson* objection. *State v. Fletcher*, 348 N.C. 292, 318–19, 500 S.E.2d 668, 683–84 (1998); *see State v. Taylor*, 362 N.C. 514, 528–29, 669 S.E.2d 239, 255 (2008) (denying *Batson* objection and finding the juror's "tremendous hesitation" for the imposition of the death penalty sufficient explanation for a peremptory challenge). The explanations provided by the State in support of its peremptory challenges were clearly stated and plainly referenced nondiscriminatory reasons. Defendant's failure to offer a surrebuttal to challenge the State's explanations further tends to show that no evidence of discrimination was present.

¶ 13 The trial court's finding is distinguishable from the holding in *Hobbs* where the North Carolina Supreme Court found the trial court "failed to weigh all evidence put on by [defendant]." *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 503 (citation omitted). First, the trial court in *Hobbs* erred when it considered the defendant's use of peremptory challenges. *Id.* at 357, 841 S.E.2d at 502 (citation omitted). Second, the trial court in *Hobbs* failed to analyze discriminatory historical evidence introduced by the defendant. *Id.* at 358, 841 S.E.2d at 502. Third, the trial court in *Hobbs* erred when it failed to compare all jurors' answers to the prosecutor's questions presented during voir dire. *Id.*

¶ 14 Here, in making its determination, the trial court only referenced the State's use of peremptory challenges. **{T. pp. 148-49}** Furthermore, no historical evidence was offered by Defendant to substantiate his claim of discrimination. Although the trial court's ruling failed to mention an examination of jurors' answers, the judge was present throughout voir dire, listened to all of the juror's answers, and was offered no evidence to support a finding of racial discrimination. The trial court is given great deference in determining the credibility of the peremptory challenges. *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citations omitted). Thus, this Court must defer to the trial court who was better situated to evaluate the totality of evidence, the tone and language the State used during voir dire, and the respective answers provided by the jurors. *See State v. Thomas*, 329 N.C. 423, 432–33, 407

S.E.2d 141, 148 (1991) (denying *Batson* objection and determining great deference needed to be given to the trial court's ruling that no discrimination occurred); *see also Hernandez v. New York*, 500 U.S. 352, 365 (1991) (citations omitted) (denying *Batson* objection and determining deference will be given to the trial court, as the trial judge was best positioned to consider "the demeanor of the attorney who exercises the challenge[,]" "the state of mind of a juror," and "the prosecutor's state of mind based on demeanor").

C. Improper Statement of Law

¶ 15 Defendant claims that the trial court incorrectly expressed the law when it stated Defendant failed to show the peremptory challenges were exercised "on the basis of" race or gender rather than just a "significant factor."

¶ 16 Under the third prong of the *Batson* analysis, the trial court must determine if the defendant has shown that race was a significant factor in determining which jurors were challenged. *State v. Waring*, 364 N.C. 443, 481, 701 S.E.2d 615, 639 (2010). "A trial court's rulings regarding race neutrality and purposeful discrimination are largely based upon evaluations of credibility and should be given great deference." *Golphin,* 352 N.C. at 427, 533 S.E.2d at 211 (citations omitted). In making its determination, the trial court will consider various factors including the "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 . . . and whether the State has accepted any African-American jurors." *State v. White*, 349 N.C. 535, 548–549, 508 S.E.2d 253, 262 (1998) (citation omitted).

¶ 17 The North Carolina Supreme Court has employed instructions containing the language "on the basis of" to determine if discrimination was a factor in the State's use of peremptory challenges. *See Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501 (holding a defendant "may rely on a variety of evidence to support a claim that a prosecutor's peremptory challenges were made on the basis of race" (citation and internal quotations marks omitted)); *see also Bennett,* ___ N.C. App. ___, 2022-NCCOA-212, ¶¶ 22, 89 (finding the trial court did not err in overruling the defendant's *Batson* objection and determining the prosecutor's challenges were not made "on the basis of race"). Although the trial court used the language "on the basis of" race or gender rather than a "significant factor," the trial court nevertheless analyzed the totality of circumstances required under the *Batson* analysis and determined discrimination was not a significant factor.

¶ 18 Defendant relies heavily on *State v. Smith*. However, *Smith* is distinguishable from the current case. In *State v. Smith*, this Court held the trial court erred when it denied the defendant's *Batson* objection. *State v. Smith*, 278 N.C. App. 606, 2021-NCCOA-391, ¶¶ 6-7, 22 (unpublished). This Court reversed the trial court's ruling in *Smith*, holding the trial court failed to consider the third step of the *Batson* analysis

and, in doing so, failed to conduct a full *Batson* inquiry. *Id.* ¶¶ 20–21. Here, unlike in *Smith*, the trial court conducted a full *Batson* analysis and proceeded through *Batson's* third step where it considered various factors associated with discrimination.

¶ 19 Although two African American jurors were challenged, the trial court took into consideration that one African American juror and one "Hispanic and white" juror did proceed to Defendant for voir dire, indicating a non-prejudicial approach to jury selection. Thus, the trial court's ruling is analogous to *State v. Headen*, where this Court held there was "no persuasive value" in concluding the State's use of half of its peremptory challenges against African American jurors was discriminatory when the jury was composed of only one or two African Americans. *State v. Headen*, 206 N.C. App. 109, 119–120, 697 S.E.2d 407, 415 (2010) (citations omitted); *see Waring*, 364 N.C. at 486-87, 701 S.E.2d at 642–43 (denying *Batson* challenge and determining that a fifty-percent acceptance rate of African American jurors was not indicative of discrimination). Additionally, as in *State v. Gregory*, there was no "discernable difference in the prosecutor's method of questioning any black prospective jurors" from the rest of the jury, as the jurors were questioned as a group. *State v. Gregory*, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995).

¶ 20 Defendant has failed to argue the presence of any evidence indicating the trial court's decision was prejudiced when it used the language "on the basis of" race or

gender rather than a "significant factor" in its instructions. Based on the record, we are not persuaded that a mistake has been made as the trial court made a determination after it completed a full *Batson* analysis. *See Clegg*, 380 N.C. 127, 2022-NCSC-11, ¶ 37 ("[F]inding a determination to be clearly erroneous when it is left with the definite and firm conviction that a mistake has been committed" (citation omitted)). We find no error in the trial court's ruling.

NO ERROR.

Chief Judge STROUD and Judge DILLON concur.

Report per Rule 30(e).