Opinion issued September 10, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00183-CR

JAMAL LANCE ADAIR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1112338

DISSENTING OPINION

The trial court's finding that appellant, Jamal Lance Adair, did not prove purposeful discrimination in the State's use of a peremptory strike against venire member 39, an African-American, is clearly erroneous, and the majority errs in

holding to the contrary. In fact, the clerk's record reveals that the State's sole explanation for striking venire member 39, i.e., that he provided "no information" on his juror information card, is objectively false. Accordingly, I dissent.

Contrary to the majority's assertion that one has to "strain the [State's] words" to show that it meant that venire member 39 "provided absolutely no information," the simple fact is that "no information" means "*no* information." There is no other permissible view of the State's use of the words "no information." Also, there is nothing in either the clerk's record or the reporter's record to support the majority's assertion that "it is possible that the [State, at the bench,] . . . point[ed] [out to the trial court] particular fields on the juror information cards as [it] explained that [venire member] 39 put no information [on it]." The majority's implication that the State merely exaggerated its reason for striking venire member 39 defies reason, and the State, itself, never asserted such an argument.

Moreover, the majority errs in concluding that appellant's trial counsel was required to make an argument to the trial court rebutting the State's proffered reason for striking venire member 39. The law is well-settled that we are to consider the "entire record," which obviously includes the clerk's record, in our review for clear error under *Batson*.[1] *See Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App.

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[1] *See Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986).

2008). Under *Batson*, the State must "stand or fall on the plausibility of [its] reasons" for striking a juror. *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005). As an appellate court, we are not, as does the majority, to "imagine a reason [for the State] that might not [be] shown up as false." *Id*. "[W]hen the State's explanation for striking a juror is clearly contrary to the evidence, . . . there is no innocent mistake" and the case must be "reversed for *Batson* error." *Greer v. State*, 310 S.W.3d 11, 16 (Tex. App.—Dallas 2009, no pet.).

In his first issue, appellant argues that the trial court erred in denying his *Batson* challenge to the State's use of its peremptory strike against two African-Americans, venire members 7 and 39, because the State used 60% of its peremptory strikes against African-Americans when the eligible panel was made up of 32% African Americans and the record rebuts the State's proffered race-neutral reasons for the strikes. *See Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). In regard to venire member 39, appellant asserts that the State's representation that venire member 39 "put *no information* on his juror information card" is "completely false."

Following voir dire, the trial court asked the parties if they had any objections to seating the jury. Appellant asserted his *Batson* challenge, noting that the State had "used six of [its] ten strikes to strike blacks." The trial court responded that three

African-Americans and "at least" three Hispanics were seated on the jury. The trial court stated that it had not previously observed any systematic racial strikes "by this particular prosecutor," and it then instructed the State to offer explanations, if it had any, for its peremptory strikes. The State then offered its reasons for striking the six African-American venire members identified by appellant in his *Batson* challenge. In regard to the two venire members identified by appellant on appeal, the State explained that it had struck venire member 7 because, among other things, he was unemployed and venire member 39 because he put "no information on his juror information card." Appellant did not offer any additional evidence or argument following the State's explanations for striking the six identified African-Americans. After this brief discussion, the trial court found the State's explanations to be race neutral and denied appellant's *Batson* challenge.

Racial discrimination has no place in a courtroom. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630, 111 S. Ct. 2077, 2088 (1991). The use of a peremptory challenge to strike a potential juror because of race violates the equal protection guarantee of the United States Constitution. *Batson*, 476 U.S. at 86, 106 S. Ct. at 1717. Such an improper strike also violates article 35.261 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 2006). In the face of perceived purposeful discrimination, a party may request a *Batson*

hearing. *See id.*

In *Batson*, the United States Supreme Court provided a three-step process for adjudicating a claim that a peremptory challenge used against a venire member was based on race. *Snyder v. Louisiana*, 552 U.S. 472, 476–77, 128 S. Ct. 1203, 1207 (2008); *Watkins*, 245 S.W.3d at 447. The opponent of the peremptory challenge must first make a prima facie showing that the peremptory challenge was exercised on the basis of race. *Snyder*, 552 U.S. at 476–77, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447. If that showing has been made, the burden of production shifts to the proponent of the strike to offer a race-neutral basis for striking the venire member in question. *Snyder*, 552 U.S. at 476–77, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447. Finally, the trial court must determine whether the opponent of the strike has shown purposeful discrimination. *Snyder*, 552 U.S. at 476–77, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447.

The "critical question" in determining whether the opponent of a strike has proved "purposeful discrimination" is "the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338–39, 123 S. Ct. 1029, 1040 (2003). Thus, the "ultimate inquiry" is "not whether" the prosecutor's reason is "suspect, or weak, or irrational," but whether the prosecutor "*is telling the truth* in his or her assertion that the challenge is not race-based." *United*

States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993) (emphasis added). The State's proffer of a "pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485, 128 S. Ct. at 1212. The Supreme Court has explained,

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and *stand or fall on the plausibility of the reasons he gives*. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, *its pretextual significance does not fade because a trial judge, **or an appeals court**, can imagine a reason that might not have been shown up as false*.

