Opinion issued May 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00967-CR

BRANDON RASHARD LEDFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 17-CR-3568

CONCURRING OPINION

Although we agree with the analysis and disposition of the sufficiency issue, the analysis of the racially motivated use of a peremptory strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), requires a closer look. Despite a timely and specific objection to the State's striking of two of three African American members of the

venire based on race, the majority concludes that the defense waived its challenge because it did not rebut the State's proffered race-neutral explanation of its strikes. Because this Court has previously held that such a rebuttal is required, we are constrained to join the Court's opinion finding that Ledford waived his objection. But because (1) *Batson* does not require a rebuttal to preserve error and (2) the fundamental nature of the right militates against creating a hurdle to jury participation, this Court should revisit its opinion in *Adair v. State*, 336 S.W.3d 680 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), en banc to right its *Batson* jurisprudence.

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)). The United States Supreme Court recognized as early as 1880 that states may not statutorily discriminate in jury selection, yet many jurisdictions used other less overt procedural tools to exclude citizens from jury participation on the basis of race, including peremptory strikes. *Id*. at 2239. This led to *Batson*.

Batson's shield against disparate treatment covers both the defendant and the prospective juror. *Edmonson v. Leesville Concrete Co., Inc*., 500 U.S. 614, 616 (1991). As a result, it applies regardless of the race of the defendant. *Powers*, 499 U.S. at 400. And the right applies in civil and criminal cases. *Edmonson*, 500 U.S.

at 616. There is no amount of race-based selection that is harmless or permissible. *See Flowers*, 139 S. Ct. at 2241 ("In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.").

The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979), damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers*, 499 U.S. at 411.

> Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.

Flowers, 139 S. Ct. at 2242–43. The exclusion of even one member from the jury panel for racial reasons invalidates the entire jury selection process. *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989). That is because the right to be free from racial discrimination in jury selection is fundamental. *See generally Flowers*, 139 S. Ct. at 2238–39.

The treatment of race in jury selection is sufficiently invidious and was so pervasive that the Supreme Court designated the error as structural.[1] *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017); *Bausley v. State*, 997 S.W.2d 313, 318–19 (Tex. App.—Dallas 1999, pet. denied) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). As structural error, racially discriminatory jury selection requires reversal without a showing of harm because it can cause "fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver*, 137 S. Ct. at 1911. For this type of structural error, it would be "futile for the government to try to show harmlessness." *Id*. at 1908.

Batson itself was a reaction to the "crippling burden of proof" previously required under *Swain v. Alabama*, 380 U.S. 202 (1965), to demonstrate purposeful racial discrimination. *Williams v. State*, 804 S.W.2d 95, 97 (Tex. Crim. App. 1991). In eliminating the dictate that "'several must suffer discrimination' before one could object," *Batson* set forth a three-step analysis, not a four-step analysis. *Batson*, 476 U.S. at 96. First, the defendant must make a prima facie showing of racial

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[1] The Supreme Court has designated other errors as structural: (1) lack of an impartial trial judge; (2) the unlawful exclusion of members of the defendant's race from a grand jury; (3) the denial of the right to self-representation at trial; (4) the denial of the right to a public trial; and (5) an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard. *See Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005) (citing *Johnson v. United States*, 520 U.S. 461, 468–69 (1997)).

discrimination. *Id.* at 96–97. If the defendant makes his showing, the burden shifts to the state, requiring it to articulate a race-neutral explanation for the strike. *Id*. at 97. The state's proffered reason need not be persuasive, as long as it is not race based. *Purkett v. Elem*, 514 U.S. 765, 769 (1995). Third and finally, the trial court determines whether the defendant has satisfied his burden of persuasion to show by a preponderance of the evidence that the strike was actually the product of purposeful discrimination. *Id*. *Batson* included no intermediate rebuttal step. *Batson*, 476 U.S. at 98–100. Nor does the state's announcement of a race-neutral reason eviscerate the defendant's prima facie showing.

In the first post-*Batson* reversal in Texas, the failure to rebut the State's race-neutral reasons for its strikes of the only African American jurors posed no impediment to the Court of Criminal Appeals finding that the State's proffered reasons were insufficient as a matter of law to rebut the defendant's prima facie showing of racial discrimination in jury selection. *Whitsey*, 796 S.W.2d at 716 (reversing for a new trial despite defendant's lack of rebuttal because trial judge's finding that prosecutor's explanation was sufficient was unsupported by the record).

