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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-938

No. COA22-36

Filed 29 December 2022

New Hanover County, Nos. 17CRS60179, 18CRS694, 18CRS695

STATE OF NORTH CAROLINA

v.

KEVIN LAMONT WHITING, Defendant.

Appeal by defendant from order entered 7 July 2021 by Judge John E. Nobles Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 6 September 2022.

*Attorney General Joshua H. Stein, by Special Deputy Attorney Generals Daniel P. O'Brien and Benjamin O. Zellinger, for the State-appellee.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.*

GORE, Judge.

¶ 1

On appeal, defendant raises the sole issue of whether the trial court erred in overruling his *Batson* objection at the remand hearing. This case was previously heard on appeal in which this Court issued an unpublished opinion remanding the case for a new *Batson* hearing. We affirm the trial court's ruling.

**I.**

¶ 2

Defendant appealed the final judgment by jury verdict “finding him guilty of assault inflicting injury by strangulation, first-degree kidnapping, and felonious assault,” which was heard before this Court on 22 September 2020. *State v. Whiting*, NO. COA19-1085, 2020 WL 7974385, at \*1 (N.C. Ct. App. Dec. 31, 2020) (unpublished). A recitation of the facts relevant to the jury verdict are laid out in this Court’s prior unpublished opinion. *Id.* Among defendant’s issues raised at the original appeal was defendant’s claim the trial court erred in denying his *Batson* objection by failing to engage in the *Batson* three-step process. *Id.* at \*2. This Court remanded the case for a new *Batson* hearing due to an “absence of any findings of fact to adequately address . . . whether [d]efendant established a prima facie case of discrimination” for the two African-American jurors peremptorily struck by the State. *Id.* at \*4.

¶ 3

On 11 June 2021, the trial court conducted the *Batson* hearing in accordance with this Court’s opinion. On remand, defense counsel appeared to rely on his initial argument for a prima facie showing under *Batson* step one. Defendant initially challenged the State’s peremptory strikes of jurors Sidion Nixon and Gerome Sidbury for excluding both potential African American jurors on the basis these jurors held some form of “displeasure” with the criminal system due to involvement by their relatives. On remand, the trial judge did not find this evidence was enough to meet

a prima facie showing of an inference of discriminatory purpose for exclusion. The trial court determined defendant did not provide sufficient evidence to “draw an inference” of discrimination during jury venire. According to the trial court, defendant’s evidence merely showed both jurors’ “displeasure with the criminal justice system” and that one of the jurors had a relative who was “a victim of sexual assault.”

¶ 4

Out of “an abundance of caution” the trial court and the State decided to proceed to step two of the *Batson* process and the State presented race-neutral reasons for its peremptory strikes of jurors Nixon and Sidbury. The State claimed its race-neutral reasons for striking juror Nixon were: her defensive demeanor, body language suggesting displeasure with being a juror, her displeasure with the criminal justice system since her brother was in pretrial confinement for three years on drug charges, and concern her employment in the mental health field would make her sympathetic to defendant. The State’s reason for excusing juror Sidbury included: his relatives “involvement with the criminal justice system,” and the prosecutor’s past and current felony cases against the juror’s cousin. The trial court determined these reasons were “race neutral on their face” and further determined the reasons “negate[d] an inference of racial discrimination and motivation.”

¶ 5

In response to the State’s race-neutral reasons, defendant argued no jurors responded to the State’s query of distrust towards law enforcement. Further, juror

Nixon expressed no displeasure with what else happened to her relative, other than the length of time. Defendant argued Sidbury only communicated belief that some of his cousin's cases were treated fairly and some were just baseless accusations against him. As his final response, defendant argued that any form of criticism toward the criminal justice system seemed to cause exclusion as a juror, which was an impermissible reason. Otherwise, defendant argued these jurors' responses were just like those of the other jurors.

