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

O P I N I O N

A jury convicted appellant, Brandon Rashard Ledford, of murder and assessed his punishment at 80 years' confinement and a $10,000 fine. In two issues on appeal,

appellant contends that the trial court abused its discretion in denying his *Batson*[1] challenges. In a third issue, appellant contends that the evidence is insufficient. We affirm.

BACKGROUND

The Murder

On the night of April 9, 2017, Brandon Lozano was working as a bellman at the San Luis Resort in Galveston, Texas. While Lozano was taking luggage to a room on the sixth floor of the hotel, he looked out a window on the back side of the hotel and saw three men wearing black hoodies looking in various cars in the hotel's parking lot. As he watched, at least one of the men broke the glass on several vehicles and all three of the men began "going through the cars" in the parking lot. Lozano called his manager and told him to alert security. As Lozano continued to watch from the sixth floor, a security guard, Phillip Molis, pulled his vehicle around the building toward the parking lot.

Molis contacted another security officer, John Pike, to let him know what Lozano had seen and Pike, too, began to make his way toward the parking lot. Molis also called Lozano, who was still watching from the sixth floor, and Lozano directed

[1] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

Molis where to go in the parking lot. Lozano could see that Molis was using a flashlight and he also knew that Molis was unarmed.

Molis ran at one of the three men in an apparent attempt to scare him off. That man, who was wearing a black-hooded sweatshirt, backed away briefly before reaching toward his belt, pulling out a handgun, and firing multiple shots at Molis.

Lozano immediately left his vantage point and began running downstairs toward the parking lot. As he was running downstairs, he called his manager to let him know what had happened. Pike, the other security officer, and Thomas Bushek, a police officer who had been attending a conference next door, both reached Molis at approximately the same time. At 10:15 p.m., Pike reported the shooting to police and called an ambulance. As he lay on the ground after being shot, Molis indicated to Bushek and Lozano the direction in which the three men had fled. Molis, who had been shot ten times, died six days later.

The Aftermath

While in the parking lot that night, police recovered 12 shell casings in the area where Molis was shot. The shell casings were several different brands but had all been fired from the same weapon, a Beretta .9 mm handgun. Two fired bullets were also found and had been fired from the same handgun. In total, nine cars had been burglarized that night. Near one burgled car, the police recovered a makeup bag with a shoe print on it.

Officers began searching the area in which Molis indicated the three hooded men had fled. In a field just to the west of the San Luis, officers found a window punch, which is often used to break car windows during a burglary. Further west, in a nearby neighborhood, police recovered a black sweatshirt and some gloves. The sweatshirt had several shards of glass in its pockets. Police also found a Beretta .9 mm handgun nearby on a fence. Near where the handgun was recovered, a portion of the fence had been broken in a westward direction. Next to the fence where the handgun was recovered, police found an aloe-vera-type plant that had been stepped on leaving a shoe print.

The night of the shooting, the police also used K-9 officers and their dogs to search for the suspects. After approximately 30 minutes of searching, Officer J. Picard and his dog were returning to the San Luis to rest when Picard noticed a fenced-in air conditioning unit near the parking lot. As he passed the space, Picard saw the top of someone's head, and he instructed the suspect to come out. The suspect found hiding, Tyrone Rufus Davis Haynes,[2] was handcuffed and arrested. Davis claimed that he was homeless and had been sleeping there, but, when searched incident to arrest, he was found to be in possession of a stack of $100 bills. When arrested, Davis was wearing tan pants, a t-shirt with the word "cocaine" on it, and a

[2] Tyrone Rufus Davis Hayes was referred to as both "Davis" and "Haynes" in the record of this trial. For purposes of this opinion, we refer to him as "Davis," the name which seemed to have been used more frequently during the trial.

black-hooded sweatshirt. Shards of glass were also recovered from this sweatshirt. Davis's cell phone was also taken from him and police also recovered a pair of latex gloves from his hiding place.

The Evidence Regarding Events Before the Murder

From information on Davis's cell phone, police developed appellant as a suspect. Specifically, on Davis's cell phone, police found videos created on April 6 and 8, 2017, shortly before the shooting, in which appellant was holding a weapon and wearing a sweatshirt, both of which were "strikingly similar" to those recovered from the neighborhood near the San Luis.

Police recovered video from Gaido's Seaside Inn, which was recorded on the day of the murder at 7:30 p.m. On the video, two men, one of which is appellant, approached the desk and asked about pricing for a room. Appellant was wearing a Spitfire t-shirt. Appellant and the other man left without renting a room. The hotel manager noticed that the two men went outside and left in a gold Lexus; she also noticed a third man in the driver's seat of the car.

