COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2230-CR **Cir. Ct. No. 2012CF006164**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY J. JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Courtney J. James appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree reckless homicide and one count of first-degree recklessly endangering safety, both with use of a dangerous weapon and as a party to the crime. *See* WIS. STAT.

§§ 940.02(1), 941.30(1), 939.63(1)(b) & 939.05 (2013-14).[1] He contends that the trial court erred when it concluded that the prosecutor's peremptory strike of Juror 14, an African-American male, was not a violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986), because: (1) the pattern of all of the prosecutor's strikes was sufficient to create an inference of discriminatory intent; (2) the prosecutor's proffered reason for striking Juror 14—that is, the juror's reaction to several questions—was not supported by the record; and (3) the trial court erred in concluding that James failed to prove purposeful racial discrimination. The State responds that the trial court properly analyzed the ***Batson*** claim and that the court's conclusion that the prosecutor's strike of Juror 14 was not purposeful racial discrimination was not clearly erroneous and should be affirmed. We agree with the State.

BACKGROUND

¶2 The State charged James with first-degree recklessly endangering safety and first-degree reckless homicide, both as a party to the crime, and with use of a dangerous weapon. James pled not guilty to all charges, and the case was tried by a jury. The jury venire consisted of thirty-five people, seven of whom the trial court found appeared, like James, to be "African-American": Jurors 3, 6, 14, 21, 22, 24, and 35.[2] During voir dire, the prosecutor asked the jury panel a

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

[2] James states that there were six African-American jurors on the venire. Trial defense counsel also referred to six African-American jurors. The trial court found that six jurors—Jurors 3, 6, 14, 22, 24, and 35—appeared to be African American and then included a seventh juror, Juror 21, in the ***Batson*** analysis with no objection from either party. *See* ***Baston v. Kentucky***, 476 U.S. 79 (1986). The State asserts in its appellate brief, with no reply from James, that there were a total of seven African-American jurors in the venire. It appears that the difference in each parties' count of total African-American jurors in the venire was due to counsel for James not including Juror 35 in his count, perhaps because Juror 35 was excluded from the panel numerically, not as the result of a strike. We include Juror 35 in the total count.

number of questions. One question posed was whether "anybody … has a strong feeling about police officers, one way or the other?" In response, and as relevant here, three of the African-American jurors raised their hands: Jurors 6, 21, and 22.

¶3 When the prosecutor repeated the question to Juror 6, he responded, "Yes," to the question, explaining that he has a trust issue with the police that is "not positive." Juror 22 also replied to the same question with, "Yes." The prosecutor then asked Juror 22: "And what is [sic] your feelings?" To which, Juror 22 replied, "Kind of negative." Then, the prosecutor asked Juror 22: "Do you believe that would affect you in listening to an officer or detective's testimony?" and Juror 22 said: "Yes, it would." The prosecutor then asked if Juror 22 could put his negative feelings aside and he responded: "No, not really."

¶4 When the prosecutor asked Juror 21 whether his strong feelings about police officers were "positive or negative," Juror 21 replied that his feelings were "Negative." Then, the prosecutor asked Juror 21: "Is that as to all the officers?" To which, Juror 21 responded: "Most of them." In response to the prosecutor's question, Juror 21 said he believed, simply based on their employment, that the police are probably not telling the truth. Later, trial defense counsel asked Juror 21 if he could put aside his "perhaps negative feelings" and "come to this impartially." Juror 21 responded, "Yes."