Indeed, the Court of Criminal Appeals phrased the defendant's burden after the State's proffer as whether the defendant "continued to sustain his burden of persuasion in establishing purposeful racial discrimination by the State's use of peremptory challenges, thus rebutting any race neutral explanation given at the

Batson hearing." *Williams*, 804 S.W.2d at 101. This follows the phrasing in the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 35.261. There was no requirement that the defendant provide additional evidence or objection.[2]

Requiring the defendant "continue to sustain" a burden of proof to prevail is not the same as a rebuttal requirement. The "rebut or waive" approach in *Adair* is in tension with the fundamental nature of the right and the procedures safeguarding it. As the majority notes, a defendant may raise a disparate treatment argument for the first time on appeal. *Young v. State*, 826 S.W.2d 141, 145–46 (Tex. Crim. App. 1991). Both at the trial and appellate level, the court engages the entire voir dire record, not limited to the arguments of the parties. *Nieto v. State*, 365 S.W.3d 673, 675–76 (Tex. Crim. App. 2012).[3] And yet, if the defendant fails to rebut the prosecutor's facially race-neutral reasons for its strikes, this Court is bound to conclude that any complaint about race-based jury selection is waived. *Adair*, 336 S.W.3d at 689–90. Presumably, this would be true even if the trial court had erred

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[2] This explanation in *Williams* was muddied somewhat by dicta in *Chamberlain v. State*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999), that the trial court did not err in concluding that the defendant did not carry his burden of persuasion due, in part, to "the absence of real rebuttal – for example, that no white venire members with similar views were ignored by the State." This assertion was unaccompanied by any citation and does not account for the trial court's role in the third step. This assertion has been cited in many cases for the proposition that a defendant's failure to offer "any real rebuttal" to a proffered race-neutral explanation "can be fatal to the claim." *See, e.g., Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002).

[3] *Nieto* confirms that *Batson* is a three-step process, not a four-step process. *Nieto*, 365 S.W.3d at 675–76.

in finding that the State had articulated a race-neutral explanation for its strikes. It does not make sense to require robust evaluation of *Batson* claims at the trial and appellate level only to dispose of the claims as waived if the defendant did not present rebuttal.

There is also a practical problem with requiring immediate rebuttal on pain of waiver. While a prosecutor may be able to quickly refer to notes to proffer race-neutral reasons for strikes they made moments earlier, a comparative analysis of similarly situated jurors for a panel of 82 potential jurors in a criminal case takes time. Many lawyers go to trial alone. The record does not reflect the presence of a second lawyer on either side.

Even if it were a good idea, *Adair*'s rebuttal requirement rests on a foundation of quicksand. First, *Adair* cites *McKinney v. State*, No. 01-05-00804-CR, 2006 WL 2042517 (Tex. App.—Houston [1st Dist.] July 20, 2006, no pet.) (mem. op., not designated for publication), which, as an unpublished memorandum opinion, had no precedential value. TEX. R. APP. P. 47.4(a). *McKinney* concludes that the defendant "did not attempt to rebut the prosecutor's race-neutral explanations and therefore failed to meet the burden of persuasion on his challenge[.]" *McKinney*, 2006 WL 2042517, at *3. The cases *McKinney* cites, however, do not hold that a defendant must rebut the race-neutral reason or face waiver. The cases only note that a defendant, who *may* rebut, has the ultimate burden of persuasion. *Purkett*, 514 U.S.

at 768 (ultimate burden of persuasion in *Batson* challenge rests with defendant); *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001) (defendant "has the opportunity to rebut" but the "burden of persuasion remains with the defendant"); *Stewart v. State*, 176 S.W.3d 856, 858 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (same). Having the opportunity to rebut is not the same as having a requirement to rebut.

Adair then relies on *United States v. Arce*, 997 F.2d 1123, 1126–27 (5th Cir. 1993), which concluded that the defendants' failure to specifically contest the government's proffered race-neutral reasons, brief employment and an unexplored concern that because the juror spoke fluent Spanish, he might resist official translations of trial evidence. *Id*. *Arce* concluded, without citation, that the defense had not disputed that explanation, so "the district court had no need to rule on its validity." *Id*. at 1127. Later, the *Arce* court quoted *United States v. Rudas*, 905 F.2d 38 (2d Cir. 1990), which required defense counsel to "expressly indicate an intention to pursue the *Batson* claim" after the government has offered reasons for its peremptory challenges. *Id*. at 41. Notably, *Rudas* cited no authority nor provided any explanation for its conclusion that by failing to dispute the government's proffer, the defendant "appeared to acquiesce." *Id*. *Rudas* and *Arce* appear to only require a reurging of the *Batson* claim, but *Adair* suggests a substantive rebuttal requirement. No authority tied to precedent justifies the rebuttal requirement in *Adair*. These

federal cases, with no authority or grounding in the *Batson* framework, cannot justify undermining so fundamental a right as that of a citizen to participate in the administration of justice or the defendant's right to be tried by a jury selected without racial discrimination.