Police later determined that Davis's cell phone had connected to the Quality Inn in Galveston on the day of the shooting. Records and video from the Quality Inn show that at 8 p.m. on the night of the murder, Davis and a third man, Marcus Moffett, rented adjoining rooms at the Quality Inn for one night. They were

accompanied by appellant and a woman, Khevan Thorne. Appellant was still wearing the Spitfire shirt he had been wearing earlier in the evening at Gaido's.

Video showed that Thorne left the room by herself at 9:21 p.m. and the three men left together at 9:23 p.m. Appellant was wearing a black-hooded sweatshirt, the same Spitfire t-shirt, frayed jeans, and black and white Jordan tennis shoes. Davis was wearing a black-hooded sweatshirt, khaki pants, and black tennis shoes; he was wearing the same clothes when arrested later that night. Moffett was wearing a black, long-sleeved Michael Jordan shirt, a black baseball cap, blue jeans, and black shoes. Three minutes later, the men were captured on video in the hotel's parking garage. Moffett was no longer wearing the baseball cap, but he had put on a black-hooded sweatshirt. The men did not leave in the gold Lexus but departed the hotel on foot.

Video later showed appellant returning to the Quality In at 10:21 p.m.; he was alone, on foot, and traveling from the direction of the San Luis. Appellant was wearing the same Spitfire shirt, frayed jeans, and white and black Jordan shoes, but he was no longer wearing the black-hooded sweatshirt. Thorne arrived at the hotel later; she was seen pacing back and forth and appeared to be nervous. Moffett returned to the Quality Inn sometime after appellant and Thorne; he was wearing the same long-sleeved Michael Jordan shirt, blue jeans, and black shoes; his black-hooded sweatshirt was tied around his waist.

Thorne, appellant, and Moffett left the hotel in the gold Lexus at 11:02 a.m. the morning after the shooting. Later that day, Thorne drove the gold Lexus to the Galveston Police Station and attempted to bond Davis out of jail.

The day after the shooting, Steven Jones heard about the shooting at the San Luis and went to police to tell them about an encounter he had with three men in black-hooded sweatshirts that occurred before the shooting. Jones was attending a public safety conference at the Galveston Island Convention Center, which is near both the Hilton Galveston Island Resort and the San Luis Resort. He was walking in a group of 10 conference attendees from the San Luis to the Hilton, where they were staying. As they walked behind the IHOP restaurant, which is between the San Luis and the Hilton, three men in their mid-20s jumped out at them from behind some bushes. Jones suspected the men had ill intentions, but they nevertheless moved on, possibly because of the size of Jones's group. Jones believed that, had he been alone, the men would have mugged him. Police later showed Jones a photo array that included appellant, Davis, and Moffett. Jones was able to identify Davis.

The Physical and Forensic Evidence

Surgeons removed several bullets from Molis's body. An analysis of the bullets showed that they were fired from the same Beretta .9 mm handgun that the officers recovered from the neighborhood between the San Luis and the Quality Inn.

All the shell casings and bullets recovered from the San Luis parking lot were fired from the same Beretta .9 mm handgun that the officers recovered from the neighborhood between the San Luis and the Quality Inn.

The shoeprint on the makeup container that was recovered from the San Luis parking lot was compared to the shoes appellant was wearing when arrested and they were found to be similar in size and tread design.

The Beretta .9-mm handgun that police recovered from the neighborhood between the San Luis and the Quality Inn was used to fire the bullets that struck Molis. A DNA analysis of the of the handgun revealed that there was a mixture of DNA from at least four contributors, at least two of which were male, but the DNA mixture was not suitable for comparison because of the excessive number of contributors. The handgun was "strikingly similar" to the gun that appellant was seen with in the videos recovered from Davis's cell phone, both of which were recorded a few days before the shooting.

The disposable latex gloves that were recovered from the neighborhood between the San Luis and the Quality Inn were analyzed and revealed that appellant was a major contributor to the DNA mixture on both gloves. The possibility that a randomly chosen unrelated individual would be included as a possible contributor to the major component of the DNA mixture was 1 in 40 septillion for African Americans on one glove and 1 in 11 octillion for African Americans on the other

glove. A gunshot residue test was also performed on both gloves, and the result was consistent with the gloves having been in the immediate proximity of a weapon as it was being fired or coming into contact with a surface containing gunshot primer residue particles.