¶5 At a side-bar conference, which was held off the record, the prosecutor moved to strike three of the African-American jurors for *cause*: Jurors

6, 21, and 22.[3] Trial defense counsel agreed with the motion as to Jurors 6 and 22, but objected to striking Juror 21 for cause. The trial court granted the motion to strike for cause Jurors 6 and 22, but not Juror 21. The State then used its *peremptory* strikes to remove two African-American jurors—Jurors 14 and 21—leaving two African-American jurors on the panel.[4]

¶6 Trial defense counsel's only ***Batson*** objection at trial was to the peremptory strike of Juror 14. The trial court conducted a hearing on the ***Batson*** motion outside the presence of the jury. Trial counsel indicated she agreed with all of the prosecutor's *cause* strike requests, except for Juror 21. She said she did not object to the prosecutor using a *peremptory* strike on Juror 21 because he said he had negative feelings about police. But she objected to the *peremptory* strike of Juror 14 as not race-neutral under ***Batson*** because Juror 14 said nothing that would indicate he could not be fair.

¶7 The prosecutor then explained that he used a peremptory strike to eliminate Juror 14, an African-American male, because Juror 14 had "reactions" during the voir dire that caused the prosecutor to believe Juror 14 was "not disposed to listening to the State if not potentially hostile." The prosecutor stated that he used another peremptory strike to eliminate Juror 2, a white male, for the same reason.

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[3] The State also moved to strike for cause Juror 19, a City of Milwaukee police sergeant who said he knew a number of the State's police witnesses. We do not discuss the State's decision to strike Juror 19 further because he is not African American and his strike is irrelevant to the issues discussed on appeal.

[4] The State used three more peremptory strikes to remove Jurors 2, 5, and 7, none of whom appeared to be African-American. James did not object to striking those jurors and they are not part of the ***Batson*** analysis.

¶8 The trial court began its ***Batson*** ruling by stating its method of analyzing the prosecutor's peremptory challenges under ***Batson***. The court then found that "there was … not a prima facie case of purposeful discrimination." The court explained its basis for that finding by analyzing the prosecutor's peremptory strikes and the percentage of African-American jurors removed from, and left on, the panel. Of the original seven African-American jurors—Jurors 3, 6, 14, 21, 22, 24, and 35—the court noted that Juror 35 was excluded numerically and the parties agreed that Jurors 6 and 22 be stricken for cause, leaving four possible African-American jurors.

¶9 With respect to the four remaining African-American jurors, the trial court found that the prosecutor struck one, Juror 21, for race-neutral reasons, and without objection from trial defense counsel. The court found that Juror 21 was credible when he said he would not believe a police officer and not credible when he said, after some very leading questions from trial defense counsel, that he could be fair.

¶10 The trial court then noted that left three African-American jurors on the panel: Jurors 3, 14, and 24. The prosecutor then used a second peremptory strike to remove Juror 14. The court acknowledged that using two peremptory strikes on the remaining four African-American jurors was a "significant percentage," but noted that the strike of Juror 21 was warranted on fairness grounds.

¶11 As to the strike of Juror 14, the trial court noted that James had not established a *prima facie* case of discrimination, but that even if he had, under the second step of the ***Batson*** analysis, the prosecutor had provided a clear explanation for his peremptory strike of Juror 14. The court repeated the

prosecutor's explanation that he thought Jurors 2 (a white male) and 14 (an African-American male) had reacted in a way that seemed hostile to believing police officers. The court noted that the prosecutor's observations of the jurors' reactions to the believability of police officers did not have to be right or persuasive. But instead, the prosecutor was only required to set forth a clear and specific statement of the reason for the strike and demonstrate a nexus between a legitimate factor for a strike and the juror stricken. The court found that the prosecutor's explanation achieved both of those objectives here.

¶12 When addressing the third step of the ***Batson*** analysis, for the reasons stated, the trial court found that James did not prove the prosecutor purposefully struck Juror 14 based on his race under the totality of the circumstances. James appeals.

DISCUSSION

¶13 James only challenges the State's peremptory strike of Juror 14, claiming it was purposeful racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and ***Batson***. To succeed on a ***Batson*** claim, a defendant first must make a *prima facie* case that the prosecutor's peremptory challenge was solely race-based. *See* ***State v. Lamon***, 2003 WI 78, ¶28, 262 Wis. 2d 747, 664 N.W.2d 607. If that showing is made, the burden shifts to the prosecutor to state a race-neutral explanation for the strike. ***Id.***, ¶29. Then, the trial court must determine whether the defendant has proved purposeful discrimination. ***Id.***, ¶32.