¶ 6 The trial court stated in its findings of fact that defendant failed to prove purposeful discrimination. It further stated:

The defendant has offered no evidence that [the prosecutor's] statements and questions to the jurors support an inference of discrimination and no historical evidence of discrimination in the Sixth Prosecutorial District. Further, there was not a disproportional number of peremptory challenges used against African American jurors, in fact, the two African Americans were seated on the jury. Rather than offer evidence of racially discriminatory intent, counsel for the defendant stated, as he did during his *Batson* motion at trial, that Nixon and Sidbury were excluded for an "impermissible reason because they expressed reasonable criticism of the criminal justice system", NOT because they were African American.

¶ 7 The trial court went on to state in its findings that the prosecutor "accepted an African American juror before the *Batson* hearing, and one African American juror after the *Batson* hearing, both of which tend to negate inference of racial discrimination or motivation[,]” nor did the prosecutor “engage in dramatically disparate questioning or investigation of the African American and non African

American prospective jurors. . . .” The trial court stated the fact that the prosecutor only used three of her six peremptory challenges also “negated an inference of racial discrimination or motivation.” The trial court concluded the stated reasons for exclusion were race neutral and not pretextual, and that “defendant offered no evidence” the State’s peremptory strikes were motivated by “discriminatory intent.” The trial court ultimately overruled the *Batson* objection on 7 July 2021, and on 14 July 2021, defendant timely appealed the order.

## II.

¶ 8

We must consider whether the trial court was clearly erroneous in its ruling on defendant’s *Batson* challenge during the remand hearing. The trial court’s ruling must be sustained unless it was clearly erroneous. *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005). “Clear error” exists when after a review of all the evidence, “the Court is left with the definite and firm conviction that a mistake has been committed.” *State v. Clegg*, 380 N.C. 127, 141, 2022-NCSC-11, ¶ 37 (citation omitted). Otherwise stated, the trial court’s determination receives great deference on appeal since trial judges are “well qualified to decide if the circumstances concerning the prosecutor’s use of peremptory challenges create[] a prima facie case of discrimination against black jurors.” *Chapman*, 359 N.C. at 339, 611 S.E.2d at 806 (alteration in original) (internal quotation marks and citation omitted). Whereas

questions regarding legal conclusions are “subject to full review” under the de novo standard. *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019).

**A.**

¶ 9 Both the United States Constitution and our North Carolina Constitution place great importance in the right to have a jury and participate in jury service. *See Clegg*, 380 N.C. at 141, 2022-NCSC-11, ¶ 38. These rights are considered a way to “safeguard[] a person accused of crime against the arbitrary exercise of power by a prosecutor or judge.” *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 81 (1986)). Because of this great importance, discrimination on the basis of race during jury selection is not tolerated. *Id.* at 142, 2022-NCSC-11, ¶ 42. Such discrimination “denies [a criminal defendant] the protection that a trial by jury is intended to secure.” *Id.* at 141, 2022-NCSC-11, ¶ 39 (alteration in original) (citation omitted).

¶ 10 Further, it deeply harms the fabric of our “democratic society” and “representative government.” *Id.* Peremptory strikes were one area, historically speaking, in which such racial discrimination was prevalent because of the traditionally liberal use of peremptory strikes. *Id.* at 142, 2022-NCSC-11, ¶ 41. Accordingly, the U.S. Supreme Court drew a line in the sand declaring racial discrimination through peremptory strikes a violation of the equal protection clause within the Fourteenth Amendment. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 82–83.

¶ 11 To determine whether there is an equal protection violation, the Supreme Court created a three-step process, known as “*Batson* challenges,” for courts to “analyze claims of racially motivated peremptory strikes.” *Clegg*, 380 N.C. at 142–43, 2022-NCSC-11, ¶ 43. In step one of the *Batson* challenge, the defendant must bring a claim through a *prima facie* “showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Batson*, 476 U.S. at 94, 90 L. Ed. 2d at 86. Once defendant satisfies step one, the burden then shifts to the State to provide race-neutral reasons for the peremptory strikes. *Id.* at 97, 90 L. Ed. 2d at 88. Finally, if the State provides race-neutral reasons, in step three the court must determine whether the evidence produced demonstrates “purposeful discrimination” by the State. *Clegg*, 380 N.C. at 143, 2022-NCSC-11, ¶ 45.