The shoeprint on the broken aloe-vera-type plant near the location where the gun was recovered was compared to the shoes appellant was wearing when arrested and were found to be similar in size and tread design.

The black-hooded sweatshirt that was recovered near the handgun and gloves in the neighborhood between the San Luis and the Quality Inn revealed a DNA mixture from at least five contributors, at least one of whom was male, but the DNA mixture was not suitable for comparison due to an excessive number of contributors. Shards of glass were discovered on the sweatshirt. When appellant returned to the Quality Inn on the night of the murder, he was not wearing the black-hooded sweatshirt that he had on when he left. In contrast, Davis was wearing a black-hooded sweatshirt when he was arrested, and Moffett had a black-hooded sweatshirt tied around his waist when he returned to the Quality Inn.

The clothes Davis was wearing when arrested were also analyzed. Davis's pants had a stain that appeared to be blood. Analysis of the stain showed that it was, in fact, blood and that the single DNA profile obtained from the pants was 43.9 nonillion times more likely if the DNA came from [Davis] than if the DNA came

from an unrelated, unknown individual. A gunshot-residue test was performed on Davis and showed that he either fired a weapon or was in the immediate proximity of a weapon as it was being fired.

The gloves that were recovered from Davis's hiding place when he was arrested were also analyzed and revealed that Davis was a major contributor to DNA discovered on the gloves. The probability that a randomly chosen unrelated individual would be included as a possible contributor to the DNA mixture was 1 in 10 decillion for African Americans. Appellant, Moffett, and Molis were excluded as possible contributors to the major component of the DNA mixture found on the gloves recovered near Davis. A gunshot-residue test on the gloves did not reveal the presence of gunshot residue.

The Arrest of Appellant and Moffett

On April 15, 2017, Galveston Police officers were conducting surveillance when appellant was seen leaving the Galveston County Jail after apparently attempting to free Davis on bond. Appellant walked away from the jail toward a nearby post office where he got into the passenger seat of the gold Lexus. Officers followed the Lexus, and after several turns in different directions, the gold Lexus finally pulled into a Kroger parking lot near the neighborhood in which the gun, gloves, and sweatshirt had been found. When the gold Lexus began driving in and out of parking spaces at the Kroger, the officers were concerned that the occupants

of the car were aware that they were being followed. However, the gold Lexus eventually left the Kroger parking lot and drove into the neighborhood from which the murder weapon had been recovered.

Sometime later, the gold Lexus returned to the parking lot and the officers decided to stop it. Moffett was driving, and, although he initially resisted, he was safely taken into custody. Appellant was not in the gold Lexus when it was stopped, so officers drove into the neighborhood looking for him. When officers located him and asked him for his name, appellant gave them a name other than his own. When he was arrested, appellant appeared to be wearing the same type of jeans and shoes that he had worn on the day of the offense.

The gold Lexus was taken to the police station and an inventory search was conducted. A great deal of ammunition was recovered from the car, including several rounds that were the same type as that recovered from the murder weapon. The police also recovered a window punch that was the same make and model as the one recovered near the San Luis. There were also shards of glass in the gold Lexus as well as items from the Quality Inn.

Officers also recovered a Spitfire t-shirt like the shirt appellant was wearing the night of the offense, and a black-hooded Crooks hooded sweatshirt and a long-sleeved Michael Jordan shirt like those that Moffett was wearing the night of the offense. A DNA analysis of the Spitfire t-shirt revealed that appellant was a major

contributor to the DNA mixture on the shirt. A DNA analysis of the black hooded Crooks sweatshirt revealed that Moffett was a major contributor to the DNA found thereon. Several pairs of jeans and shoes, for whom Moffett was a major contributor, were also recovered. One pair of frayed jeans, similar in appearance to those appellant was wearing on the day of the offense and when he was arrested, showed that both appellant and Davis were major contributors to the DNA found thereon. A pair of Empyre jeans tested positive for blood and a DNA analysis showed a single DNA profile for which Moffett was a major contributor. Officers also recovered baseball caps that appeared similar to those Moffett and Thorne were wearing on the day of the offense.

The officers also tested the gold Lexus for fingerprints, and they found fingerprints belonging to appellant, Moffett, and Thorne. Moffett's fingerprints were on the driver's side door handle and appellant's fingerprints were recovered from the bottom of the trunk lid and the rear bumper.