¶14 James asserts that the trial court erred at each step of the ***Batson*** analysis. First, James argues the trial court failed to properly analyze all of the evidence that allegedly gives rise to a pattern of suspicious strikes and that leads to

an inference of discriminatory intent. Second, James argues that the prosecutor's stated explanation for striking Juror 14 is not supported in the record. And third, James claims the trial court improperly exercised its discretion in concluding that James failed to prove purposeful discrimination. We disagree with James and address each step in turn; however, first we must address James's unsubstantiated assertion that the standard of review on the first prong of the ***Batson*** analysis is *de novo*.

I. *We review each step of the **Batson** analysis for an erroneous exercise of discretion.*

¶15 The Wisconsin Supreme Court has stated, without reservation, that "Wisconsin law is in accord with the U.S. Supreme Court, holding that discriminatory intent is a question of historical fact, and the clearly erroneous standard of review applies at each step of the ***Batson*** analysis." ***Lamon***, 262 Wis. 2d 747, ¶45. However, despite this clear directive, James argues that our standard of review for the first step of the ***Batson*** analysis is *de novo*, relying on three federal cases: ***Mahaffey v. Page***, 162 F.3d 481 (7th Cir. 1998); ***United States v. Stephens***, 421 F.3d 503 (7th Cir. 2005); and ***United States v. Jordan***, 223 F.3d 676 (7th Cir. 2000). There are several problems with James's standard of review argument.

¶16 First, we must follow our supreme court's clear directive. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). And, as set forth above, the supreme court has stated that "the clearly erroneous standard of review applies at *each step* of the ***Batson*** analysis." ***Lamon***, 262 Wis. 2d 747, ¶45 (emphasis added).

¶17 Second, none of the Seventh Circuit Court of Appeals cases on which James relies support his argument that our standard of review for the first step of the ***Batson*** analysis is *de novo*, and one case even directly contradicts it. To be sure, in ***Mahaffey*** and ***Stephens***, the Seventh Circuit Court of Appeals held that while fact findings in a ***Batson*** challenge are afforded deference, the *prima facie* determination is subject to *de novo* review. *See* ***Mahaffey***, 162 F.3d at 484; ***Stephens***, 421 F.3d at 510-11. However, in ***Jordan***, the Seventh Circuit Court of Appeals clarified that in some unusual cases, like ***Mahaffey*** and ***Stephens***, in which it had applied a *de novo* standard of review to the first step of the ***Batson*** analysis, it did so because in those cases the trial court stopped its review at whether the defendant had established his or her *prima facie* case. *See* ***Jordan***, 223 F.3d at 686. In each instance, *de novo* review was appropriate because the reasons for deference to the trial court did not exist, namely, the trial court had not conducted a hearing, heard testimony, or assessed credibility. *See* ***id.*** However, the Seventh Circuit Court of Appeals reiterated that in cases where a court is reviewing all three steps of a trial court's ***Batson*** analysis, and has a record to review, "[t]he standard of review remains as set forth in ***United States v. Williams***, 934 F.2d 847, 849 (7th Cir. 1991), which states that the appellate court 'will only overturn the trial court's determination that a prosecutor's use of peremptory challenges was not motivated by purposeful discrimination if that determination is clearly erroneous.'" ***Jordan***, 223 F.3d at 686. That is the case here.

¶18 Third, the United States Supreme Court has already ruled that any review of whether the defendant established a *prima facie* case under the ***Batson*** analysis is moot once the trial court goes on to complete steps two and three. ***Hernandez v. New York***, 500 U.S. 352, 352 (1991) ("Since the prosecutor offered an explanation for the peremptory challenges and the trial court ruled on the

ultimate question of intentional discrimination, the preliminary issue whether Hernandez made a prima facie showing of discrimination is moot."). Again, that is the case here.