Batson does not have a rebuttal requirement. In the 35 years since *Batson*, the Supreme Court has never imposed one. Instead, the Court has rebuffed state attempts to increase the burden on criminal defendants asserting *Batson* challenges. *See, e.g.*, *Johnson v. California*, 545 U.S. 162, 170 (2005) (rejecting California's requirement that the defendant demonstrate at step one that the challenge was more likely than not the product of purposeful discrimination, rather than merely producing evidence supporting an inference of discrimination). Indeed, it is difficult to imagine any objection in a criminal trial, much less a key protection under the Equal Protection Clause, requiring rebuttal to preserve error. As *Batson* itself recognized, the job of enforcement rests "first and foremost" with trial judges. *Flowers*, 139 S. Ct. at 2243. *Batson*'s third step is the trial judge's consideration of the race-neutral explanations in light of all the relevant facts and circumstances and the arguments of the parties. *Id*. It is not a rebuttal by the defense.

Fabrication of a rebuttal requirement in *Adair* found nowhere in *Batson* or its progeny has had two nefarious consequences. First, it improperly shunts otherwise valid *Batson* challenges to the garbage bin of waiver. Second, it relieves the trial

court of performing the *Batson*-mandated analysis that this Court reviews. *Adair*'s rebuttal requirement allows race-based juror selection to go unexamined.

The trial court, the primary enforcer of *Batson*, did not complete step three. First, the trial court did not, as required, *Davis v. Fisk Elec. Co*., 268 S.W.3d 508, 515–16 (Tex. 2008), give the defendant an opportunity for any rebuttal. Second, the trial court was obligated to, but did not, evaluate the State's race neutral reasons for the strikes. *Batson*, 476 U.S. at 98 ("The trial court then will have the duty to determine if the defendant has established purposeful discrimination."). The trial court did not make any findings or examine all relevant factors, instead immediately responding only, "Okay. Your motion is denied." The entire *Batson* proceeding lasted one minute.

Without the rebuttal requirement in *Adair*, the result here likely would have been different. Instead of being disposed of as waived, the proper disposition might have been to remand to have the trial court conduct a *Batson* third-step analysis in the first instance. *See, e.g., Hutchinson v. State*, 86 S.W.3d 636, 638–39 n.1 (Tex. Crim. App. 2002); *Kassem v. State*, 263 S.W.3d 377, 383 (Tex. App.—Houston [1st Dist.] 2008, no pet.). This would have allowed the trial court to examine "all relevant circumstances." *Davis*, 268 S.W.3d at 511. Several factors can show purposeful discrimination. *Id*. at 512–14 (citing *Miller-El v. Dretke*, 545 U.S. 231, 240–66 (2005)). "[T]he presence of any one of these factors tends to show that the State's

reasons are not actually supported by the record or are an impermissible pretext." *Whitsey*, 796 S.W.2d at 713.

One factor is a statistical analysis of the state's peremptory strikes. Another is a comparative juror analysis to examine disparate treatment of potential jurors.[4] The Supreme Court noted that "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists who were allowed to serve." *Miller-El*, 545 U.S. at 241. The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id*. The Court rejected the notion that struck venire members must be compared only to jurors who are identical in all respects: "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie

[4] A third factor the Supreme Court considered was the prosecution's use of the jury shuffle, a practice unique to Texas, that the district attorney's office had previously admitted to using to manipulate the racial makeup of juries. *Davis*, 268 S.W.3d at 513 (citing *Miller-El*, 545 U.S. at 254). The fourth factor the Supreme Court relied on was the "contrasting voir dire questions posed respectively to black and nonblack panel members," giving black panel members a graphic account of the death penalty before querying them on their opinions while giving nonblack panel members a bland description." *Davis*, 268 S.W.3d at 513 (quoting *Miller-El*, 545 U.S. at 255). Finally, the Supreme Court considered the Dallas County District Attorney's Office's history of "systematically excluding blacks from juries" using a manual distributed to line prosecutors. *Davis*, 268 S.W.3d at 514 (quoting *Miller-El*, 545 U.S. at 263 (further quotation omitted)).

cutters." *Davis*, 268 S.W.3d at 247 n.6; *see Moore v. State*, 265 S.W.3d 73, 86–88 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd) (finding no meaningful difference between failing to respond to a question on the juror questionnaire and a response of a series of question marks and concluding that the state's explanation applied equally to non-African American potential jurors).