SUFFICIENCY OF THE EVIDENCE

In issue three,[3] appellant contends that "the evidence is insufficient to prove appellant was guilty of murder under any of the State's seven murder theories." The

[3] Although raised as his third issue, we address appellant's sufficiency issue first because in it he seeks an acquittal. *See Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("We address appellant's second issue first because it challenges the sufficiency of the evidence and seeks rendition of a judgment of acquittal."); *see also King v. State*, No. 01-18-00335-CR, 2019 WL

State responds that "[w]hen viewed together, the circumstantial evidence in this case shows beyond a reasonable doubt that appellant committed the offense as the primary actor." Even though the jury charge authorized a conviction on multiple theories—including as a primary actor, as a party, and as a conspirator—and we must uphold the jury's verdict if the evidence is sufficient under any of the multiple theories,[4] we will first review the theory argued by the State on appeal. That is, we will consider whether sufficient evidence to supports appellant's conviction as the primary actor.

Standard of Review and Applicable Law

When reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *see Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is only standard to apply to determine sufficiency of evidence). The jury is the exclusive

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5432053, at *2 (Tex. App.—Houston [1st Dist.] Oct. 24, 2019, pet. ref'd) (mem. op., not designated for publication) (stating same); *see also Benavidez v. State*, 323 S.W.3d 179, 182 (Tex. Crim. App. 2010) (holding sufficiency of evidence, when raised, must be addressed before trial error because sustaining it results in acquittal and "would interpose a jeopardy bar to retrial").

4 *See Green v. State*, 495 S.W.3d 563, 572 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

judge of the facts and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). As the sole judge of credibility, the jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

We afford almost complete deference to the jury's credibility determinations. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). We may not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Rather, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (quoting *Jackson*, 443 U.S. at 319). We resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Analysis

Appellant points out that there was no direct evidence presented establishing his *identity* as the shooter. However, circumstantial evidence alone may be sufficient to establish guilt. *Sorrells*, 343 S.W.3d at 155. Thus, we consider whether the circumstantial evidence in this case was sufficient to establish the element of identity. We hold that it was.

The evidence established that appellant was a known associate of Tyrone Davis. In fact, police first developed appellant as a suspect after recovering videos of him taken from Davis's phone, which was seized when Davis was arrested and searched pursuant to a warrant. In the videos, taken just days before the murder, appellant was seen holding a gun and wearing a sweatshirt that were "remarkably similar" in appearance to those recovered after the murder in the neighborhood near the San Luis.

Based on the evidence presented at trial, the jury could have reasonably concluded that appellant was with Davis and Moffett in Galveston and at the San Luis on the night of the offense. Video from Gaido's Surfside Inn shows appellant and another man enter and then drive away from Gaido's in a gold Lexus; a third man was in the car. Shortly after the three men left Gaido's, video from the Quality Inn shows Davis and Moffett rent rooms, accompanied by appellant and Thorne. Evidence also places the men near the San Luis on the night of the offense. Steven

Jones, who was attending a conference at the convention center near the San Luis, testified that three men jumped out at him and the group he was with as they were walking toward the San Luis. The men, one of whom Jones later identified as Davis, fled when they saw the number of people with Jones.[5]

Based on the evidence presented, the jury could have reasonably concluded that appellant discarded the murder weapon, his gloves, and his sweatshirt as he fled from the San Luis back to the Quality Inn. A handgun, later determined to be the weapon from which the bullets that killed Molis were fired, was found on a fence in the neighborhood between the San Luis and the Quality Inn.

Although no DNA analysis or fingerprints were recovered from the handgun, the handgun was located near some discarded latex gloves. Both gloves had a mixture of DNA, of which appellant was the major contributor. Davis and Moffett were excluded as contributors to the major component of DNA on the gloves. From this evidence, the jury could have concluded that these gloves were worn by appellant.[6] At least one of the gloves also tested positive for a high level of gunshot-

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[5] Though argument is not evidence, appellant's counsel admitted that appellant was at the San Luis on the night of the offense, stating to the jury in opening statements that "there is no doubt, no doubt whatsoever that [appellant] was in and around that parking lot that night. We're not arguing that . . . he was somewhere else. He was in the parking lot."

[6] In contrast, the latex gloves that were recovered from Davis's hiding place also had a DNA mixture, of which Davis was the major contributor; appellant and Moffett were excluded as major contributors. From this evidence, the jury could have reasonably concluded that the gloves recovered near Davis were, in fact, worn by

residue particles, meaning it was in the immediate proximity of a weapon as it was fired.