¶19 Consequently, we agree with the State that the standard of review in this case is clearly erroneous and applies to all three steps of the ***Batson*** analysis.

II. *James has not shown that the facts and relevant circumstances raise an inference that the prosecutor exercised its peremptory strike to exclude Juror 14 on account of race.*

¶20 Under ***Batson***, in order to establish a *prima facie* case that the prosecutor struck Juror 14 for a discriminatory purpose, thereby violating James's right to Equal Protection, James must first establish that: (1) he is a member of a cognizable group, Juror 14 is a member of the same cognizable group, and the prosecutor exercised a peremptory strike to remove Juror 14; and (2) the facts and relevant circumstances raise an inference that the prosecutor used its peremptory strike to exclude Juror 14 on account of his race. *See* ***Lamon***, 262 Wis. 2d 747, ¶28. The record shows (and the parties do not dispute) that both James and Juror 14 are African American, a cognizable group under ***Batson***, and that the prosecutor exercised a peremptory strike to remove Juror 14. As such, James's first claim on appeal focuses on the second prong of the *prima facie* case: whether the facts and relevant circumstances raise an inference that the prosecutor used its peremptory strike to exclude Juror 14 on account of his race.

¶21 James believes that an inference of discriminatory intent in striking Juror 14 can be made based upon an alleged "pattern of strikes" made by the prosecutor that James claims removed all but two African-American jurors on the

panel.[5] In ***Stephens***, the Seventh Circuit Court of Appeals held that "a pattern of strikes against jurors of a particular race may give rise to an inference of discrimination" and meet the defendant's burden at the *prima facie* stage of a ***Batson*** inquiry. ***Stephens***, 421 F.3d at 512. "Such a pattern can be evident where a prosecutor uses peremptory challenges to eliminate all, or nearly all, members of a particular race. In determining whether a pattern is present, courts have also considered whether a disproportionate number of peremptory challenges were exercised to exclude members of a particular cognizable group." ***Id.***

¶22 James develops his pattern argument by counting the African-American jurors in the venire as compared to the whole venire, and then comparing that total to the African-American jurors removed by the State's motions to strike for cause *and* the State's peremptory strikes. James explains the pattern this way:

> In terms of the pattern, although African-Americans comprised only 17% of the venire (6 of 35), by using challenges for *cause or peremptory strikes*, the State excluded 67% (4 of 6, juror nos. 6, 14, 21, and 22) of the African-Americans. Although African-American males comprised only 11% of the venire (4 of 35), the State excluded 100% of this group. These statistical facts alone established the requisite inference of discrimination.

[5] James interjects gender into his ***Batson*** argument without development from the record or any controlling legal authority. He conclusorily states that the State used its strikes disproportionately to remove all African-American men, noting that the two African-American jurors that remained on the panel were both women. Although he argues that "African-American males" is a cognizable group under ***Batson***, and that the trial court erred in not considering this group, he concedes that the United States Supreme Court has never addressed this issue and cites to no Wisconsin authority in support. He does not even identify the genders of the stricken jurors other than Juror 14. We do not develop parties' arguments for them. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (Appellant "must present developed arguments if it desires this court to address them.").

(Emphasis added.)

¶23 James's pattern argument suffers two fatal flaws. First, James mistakenly includes strikes for *cause* as well as *peremptory* strikes to establish his "pattern." However, ***Batson*** and every case since has made it clear that discriminatory intent is based solely on *peremptory* strikes. *See* ***id.***, 476 U.S. at 96; *see also* ***Lamon***, 262 Wis. 2d 747, ¶28. Second, James's pattern argument implodes because his basis is just one peremptory strike—that of Juror 14. It is inherently impossible to have a "pattern" of one.