On appeal, we review for clear error, but that is just another way of saying that the trial court's conclusions must be supported by the record. *Hill v. State*, 827 S.W.2d 860, 866 (Tex. Crim. App. 1992) (stating that the *clearly erroneous* standard is "analytically and intellectually the same" as the *supported by the record* standard). While we cannot substitute our judgment for that of the trial court, we are not limited to the specific arguments presented at trial. *Id.* Instead, we review the voir dire record in its entirety. *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App. 2008). We engage that analysis here.

Ledford is African American. His complaint was that the State struck two African American potential jurors, No. 8 and No. 16, without an apparent race-neutral basis. Jurors 8 and 16 were two of the three remaining African American venire members on the panel. The State responded that No. 8 disagreed with No. 48's take on the law of parties and also "gave low numbers" to the defense's questions. As for No. 16, he gave a "neutral" number in response to the defense's questions so he "couldn't pick a side." This explanation is facially race-neutral,

satisfying step two of the *Batson* procedure. Per *Batson*, the trial court should then have evaluated the State's reasons to determine whether those explanations were genuine or a pretext for purposeful discrimination. *Whitsey*, 796 S.W.2d at 713.

Here, the trial court only checked that the record did not contradict the State's race-neutral explanation. The trial court noted that the State had correctly recited Juror No. 8 and Juror No. 16's responses, but this is only one potentially relevant factor. *See Jones v. State*, 431 S.W.3d 149, 156 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (whether the record contradicts the State's explanation for its strikes is one of many factors for the trial court to consider in its *Batson* evaluation). What the trial court did not do was to compare Juror No. 8 and Juror No. 16 with other similarly situated potential jurors. Without a comparative analysis, there was no way to evaluate the genuineness of the State's proffered explanations. *See Nieto,* 365 S.W.3d at 675–76. If there is no meaningful difference between those who were struck and those who were not, the proffered reason does not explain the basis for the strike.

Had the trial court held a full hearing and considered the entirety of voir dire and all relevant circumstances and given the defense an opportunity for rebuttal, the trial court would have seen that the State treated similarly situated jurors of different races differently. First, although the State correctly noted that No. 8, N. Taylor, disagreed with No. 48's statement about the law of parties, Taylor was not the only

juror to do so. Indeed, No. 39, a white juror, responded the same way Taylor did, by holding up their juror number as someone who disagreed with No. 48. But No. 39 was not struck. The State did not interrogate either potential juror further about the law of parties. Even so, the State did receive more information about Taylor, who, after hearing more about the law of parties, did not hold up her juror card to agree that she could not follow the law of parties. Neither did No. 39. This would seem to overcome the State's race neutral explanation. But the State cited two facially neutral explanations, so we will look at both. *See Cantu v. State*, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992).

The State also cited Taylor's "low numbers" on the defense's questions about (1) whether jurors agreed or disagreed with the idea that a defendant should present evidence and (2) whether an indictment was evidence of guilt. But looking at each prospective juror's responses to all questions requiring a numbered response, not just the defense's questions, puts Taylor on equal footing with No. 39, and belies the State's assertion that her responses "created a defense line to juror instead of a State's line to juror."

Question	Juror No. 8	Juror No. 39
A defendant should testify	3 (neutral)	1 (strongly disagree)
Most important punishment factor	1 (seriousness of the offense)	1 (seriousness of the offense)
A defendant should present evidence	1 (strongly disagree)	3 (neutral)
An indictment is evidence of guilt	1 (strongly disagree)	1 (strongly disagree)
	TOTAL: 6	TOTAL: 6

Neither juror's responses created a "defense line" to a juror: they had the same total score when their answers were tallied. Taylor was African American; No. 39 was white. Taylor was struck; No. 39 was not. As the Supreme Court explained, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El*, 545 U.S. at 241.

Second, the State explained that it struck Juror No. 16, C. Isaac, because "in all of the defense's [scaled] questions he answered number three, which means that he was just a neutral juror, he couldn't make a decision . . . he couldn't pick a side." Although it is true that Isaac answered both defense questions as neutral, he was not the only one to do so. Juror No. 53, who was white, also answered both questions neutrally. Both jurors also answered the State's scaled question about the defendant testifying neutrally. But the State did not strike No. 53.

Question	Juror No. 16	Juror No. 53
A defendant should testify	3 (neutral)	3 (neutral)
A defendant should present evidence	3 (neutral)	3 (neutral)
An indictment is evidence of guilt	3 (neutral)	3 (neutral)
	TOTAL: 9	TOTAL: 9

Who knows how many meritorious *Batson* claims have succumbed to this imaginary rebuttal requirement? Just as one racially discriminatory peremptory strike is one too many, *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), one trial tainted by unexamined *Batson* error is one too many. The Supreme Court has "vigorously enforced and reinforced [*Batson*] and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2243. We must do the same.

Sarah Beth Landau
Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.
Justices Landau and Countiss, concurring.