IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-167

No. COA 17-1157-2

Filed 20 April 2021

Catawba County, Nos. 11 CRS 3822-23, 4077-78, 51398, 51400, 51401

STATE OF NORTH CAROLINA

v.

EVERETTE PORSHAU HEWITT

Appeal by Defendant from Judgments entered 18 May 2016, by Judge Nathaniel J. Poovey in Catawba County Superior Court. Originally heard in the Court of Appeals 5 June 2018, with unpublished opinion issued 19 June 2018. Remanded by Special Order of the Supreme Court on 14 August 2020, for reconsideration in light of the Supreme Court's opinion in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020). Heard on remand in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

HAMPSON, Judge.

Procedural Background

¶ 1 Everette Porshau Hewitt (Defendant) timely appealed from Judgments entered 18 May 2016, upon jury verdicts finding him guilty of three counts of First-Degree Murder, Attempted First-Degree Murder, Assault with a Deadly Weapon with Intent to Kill, and First-Degree Burglary. On 19 June 2018, this Court filed an unpublished opinion holding the State offered a facially valid, race-neutral explanation for the State's peremptory challenge in response to Defendant's *Batson* objection, and, therefore, the trial court did not err in determining Defendant failed to prove purposeful discrimination. *State v. Hewitt*, 260 N.C. App. 271, 814 S.E.2d 921 (COA 17-1157) (2018) (unpublished) (slip op. at *11). On 14 August 2020, the Supreme Court of North Carolina issued an Order allowing Defendant's Petition for Discretionary Review "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *State v. Hobbs*, [374 N.C. 345,] 841 S.E.2d 492 (2020)."

Analysis

I. *State v. Hobbs*

¶ 2 "When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson v. Kentucky*." *Hobbs*, 374 N.C. at 349-50, 841 S.E.2d at 497 (citation omitted). First, the burden of production is on the defendant to make a prima facie showing of racial discrimination. *Id.* at 350, 841 S.E.2d at 497 ("So long as a defendant provides

evidence from which the court can infer discriminatory purpose, a defendant has established a prima facie case and has thereby transferred the burden of production to the State."). Then, "the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge." *Id.* at 352, 841 S.E.2d at 499 (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243, 204 L. Ed. 2d 638, 656 (2019)). "At the third step of the analysis, the defendant bears the burden of showing purposeful discrimination." *Id.* at 353, 841 S.E.2d at 499 (citation omitted). This third and final step provides an opportunity for the defendant " 'to show the State's explanations for the challenge are merely pretextual.' " *Id.* at 354, 841 S.E.2d at 499 (quoting *State v. Golphin*, 352 N.C. 364, 426, 533 S.E.2d 168, 211 (2000)).

¶ 3 The *Hobbs* Court directed:

> At the third step, the trial court must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent.

Id. at 353, 841 S.E.2d at 499 (citations and quotation marks omitted). The Court further elaborated, "when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, *must* consider that evidence in determining whether the defendant has proved purposeful discrimination

in the State's use of a peremptory challenge." *Id.* at 356, 841 S.E.2d at 501 (emphasis added).

¶ 4 "A criminal defendant may rely on 'a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race.' " *Id*. (citation omitted). This evidence includes, but is not limited to:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
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> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
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> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
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> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
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> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id. (quoting *Flowers*, 139 S. Ct. at 2243, 204 L. Ed. 2d at 655-56).

¶ 5 The *Hobbs* Court ultimately concluded the trial court erred because it "did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges," reiterating that "there is nothing new about requiring a court to consider *all* of the evidence before it when determining

whether to sustain or overrule a *Batson* challenge." *Id.* at 358, 841 S.E.2d at 502 (emphasis added). Likewise, the Supreme Court pointed out, that at least as to one prospective juror: "The Court of Appeals failed to conduct a comparative juror analysis, despite being presented with the argument by Mr. Hobbs[,]" and this Court "failed to weigh all the evidence put on by Mr. Hobbs, instead basing its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral." *Id.* at 359, 841 S.E.2d at 503. Moreover, "[t]he trial court similarly failed to either conduct any meaningful comparative juror analysis or to weigh any of the historical evidence of racial discrimination in jury selection presented by Mr. Hobbs." *Id.* at 359-60, 841 S.E.2d at 503.

¶ 6 Consequently, the Supreme Court determined:

> Failing to apply the correct legal standard, neither the trial court nor the Court of Appeals adequately considered all of the evidence offered by Mr. Hobbs to support his claim that certain potential jurors were excused from serving on the jury in his case on the basis of their race. Accordingly, the trial court must conduct a new hearing on these claims.

Id. at 360, 841 S.E.2d at 503.

¶ 7 In its Conclusion, the Supreme Court held, in relevant part,

> the Court of Appeals erred as a matter of law and the trial court clearly erred in ruling that Mr. Hobbs failed to prove purposeful discrimination with respect to the State's use of peremptory challenges to strike jurors Humphrey, Layden, and McNeill without considering all of the evidence presented by Mr. Hobbs. This error included failing to engage in a comparative juror

> analysis of the prospective juror's voir dire responses and failing to consider the historical evidence of discrimination that Mr. Hobbs raised.