Miller-El v. Dretke, 545 U.S. at 252, 125 S. Ct. at 2332 (emphasis in bold and italics added).

On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is "clearly erroneous." *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447. In reviewing a record for clear error, "the reviewing court should consider *the entire record* of voir dire; *it need not limit itself to arguments or considerations that the parties specifically called to the trial court's attention* so long as those arguments or considerations *are manifestly grounded in the appellate record*." *Watkins*, 245 S.W.3d at 448 (emphasis added).

In determining whether a party has met its burden to show purposeful discrimination, we may consider a number of factors, including whether the

proponent of the peremptory challenge exercised its challenges to eliminate a far greater proportion of jurors of the same race of the juror in question, whether the reasons offered for striking the juror in question "appeared to apply equally well" to other jurors of a different race who were not struck, whether the proponent of the peremptory challenge utilized its option to shuffle the jury panels in a manner that supported an inference of race discrimination, whether the proponent of the peremptory challenge directed questions expressly designed to elicit grounds for peremptory challenges disproportionately, in a manner that suggested an intent to single out jurors of an identified race for elimination, and whether the proponent of the peremptory challenge had followed a formal policy to exclude jurors of an identified race. *Watkins*, 244 S.W.3d at 448–49.

Here, the clerk's record clearly reveals that the State's explanation that it struck venire member 39 because he had put "no information" on his juror card is objectively false. Contrary to the State's representation to the trial court, venire member 39 answered almost all of the questions presented to him on the card:

Questions Asked:	Answered:
Male/Female	✔
Race	Did not answer
Age	✔

Date of Birth	✔
Texas Driver's License #	✔
Home Phone	✔
County	✔
Have you ever been an accused, complainant, or witness on a criminal case?	✔
Have you ever sustained any accidental bodily injury requiring medical attention?	✔ (Answered, "Yes")
If yes, what type?	Did not answer
Have you ever served on a civil jury?	✔
Have you ever served on a criminal jury?	✔
U.S. citizen?	✔
Your occupation	Answered "N/A"
Your work phone	Answered "N/A"
Your employer	Answered "N/A"
How long?	Answered "N/A"
Spouse's name	✔
Spouse's occupation	✔
Spouse's employer	✔
How long?	✔
Marital status	✔

Highest level of education	✔
Number of children	✔
Age range	✔
Signature	✔

Venire member 39 provided his gender, age, date of birth, home telephone number, county of residence, driver's license number, spouse's name, spouse's occupation, spouse's employer, spouse's length of employment, number of children, and age range of his children. Venire member 39 also identified that he was married, had a high school diploma, and was a United States Citizen. In regard to questions about his employment, venire member 39 answered "N/A" in the spaces provided for occupation, employer, work phone, and length of his employment. He noted that he had not previously served on a civil or criminal jury and had never been an accused, complainant, or witness in a criminal case. Venire member 39 also stated that he had previously suffered bodily injury requiring medical attention. In fact, venire member 39 did not answer only two questions: (1) his race and (2) the type of bodily injury that he sustained requiring medial attention. In sum, including the "N/A" answers supplied by venire member 39, he provided information in 25 of the 27 blanks on his juror card. Thus, the State's representation to the trial court that venire member 39 had provided "no information" on his juror card is objectively false. Again, "no

information" means "*no* information." Also, as noted by appellant, venire members 11 and 32, who were not African-American, also did not completely fill out their juror information cards, yet the State did not strike them.

Thus, the answer to the "ultimate" question of whether the State told the truth in its assertion that its peremptory challenge to venire member 39 was not race based is clearly "no." *See Bentley Smith*, 2 F.3d at 1375. Because the State's race neutral explanation was not genuine, it is pretextual, "naturally giv[ing] rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485, 128 S. Ct. at 1212.

Because the State's "reason does not hold up," its pretextual significance stands, and, under the governing law, the majority is not free to "imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252, 125 S. Ct. at 2332.

Accordingly, I would hold that the trial court's finding that appellant did not establish purposeful discrimination with respect to the State's striking of venire member 39 was clearly erroneous. The trial court's finding, which was based entirely upon the State's sole explanation that it struck venire member 39 because he put "no information" on his juror card, stands in stark contrast to the reality that venire member 39 answered almost every question presented to him on the card. The United States Constitution "forbids striking even a single prospective juror for a

discriminatory purpose." *Snyder*, 552 U.S. at 478, 128 S. Ct. at 1208 (citing *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). Thus, I would further hold that the trial court erred in denying appellant's *Batson* challenge, sustain appellant's first issue, and remand the case to the trial court for a new trial. The majority's holding to the contrary and affirmance of the trial court's judgment are in serious error. It has committed an error of such importance to the State's jurisprudence that it should be corrected. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004).

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.

Justice Jennings, dissenting.

Publish. TEX. R. APP. P. 47.2(b), 47.4.