The murder weapon was also recovered near a black-hooded sweatshirt. The black-hooded sweatshirt—a black Nike sweatshirt that appeared similar to one that appellant was wearing in the videos on Davis's phone and on the video from the Quality Inn—had at least five DNA contributors, which was too many for a meaningful analysis. It was also not tested for gunshot residue because, according to the State, it was recovered more than four hours after the shooting. There were, however, shards of glass recovered from the sweatshirt. And, the evidence showed that when appellant, Davis, and Moffett left the Quality Inn on the night of the murder, all three were wearing black-hooded sweatshirts. Davis had his when he was arrested, and video from the Quality Inn showed that Moffett had his tied around his waist when he returned to the hotel after the shooting. Only appellant had lost his black-hooded sweatshirt during the evening. From this, the jury could have reasonably concluded that the sweatshirt found near both the murder weapon and the gloves with appellant's DNA and gunshot residue belonged to appellant.[7]

Davis. Although Davis had a small amount of gunshot residue on his person, the gloves found near him had none.

[7] The owner of the yard from which the sweatshirt was recovered told police that it did not belong to anyone living there.

Additionally, police recovered two partial footprints during the murder investigation; one from a make-up case from one of the burgled cars in the San Luis parking lot and one from an aloe-vera-type plant that was located near the murder weapon, which appeared to have been crushed as the suspect fled through the neighborhood. Jenny Lounsbury, a forensic scientist with the Texas Department of Public Safety, compared the partial prints against the shoes that appellant was wearing when arrested. On a scale of 1 to 5, with 1 being a match and 5 being an exclusion, the shoes appellant was wearing when arrested were classified as a 2C and were "similar in size and tread design" when compared to the footprints recovered by police. She concluded that the footprints "could have been made by [appellant's] shoe or any other shoe with similar characteristics." Lounsbury was able to exclude all the other shoes recovered by police during the investigation, including those recovered from the gold Lexus Moffett was driving when he was arrested and those recovered from Davis.

Appellant's behavior after the shooting could also be considered by the jury in determining whether the State proved that he was the shooter. First, he returned to the Quality Inn from the direction of the San Luis; he was captured on video acting nervously and pacing around. He was not wearing his black-hooded sweatshirt. Also, several days after the offense, appellant was seen leaving the Galveston County Jail, where Davis was being detained. Appellant got into the gold Lexus, which was being

driven by Moffett, and returned to the neighborhood from which the gun, gloves with his DNA and gunshot residue, and black-hooded sweatshirt were recovered by police. When appellant was arrested walking through that neighborhood, he gave police officers a false name. From this evidence a jury could have reasonably concluded that appellant, who was not from Galveston, had returned to the neighborhood to try and recover incriminating evidence related to the crime, not knowing that it had already been discovered by police.

Nevertheless, appellant contends that the evidence is insufficient because there was (1) no DNA analysis conducted on the black-hooded sweatshirt because there were more than five DNA contributors, (2) no gunshot residue analysis conducted on the black-hooded sweatshirt, (3) no evidence that the shoeprint analysis was a match to appellant's shoes, and (4) no evidence that appellant had time between the shooting and the time he arrived back at the Quality Inn to have run the distance between the San Luis and the Quality Inn. All of these arguments focus on evidence that appellant claims is missing from the State's case. However, in conducting an analysis of the sufficiency of the evidence, we should not distinguish "missing" evidence in the case from evidence present in other cases. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

At trial and on appeal, appellant also urges a theory to explain the presence of his DNA inside the glove with the gunshot residue that police recovered from the

neighborhood. Appellant contends that someone, likely Davis, put on his own glove, double-gloved a glove that appellant previously worn on top of it, and then fired the gun at Molis. This double-gloving theory, appellant contends, would explain the presence of his DNA inside the glove, with the presence of gunshot residue outside the glove, even if he did not fire the weapon. Appellant points out that this "double glove" theory would also explain why Davis had gunshot residue on his person but not his own gloves. The jury, however, heard and apparently rejected this theory. We are bound to defer to the factfinder's weighing of the evidence and its drawing of reasonable inferences. *Zuniga v. State*, 551 S.W.3d 729, 739 (Tex. Crim. App. 2018) (citing *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) ("For the evidence to be sufficient, the State need not disprove all reasonable alternative hypotheses that are inconsistent with the defendant's guilt . . . Rather, a court considers only whether the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence when considered in the light most favorable to the verdict.")). And, the jury's rejection of this theory is not unreasonable, especially since Davis was arrested near the two gloves containing his own DNA, in an area near the San Luis, but away from the glove recovered from the neighborhood, which appellant contends Davis might have "double gloved" over his own gloves.