Id. at 360, 841 S.E.2d at 503-04. In so concluding, our Supreme Court reversed this Court and remanded the case to the trial court with instructions "to conduct a *Batson* hearing consistent with this opinion, to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion, or within such time as the current state of emergency allows." *Id.* at 360, 841 S.E.2d at 504.

II. Defendant's *Batson* Challenge Considering *Hobbs*

¶ 8 In this case, on remand, Defendant argues, the State concedes, and we agree that in light of *Hobbs*, reconsideration of our prior opinion requires we conclude the trial court erred in its analysis of the third *Batson* prong. Specifically, the trial court here made the same error as the trial court in *Hobbs* in "failing to engage in a comparative juror analysis of the prospective juror's voir dire responses . . . ." *Id.*; *accord State v. Alexander*, ___ N.C. App. ___, ___, 851 S.E.2d 411, 421 (remanding the matter to the trial court in light of *Hobbs* where "[w]e are unable to discern from the record how or whether the trial court considered Defendant's comparative juror argument"). Thus, like in *Hobbs*, "[w]e do not know from the trial court's ruling how or whether these [juror] comparisons were evaluated." *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 502.

¶ 9 In light of this error, Defendant requests this Court undertake its own review of the Record in this case to determine whether Defendant is entitled to a new trial arising from his *Batson* challenge. The State, however, argues the appropriate remedy, as in *Hobbs*, is to remand this matter to the trial court to evaluate the *Batson* challenge in light of *Hobbs*, including undertaking the comparative juror analysis. In *Hobbs*, the Supreme Court ruled: "Neither the trial court nor the Court of Appeals appropriately considered all of the evidence necessary to determine whether Mr. Hobbs proved purposeful discrimination with respect to the State's peremptory challenges of jurors Humphrey, Layden, and McNeill. Accordingly, we must remand to the trial court for a new *Batson* hearing." *Id.* at 356, 841 S.E.2d at 501. Notably then, the Court in *Hobbs* did not remand that case to this Court, in whole or in part, to review the record but rather reversed this Court and remanded the matter to the trial court to conduct a new *Batson* hearing.

¶ 10 Thus, consistent with *Hobbs*, the appropriate remedy at this stage is to remand this matter to the trial court to conduct a new *Batson* hearing and to enter a new order. *See id*. In conducting Defendant's new *Batson* hearing, "[t]he trial court may, in its discretion, undertake any evidentiary procedures it deems necessary to comply with our mandate." *Alexander*, ___ N.C. App. at ___, 851 S.E.2d at 422. Following this hearing, the trial court must enter an order including "specific findings of fact under the totality of *all* the circumstances at the third step of its *Batson* analysis,

including, but not limited to, findings . . . disclosing how or whether a comparative juror analysis was conducted[.]" *Id.* at ___, 851 S.E.2d at 421-22 (citing *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502).

Conclusion

¶ 11 Accordingly, for the foregoing reasons and in light of *Hobbs*, the trial court's Order overruling Defendant's *Batson* objection is reversed. The matter is remanded to the trial court "to conduct a *Batson* hearing consistent with [*Hobbs*], to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion, or within such time as the current state of emergency allows." *Hobbs*, 374 N.C. at 360, 841 S.E.2d at 504. Moreover, in the event the trial court "rule[s] in Defendant's favor on his *Batson* challenge, Defendant shall receive a new trial." *Alexander*, ___ N.C. App. at ___, 851 S.E.2d at 422. Pursuant to N.C.R. App. P. 32(b), we direct the mandate of this Court will issue to the trial court in five business days following the filing of this Opinion.

REVERSED AND REMANDED.

Judge ARROWOOD concurs.

Judge MURPHY concurs in separate opinion.

Report per Rule 30(e).

MURPHY, Judge, concurring.

¶ 12 I concur in the Majority's remand based on our opinion in *State v. Alexander*, which held "[b]ecause the trial court failed to enter findings regarding [comparative juror analysis], we are bound by *Hobbs* to reverse its denial of [the] [d]efendant's *Batson* challenge." *State v. Alexander*, 851 S.E.2d 411, 421 (N.C. App. 2020). However, if this procedural issue were one of first impression, I would review the issue rather than reverse and remand. Our Supreme Court in *Hobbs* recognized that we may conduct our own comparative juror analysis and we are not required to delay justice and remand to the trial court for further consideration in every case, noting:

> Neither the trial court *nor the Court of Appeals* appropriately considered all of the evidence necessary to determine whether Mr. Hobbs proved purposeful discrimination with respect to the State's peremptory challenges of jurors Humphrey, Layden, and McNeill. Accordingly, we must remand to the trial court for a new *Batson* hearing.

State v. Hobbs, 374 N.C. 345, 356, 841 S.E.2d 492, 501 (2020) (emphasis added). Nonetheless, *Alexander* is binding upon this panel until such time as our Supreme Court clarifies its procedural impact on this and similarly situated cases.

¶ 13 Further, while not argued below or on appeal, if we were to consider this matter without remanding to the trial court, I would invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the impact of the 100% strike rate of African

American males by the State and the interplay of the Supreme Court of the United States' holdings in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L. Ed. 2d 89 (1994).