¶ 12 Our Supreme Court previously described a way to visualize this process. The Court stated:

a common judicial analogy proves illustrative: in step one (and in subsequent rebuttal), the defendant places his reasoning on the scale; in step two (and in subsequent rebuttal), the state places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately decid[e] whether it was more likely than not that the challenge was improperly motivated.

*Id.* at 149–50, 2022-NCSC-11, ¶ 63 (alteration in original) (internal quotation marks and citations omitted). This three-step process is laid out in the following analysis for the present case.

**B.**

¶ 13 Defendant raised a *Batson* objection during the jury venire for racial discrimination since the State removed two of the four prospective African American jurors through peremptory strikes. Defendant argues he presented a prima facie case by showing the relevant facts, taken together, suggest the State acted with purposeful discrimination. Alternatively, he argues even if he did not, the court’s decision on remand to continue to step two and three of the *Batson* process moots the trial court’s determination defendant did not present a prima facie showing under step one.

¶ 14 Step one only requires the defendant present enough evidence to infer a “discriminatory purpose” behind the State’s striking of an African American prospective juror. *Batson*, 476 U.S. at 93–94, 90 L. Ed. 2d at 85–86. In fact, this step of the *Batson* challenge “is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State . . . .” *State v. Waring*, 364 N.C. 443, 478, 701 S.E.2d 615, 638 (2010) (citation omitted). However, when the trial court proceeds to step two and three of the *Batson* process, such continuance moots whether defendant met his burden under step one. *State v. Hobbs*, 374 N.C. 345, 355, 841 S.E.2d 492, 500 (2020).

¶ 15 On remand, the trial court incorporated the *Batson* three-step process in accordance with this Court’s unpublished opinion. The trial court determined defendant did not provide sufficient evidence for a prima facie showing under *Batson*



step one. However, out of “an abundance of caution” the State presented its reasons for removing jurors Nixon and Sidbury. The court also proceeded to step three of *Batson* and determined defendant had not proven purposeful discrimination. Per *Hobbs*, such continuance to steps two and three of the *Batson* process moots the trial court’s determination there was no prima facie showing as to either juror excused. 374 N.C. at 355, 841 S.E.2d at 500. Accordingly, we proceed to step two of the *Batson* process.

¶ 16 Since step one was moot, the burden shifted to the State to present race-neutral reasons for its peremptory strikes of two African American jurors. Under step two, the State’s race-neutral reasons “must be clear and reasonably specific” but the State “does not have to rise to the level of justifying a challenge for cause.” *State v Golphin*, 352 N.C. 364, 426, 533 S.E.2d 168, 211 (2000). The State’s reasons are generally treated as race-neutral “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation.” *Id.* (alteration in original) (internal quotation marks and citations omitted). Also, during this second step, defense may rebut the State’s evidence to expose any pretext within the State’s explanation. *Id.*

¶ 17 The trial court, on remand, concluded the reasons presented by the State during step two were “race neutral on their face.” The State’s race-neutral reasons for juror Nixon, according to the trial court’s findings of fact were:

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Nixon appeared defensive in her demeanor during voir dire, and her body language suggested she was not pleased about being in the jury box. . . . Nixon expressed a dissatisfaction with the criminal justice system due to her brother having been incarcerated pretrial for three years on drug charges in New Hanover County before being sentenced to federal prison. . . . [and] due to Nixon’s work in the mental health field, [the prosecutor] felt that Nixon may sympathize with the defendant, who at the time was homeless and had a problem with alcohol.

The State’s race-neutral reasons for juror Sidbury were:

[D]ue to his family members’ involvement with the criminal justice system, where he stated that they weren’t always treated fairly. . . . [A]t the time of the trial, [the State’s prosecutor] had past and pending felony cases against Sidbury’s cousin, Shaun Sidbury. . . . [and] Sidbury expressed a belief that some of his cousin’s charges were fair and some were not.