¶24 Beyond that, even considering all of the strikes—cause and peremptory—the record completely undermines James's pattern argument. There were thirty-five people in the original venire panel. Seven appeared to be African-American: Jurors 3, 6, 14, 21, 22, 24, and 35. Juror 35 was excluded numerically, leaving six African-American jurors. The prosecutor moved to strike three African-American jurors for cause: Jurors 6, 21, and 22. The prosecutor explained that he moved to strike Juror 6 because Juror 6 said he did not trust police. In fact, trial defense counsel herself referred to Juror 6 as "patently biased." The prosecutor said he moved to strike Juror 22 because Juror 22 said he could not trust police and could not set that feeling aside. Notably, James did not object to striking Jurors 6 or 22. The trial court granted the motion to strike for cause Jurors 6 and 22, but not Juror 21. So, of the original seven African-American jurors, three were excluded for reasons unrelated to race or the State's peremptory strikes and James did not object to any of those strikes either at trial or on appeal.

¶25 Of the four African-Americans left on the panel, the prosecutor used two of its five peremptory strikes to eliminate African-American Jurors 21 and 14.

James did not object to the use of a peremptory strike against Juror 21 at either trial or on appeal. In fact, James's trial counsel not only did not object to the State's peremptory strike of Juror 21, she specifically stated at the ***Batson*** hearing that she was not raising any objection to the strike of Juror 21 because the prosecutor had a race-neutral basis for striking Juror 21: Juror 21 had stated that he believed police officers were untruthful based simply on their employment as police officers.

¶26 Thus, only one of the State's peremptory strikes, that of Juror 14, is properly part of James's pattern argument. The premise of the pattern argument is that a *disproportionate pattern* of strikes against a cognizable group may show that members of the defendant's race were excluded from the panel, based solely on race. *See* ***Stephens***, 421 F.3d at 512. However, the only peremptory strike that is left as a basis for James's pattern argument is the strike of Juror 14. And as noted above, one strike does not make a pattern.

¶27 As we have seen, the burden of presenting evidence sufficient to create an inference of discriminatory intent is on the defendant in a ***Batson*** challenge. *See* ***Lamon***, 262 Wis. 2d 747, ¶32. Here, James established no pattern and the trial court clearly did not err in concluding that James failed to establish a *prima facie* inference of discriminatory intent.

III. *The trial court's finding that the prosecutor offered a race-neutral reason for the strike was not clearly erroneous*.

¶28 The trial court went on to the second step of the ***Batson*** analysis, even though it found that James had failed to establish a *prima facie* case in the first step, and found that "the State articulated a reason justifying the exercise of the strike. It was a legitimate factor." This finding is not clearly erroneous.

¶29 A prosecutor may not just deny he had a discriminatory motive for the challenged peremptory strike, but "must articulate a neutral explanation related to the particular case to be tried." ***Batson***, 476 U.S. at 98. As the Wisconsin Supreme Court noted in ***Lamon***, citing ***Batson***: "[t]he prosecutor's explanation must be clear, reasonably specific, and related to the case at hand." ***Lamon***, 262 Wis. 2d 747, ¶29. It does not have to be persuasive on the issue, or even plausible, but it must have facial validity. ***Id.***, ¶¶29-31. And "[u]nless discriminatory intent is inherent in the prosecutor's explanation, 'the reason offered will be deemed race neutral.'" ***Id.***, ¶30 (citing ***Hernandez***, 500 U.S. at 360).

¶30 Here, James challenged only the peremptory strike of Juror 14. The prosecutor's explanation for that strike was, in part:

> Juror number two is a white male, juror number 14 is an African-American male. Both of them had reactions during the discussions, and I have never had a series of discussions like this about officers where so many individuals have had such blatantly hostile view of officers. I never experienced that before.
>
> Juror numbers two and 14 had inclinations or had reactions that I view to be inclinations along those grounds. Oftentimes you will see that, and I believe that I did see this and it did appear that both of them appeared at least not -- not disposed to listening to the State if not potentially hostile, and that was my reasoning for striking both of those.