From the circumstantial evidence detailed above, a rational jury could have concluded beyond a reasonable doubt that appellant shot and killed Molis. Accordingly, we overrule issue three.

DENIAL OF *BATSON* CHALLENGES

In his first and second issues on appeal, appellant contends that the State "improperly used [] peremptory strike[s] against [Venirepersons 8 and 16], African American[s], a racially discriminatory act in violation of the Equal Protection Clause of the United States Constitution and in violation of Article 35.261 of the Texas Code of Criminal Procedure[.]"

Background

At the end of voir dire, the State used two of its peremptory challenges to strike Prospective Jurors 8 and 16 from the venire panel. Appellant raised a *Batson* challenge to the strikes as follows:

> [Defense Counsel]: Judge, the—prior to the swearing in of the panel, the defense has a *Batson* challenge, pursuant to the Texas Code of Criminal Procedure, Article 35.261. We ask that the Court take Judicial notice that [appellant] is an African American. There were two venire—
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> [Trial Court]: Please be—can you put on the white noise, please? I can't get the white noise on mine. Okay, go right ahead.
>
> [Defense Counsel]: May I continue?
>
> [Trial Court]: Yes.
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> [Defense Counsel]: There are two panel members of the venire, Juror No. I, Netobia Taylor and Juror No. 16, Curtis Isaac, Jr. [Appellant] is

a—we ask the Court to find that [appellant] is a member of an identifying racial group.

[Trial Court]: Okay. That will be done.

[Defense Counsel]: And then Jurors No. 8, No. 16 are of the same racial group. There were no questions posed to No. 8 or to No. 16 that would have led to a cause. They were basically silent as to what they were—responding, they were giving the answers. When they did, they were back and forth. We believe that these two jurors should be on the panel and they should not have been struck by the State. We believe there's a challenge for the basis—perfect challenge on the basis of race for No. 8 and No. 16.

[Trial Court]: Okay. State? Who is No. 8, the name of Juror No. 8?

[Defense Counsel]: Netobia Taylor.

[Trial Court]: Okay. Go right ahead.

[Prosecutor]: Your Honor, Juror No. 8 had a significant discussion by [the Prosecutor] regarding the law of parties that arose from Juror No. 48. No. 8 said that she would disagree with Juror No. 48 regarding that viewpoint of both parties. We feel an important viewpoint in terms of what 48 specified. So since Juror No. 8 disagreed with Juror No. 48, we removed her. Additionally, Juror No. 8's response to the defendant's—defense's questions, she gave low numbers which we felt that created a defense line to juror instead of a State's line to juror. To Juror No. 16 there were actually—

[Defense Counsel]: Juror 16 is Curtis Isaac, Jr.

[Trial Court]: Okay. I'm going to pick up her chart and her chart does imply No. 8 and what she [the prosecutor] put on the record. Now, looking at box No. 16. Go right ahead.

[Prosecutor]: Box No. 16 noted that there were no questions asked of No. 16, which does—which gave us little information about him. However, in all of the defense's skilled questions he answered number three, which means that he was just a neutral juror, he couldn't make a

> decision. And he was going to be a difficult time any sort of unanimous decision because his scores for defense's questions were all number three on the three skilled questions that the defense did. And so taking that into account, we did look at the defense's skilled questions when deciding our strikes. Our prefer strikes were because he couldn't pick a side. One side or the other, he neither strongly agreed nor disagreed with the defense's question. We feel that he would not be an appropriate person. That's why we struck No. 16.
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> [Trial Court]: Okay. Your motion is denied.

Standard of Review and Applicable Law

The racially motivated use of a peremptory strike violates the Equal Protection Clause of the United States Constitution. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also* U.S. CONST. amend. XIV, § 1. The exclusion of even one juror with racial motive invalidates the jury selection process and requires a new trial. *Jones v. State*, 431 S.W.3d 149, 154 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

Named after the seminal Supreme Court decision, an objection that a peremptory strike was based on race is called a *Batson* challenge. The resolution of a *Batson* challenge involves a three-step process, which encourages prompt rulings on objections to peremptory challenges and reduces disruptions in the jury-selection process. *Nieto v. State*, 365 S.W.3d 673, 675–76 (Tex. Crim. App. 2012). First, the defendant must make a prima-facie showing of racial discrimination. *Id.* at 676. If the defendant makes the requisite showing, the burden shifts to the prosecutor in the second step, requiring him to articulate a race-neutral explanation for the strike. *Id.* Finally, the trial court determines whether the opponent of the strike has satisfied his

burden of persuasion to establish by a preponderance of the evidence that the strike was indeed the product of purposeful discrimination. *Blackman v. State*, 414 S.W.3d 757, 765 (Tex. Crim. App. 2013).