¶ 18 As stated in *Clegg*, “the inquiry here is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; that scrutiny is reserved for step three.” 380 N.C. at 149, 2022-NCSC-11, ¶ 62. Based upon our review of the record, the defendant restated the evidence he presented during the prima facie showing as a rebuttal to the State’s alleged race-neutral reasons. Accordingly, since the State’s reasons on their face appear race-neutral, the trial court committed no clear error in concluding the same.

¶ 19 Finally, within step three, the trial court has the duty of determining if there was purposeful discrimination based upon what was proffered by both parties. *Clegg*, 380 N.C. at 143, 2022-NCSC-11, ¶ 45. In considering “all of the relevant

circumstances and reasoning submitted by both parties,” the trial court must “determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination.” *Id.* at 149, 2022-NCSC-11, ¶ 63 (quoting *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241, 204 L. Ed. 2d 638, 653 (2019)). This Court’s ultimate question is whether the “trial court clearly erred in concluding that the State was not motivated in substantial part by discriminatory intent.” *Flowers*, 139 S. Ct. at 2244, 204 L. Ed. 2d at 657 (internal quotation marks and citation omitted).

¶ 20 The trial court was tasked with considering all of defendant’s evidence presented throughout each step to determine the existence of purposeful discrimination. *See Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501. The trial court’s applicable standard for purposeful discrimination is “given all relevant circumstances, whether it was more likely than not that the challenge was improperly motivated.” *Clegg*, 380 N.C. at 138, 2022-NCSC-11, ¶ 30 (internal quotation marks and citation omitted).

¶ 21 The U.S. Supreme Court specified evidence the defendant may proffer to establish purposeful discrimination. This evidence includes:

- statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case;

- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor’s misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State’s peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

*Flowers*, 139 S. Ct. at 2243, 204 L. Ed. 2d at 655–56.

¶ 22

The trial court stated in its findings of fact that defendant offered no evidence that the State’s “statements and questions to the jurors support an inference of discrimination and no historical evidence of discrimination in the Sixth Prosecutorial District.” Of the variety of evidence admissible to challenge the State’s peremptory strikes as purposeful discrimination, defense counsel failed to raise the evidence at the trial court, including on remand, that he now raises on appeal. Defense counsel raised the arguments that two African American jurors were removed, that it appeared any criticism of the criminal justice system resulted in exclusion from the jury, and defense counsel mentioned body language, but then returned to the argument that it had to do with criticism of the criminal justice system. Yet on appeal, defendant now makes side-by-side comparison of the African American prospective jurors excluded and white prospective jurors not excluded, speaks to the statistical evidence of peremptory strikes against African American prospective jurors as compared to white prospective jurors, challenges the State’s questioning of

African American and white prospective jurors, and challenges in detail the questionable evidence of body language as a reason for exclusion of juror Nixon.

¶ 23 While these arguments are well taken, they were not raised at trial, which prevented the trial court from the opportunity to weigh the evidence under *Batson* step three. This is likely the reason the trial court stated in its findings of fact that defendant offered no evidence amounting to “racially discriminatory intent” in response to the State’s race-neutral reasons for its peremptory strikes. This case differs from *Hobbs* and *Clegg*, because in those cases the defense raised their challenges at the trial court level, i.e., as to the statistical disparities, questionable comparisons between white and African American jurors, and the past evidence of disparities in peremptory strikes throughout North Carolina. *Clegg*, 380 N.C. at 151–53, 2022-NCSC-11, ¶ 66–72; *Hobbs*, 374 N.C. at 358–59, 841 S.E.2d at 502–03. Despite the arguments, or the lack there of, the trial court thoroughly considered all the evidence available on the record in the context of the *Batson* steps. Therefore, the trial court did not commit clear error in its decision on remand that defendant failed to show purposeful discrimination.

### III.

¶ 24 Based upon the available evidence before the trial court, the trial court properly applied the *Batson* steps and did not clearly err in overruling the *Batson* objection.

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AFFIRMED.

Judges ZACHARY and JACKSON concur.

Report per Rule 30(e).