¶31 The trial court correctly stated the applicable law and properly found that the State's explanation was "clear, reasonably specific, and related to the case at hand." *See* ***Lamon***, 262 Wis. 2d 747, ¶29. The court noted that the prosecutor had the burden in the second phase of the ***Batson*** analysis "to articulate a neutral explanation for challenging members of the defendant's distinctive group. Mere

denial of the discriminatory intent is not sufficient; the explanation must be clear and reasonably specific demonstrating a nexus between legitimate factors for the strike and the juror who was stricken." The court also noted that the prosecutor's interpretation of Juror 14's reaction does not have to be right, or even plausible, but the prosecutor does have to have a "clear, specific statement of the reason[]" with a nexus between a legitimate factor and the challenged strike.

¶32 Here, the trial court relied on the prosecutor's statement that Juror 14 (an African-American male), like Juror 2 (a white male), had a reaction during the voir dire that caused the prosecutor to believe he was "not disposed to listening to the State if not potentially hostile." The prosecutor did not just simply deny discriminatory intent, he gave a clear and specific reason for his strike that was linked to a legitimate factor in the case—the credibility of police witnesses. He stated he saw a "reaction" from Juror 14 to questions posed to all the jurors concerning their beliefs in the truthfulness of police officers. Based on the reaction he saw from Juror 14, the prosecutor used a peremptory strike because Juror 14 did not appear to be willing to give the State's case an impartial listen. That is far more of an explanation than just a denial. It has facial validity and is not on its face in any way inherently discriminatory. *See* ***Lamon***, 262 Wis. 2d 747, ¶30.

¶33 James also argues that Juror 14's "reaction," as relied on by the prosecutor, is not supported in the record. James finds it "implausible" that the "reaction" occurred at all because it was not noted in the transcript or argued by the prosecutor in support of a motion to strike Juror 14 for cause. To the extent that James is arguing that the prosecutor's explanation is incredible, we note that the trial court was in the best position to determine the prosecutor's credibility and we defer to that court. *See* ***id.***, ¶42 ("the ***Batson*** Court held that the trial court

judge is in the best position to determine the credibility of the [S]tate's race-neutral explanations, so great deference will be given to that ruling"). Here, the trial court presided over the voir dire and heard the challenge to the strike of Juror 14 as well as the prosecutor's explanation. James fails to point to anything in the record to show that the trial court's determination was clearly erroneous. As such, we defer to the trial court. *See* ***Lamon***, 262 Wis. 2d 747, ¶42.

IV. *The trial court's finding that James failed to prove purposeful racial discrimination was not clearly erroneous*.

¶34 In the third step of a ***Batson*** analysis, if the trial court finds that the prosecutor has offered a race-neutral explanation for the strike, the trial court then "has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established." *See* ***Lamon***, 262 Wis. 2d 747, ¶32.

¶35 Here, the trial court concluded that James failed to prove purposeful discrimination under the totality of the circumstances. It had already rejected James's pattern argument and concluded that the prosecutor provided a "clear, reasonably specific" reason for the strike that was based on a legitimate, non-discriminatory factor. It had observed that Jurors 6 and 22 had clearly stated they could not believe police officers, and that Juror 21 was not believable when he said he could set aside his negative feelings about police officer credibility. Further, the court found that the prosecutor struck a white juror, Juror 2, as well as Juror 14, for the same reason—their hostile reactions to the prospect of police officers being truthful.

¶36 James reargues at this third stage of the ***Batson*** analysis that the pattern evidence shows purposeful discrimination. But he offers nothing new to

show that the trial court was wrong when it rejected his pattern argument. The trial court determined that there was no purposeful discrimination. We will only overturn the trial court's finding of no purposeful discrimination if it is clearly erroneous.

¶37 As noted above, the totality of the circumstances show James failed to prove purposeful discrimination.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.