To determine whether the defendant has proved purposeful discrimination, the trial court should consider all relevant factors, including, by way of example:

> • whether there is a statistical disparity between the percentage of minority and white panelists who were struck;
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> • whether the record supports or contradicts the prosecutor's explanation for its strikes;
>
> • whether the reason given for the peremptory challenge is related to the facts of the case;
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> • whether the prosecutor questioned the minority panelists before striking them;
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> • whether there was disparate examination of minority panelists, i.e., whether the prosecutor examined minority panelists so as to evoke a certain response without asking the same question of white panelists; and
>
> • whether there was disparate treatment of minority panelists, i.e., whether the prosecutor's explanations for striking minority panelists apply equally well to white panelists who were not struck.

See Nieto, 365 S.W.3d at 678 n.3.

The trial court's ruling in the third step must be sustained unless it is clearly erroneous. *Id.* at 676. The clearly erroneous standard is highly deferential because the trial court is in the best position to determine if the prosecutor's explanation is genuinely race neutral. *Id.* The trial court must focus on the genuineness of the

asserted non-racial motive, rather than the reasonableness. *Id.* We defer to the trial court's ruling in the absence of exceptional circumstances. *Id.* Whether the defendant satisfies his burden of persuasion to show that the State's facially race-neutral explanation for its strike is pretextual, not genuine, is a question of fact for the trial court. *Blackman*, 414 S.W.3d at 765.

An appellate court should consider the entire record of the voir dire and need not limit itself to the specific arguments brought forth to the trial court by the parties. *Nieto*, 365 S.W.3d at 676. A reviewing court may not substitute its judgment for the trial court's in deciding that the prosecutor's explanation was a pretext. *Id.* Just like the trial court, the reviewing court must focus on the genuineness, rather than the reasonableness, of the asserted non-racial motive. *Id.*

Analysis

1. Prima Facie Showing of Racial Discrimination

Step one of the *Batson* analysis, i.e., prima facie showing of racial discrimination, was rendered moot when the State moved to step 2 and offered race-neutral reasons for its strikes. *See Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008) ("Once the opponent of the challenged strike raises a question of purposeful discrimination, if the trial court then proceeds immediately to the second step by inquiring of the proponent whether he had a non-discriminatory purpose, a reviewing court is to assume that the opponent has satisfied his step-one obligation

to make a prima facia case of purposeful discrimination and address only the second and third steps.").

2. Race-Neutral Reasons for the State's Strikes

Step two of the *Batson* analysis requires the State to offer race-neutral reasons for its strikes against Jurors 8 and 16. A race-neutral explanation is one based on something other than the race of the panelist. *Jones v. State*, 431 S.W.3d 149, 155 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). At this step of the inquiry, the issue is simply the facial validity of the prosecutor's explanation. *Id.* Unless discriminatory intent is inherent in the explanation, the offered reason is race neutral. *Id.*

Regarding Juror No. 8, the State expressed concern about the juror's position on the law of parties. This Court has held that a juror's problem with the law of parties is an adequate race-neutral reason. *See Ware v. State*, No. 01-91-00214-CR, 1992 WL 85774, at *3 (Tex. App.—Houston [1st Dist.] Apr. 30, 1992, no pet.) (not designated for publication).

Regarding both Juror No. 8 and No. 16, the State relied on the jurors' answers to defense questions, which required the jurors to assign a value between one and five to demonstrate whether they agreed or disagreed with certain statements. The State responded that Juror No. 8's "low numbers" to certain questions demonstrated that she tended to favor the defense over the State. The State was also concerned that

Juror No. 16's consistent answers of "3" showed that the juror would be a neutral juror and that it would be difficult to reach a unanimous verdict with him on the panel. This Court has held that the State's reliance on a juror's answers to such questions to show that the juror would be either neutral or favorable to the defense is a race-neutral explanation. *See Green v. State*, No. 01-18-00162-CR, 2019 WL 2621738, at *11 (Tex. App.—Houston [1st Dist.] June 27, 2019, pet. ref'd) (mem. op., not designated for publication). Accordingly, we conclude that the State presented race-neutral reasons for the strikes.

3. Purposeful Discrimination

We must next determine whether appellant proved purposeful discrimination; that is, whether the trial court clearly erred in failing to find purposeful discrimination in the State's use of peremptory strikes. *See Stewart v. State*, 176 S.W.3d 856, 858–59 (Tex. App.—Houston [1st Dist.] 2005, no pet). The trial court must evaluate the facially race-neutral reasons given by the prosecutor to determine whether those explanations are genuine or merely a pretext for purposeful discrimination. *Whitsey v. State*, 796 S.W.2d 707, 713 (Tex. Crim. App. 1989).

For both Jurors No. 8 and No. 16, appellant argues that he has shown purposeful discrimination because the record shows that they, as African American jurors, received disparate treatment from white jurors who responded to the questions similarly. *See Nieto*, 365 S.W.3d at 678 n.3 (noting that disparate treatment

of minority panelists—whether prosecutor's explanations for striking minority panelists apply equally well to white panelists not struck—is factor in considering purposeful discrimination).

The State responds, among other arguments, that appellant, by offering *no rebuttal at all* to the prosecutor's race-neutral reasons, has failed to carry his burden of persuasion on the third step of the *Batson* analysis. We begin by noting that the Texas Court of Criminal Appeals has held that a disparate treatment argument may be made for the first time on appeal. *Young v. State*, 826 S.W.2d 141, 145–46 (Tex. Crim. App. 1991). The issue presented, however, is not whether disparate treatment can be raised for the first time on appeal, but whether a defendant can raise disparate treatment when he did not offer any objection or evidence during the *Batson* hearing to rebut the State's proffered race-neutral reasons. This Court considered the issue in *Adair v. State*, 336 S.W.3d 680 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

In *Adair*, the defendant raised a disparate treatment argument for the first time on appeal. *Id.* at 689. This Court agreed that *Young v. State* permitted such an argument, provided that the argument was based on "evidence presented to the trial judge during voir dire and the *Batson* hearing." *Id.* (citing *Young*, 826 S.W.3d at 145–46)). Because the appellant in *Adair* was relying on juror information cards that were not admitted at trial, this Court refused to consider them even though they had been provided to the Court in a "sealed, supplemental record," except to the

extent that the juror information cards were discussed at the hearing. *See id*. The Court further noted that "appellant failed to offer any rebuttal argument," noting that "[a]ppellant never attempted to rebut the prosecutor's explanations at trial. Appellant never indicated to the court that he believed the explanations to be pretext. Also, appellant never attempted to make a comparative analysis of the information of the juror information cards to the trial court." *Id.* at 689, n.5. The Court also noted that "defense counsel did not even make a general argument that he believed the explanations to be a pretext; rather, he did nothing to put the court on notice that he was not satisfied with by the prosecutor's race-neutral explanations." *Id.* at 689, n.6.

This Court concluded that:

> [N]ot making the comparative analysis to the trial court is distinguishable from failing to make any argument whatsoever in response to the prosecutor's race-neutral reasons. *See Young*, 826 S.W.2d at 142, 146 (holding that comparative analysis, pointing to specific testimony, may be made for first time on appeal, where defense counsel offered general rebuttal argument and "quarreled with the State's reason" at trial). In other words, ***the authority allowing for a comparative analysis for the first time on appeal does not excuse defense counsel from making any rebuttal argument whatsoever***.

Id. at 690 (emphasis added).

The same is true in this case. Appellant relies on jury biographical forms that were not admitted at the *Batson* hearing, but were included in a sealed, supplemental clerk's record to this Court. Even if we were to consider the documents, we would, under the reasoning of *Adair*, still conclude that the trial court did not clearly err in

concluding that appellant had not met his burden of persuasion to establish purposeful discrimination.[8]

Accordingly, we overrule issues one and two.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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

Landau, J., concurring, joined by Countiss, J.

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[8] *See also United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (citing *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) ("Once the Government has offered reasons for its peremptory challenges, defense counsel must expressly indicate an intention to pursue the *Batson* claim.")); *see also United States v. Brent*, 300 Fed. Appx. 267, 270, 272 (5th Cir. 2008) (unpublished) (explaining that defendant waived *Batson* claim because he "objected to the government's peremptory strike but did not challenge the prosecution's race-neutral explanation").