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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-307

Filed 21 March 2023

Guilford County, No. 18CRS74175

STATE OF NORTH CAROLINA

v.

ALVIN NATHANAEL SMITH

Appeal by Defendant from Order entered 9 November 2021 by Judge Lori I. Hamilton in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General James M. Wilson, for the State.

Lisa Miles for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Alvin Nathaneal Smith (Defendant) appeals from an Order entered 9 November 2021 denying Defendant's objection, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), to the State's exercise of peremptory challenges to two African-American prospective jurors. This is the second time this matter is before

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us on appeal. *See State v. Smith*, 278 N.C. App. 606, 860 S.E.2d 51 (2021) (*Smith I*). In *Smith I*, we concluded the trial court erred by failing to conduct a full *Batson* inquiry, and we remanded this case for the trial court to conduct a *Batson* hearing, addressing all three steps of the inquiry. *Id.* This appeal follows those further proceedings undertaken below. While much of the background of this case may be found in our opinion in *Smith I*, relevant to this appeal, the Record before us tends to reflect the following:

On 13 August 2018, a Guilford County grand jury returned an indictment charging Defendant with First-Degree Murder. Jury selection began on 27 January 2020. The State exercised one peremptory challenge and then passed the panel to Defendant, who successfully challenged two jurors for cause and exercised three peremptory challenges before returning the panel to the State. The State then exercised peremptory challenges to strike two African-American prospective jurors. Defendant objected on *Batson* grounds, arguing two of the three peremptory challenges exercised by the State were used to strike the only African-American prospective jurors called to that point in jury selection. The trial court then conducted a hearing on the record—outside the presence of the jury—regarding Defendant’s *Batson* objection. The trial court found Defendant met the *prima facie* showing and called on the State to provide race-neutral reasons for the strikes. The State provided the following explanation for the challenged peremptory strikes:

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With regard to Ms. Powell, she was stricken purely for the reason that she gave as far as her work situation. If it hadn't been for that I would have been perfectly happy to keep her on there. In order to somewhat accommodate her work situation where she said she's -- only four people work there, she's number two in command, the number -- her supervisor is the number one in command, has been called away due to a family emergency, I struck her for that limited reason. Otherwise, the State would have been satisfied with her.

With regard to juror number one, Ms. Creecy, quite frankly, she was giving me a mean look the whole time. And that would be my reason for striking her, was the fact that she didn't appear very open with my questions, was very short, and appeared to my visual perception that she was looking like she was mad at me for being here. She might very well be mad at me, but that was the reason for striking her. It had nothing to do with her. That would be the showing for the State.

The trial court then heard from Defendant's counsel, announced a recess, and asked to see counsel in chambers. After a brief recess, the trial court issued its ruling denying Defendant's objection on the record, stating in part:

And so I have expressed, Counsel, my concern with the peremptory challenge. However, in looking at *Batson* and its progeny it appears that a number of cases following *Batson* have held that if the prosecutor can give a racially-neutral reason, whatever that racially-neutral reason is, then courts have upheld the trial court in denying the *Batson* challenge.

And so for that reason despite my concern, because I cannot make as what I'm -- as -- as what I understand it is my -- my duty to determine whether or not the challenge peremptory was the result of purposeful race or gender discrimination. And I don't feel that I can make that determination at this time. I cannot make the determination that the peremptory was, in fact, the result of the purposeful race or gender discrimination.

I am going to deny the *Batson* challenge.

In the prior appeal in *Smith I*, we concluded: “the trial court erred by failing to conduct a full *Batson* inquiry addressing each of the three steps necessary for a determination regarding whether the State exercised its peremptory challenges in a racially discriminatory manner.” *Smith I*, 278 N.C. App. 606, ¶ 21. In so doing, this Court reasoned:

[I]t appears that the trial court denied Defendant’s *Batson* challenge not because it determined that Defendant failed to meet his burden of proving purposeful determination, but solely because the State offered apparently race-neutral explanations for its challenges to the only two African-American prospective jurors yet to be called during voir dire.

Id. at ¶ 20. The matter came back before the trial court on remand on 8 September 2021. In its opening remarks, the trial court stated the purpose of the remand hearing was to conduct a full *Batson* hearing, specifically to determine whether Defendant met the burden of proving purposeful discrimination. Further, the trial court noted it previously found Defendant met the *prima facie* showing required at step one of the *Batson* analysis, which shifted the burden to the State to provide race-neutral explanations for the peremptory strikes. The trial court also noted it found the State offered race-neutral explanations for the exercise of the two peremptory challenges; however, it erroneously ended the *Batson* analysis before reaching the third step: determining whether Defendant met the burden of proving purposeful discrimination.

The trial court then heard arguments from both Defendant and the State. At the conclusion of the hearing, the trial court took the matter under advisement with the consent of the parties to be notified by email of the court's decision. On 9 November 2021, the trial court entered an Order denying the Defendant's *Batson* challenge, finding Defendant did not meet his burden of proving purposeful discrimination by a preponderance of the evidence. The Order stated in relevant part:

4. The State conceded the issue of the susceptibility of the case at bar to racial discrimination.

5. Neither the State, nor the Defendant, exercised all of their respective peremptory challenges.

6. The witnesses in the case were multiracial.

7. At the point at which Defendant raised his *Batson* objection, the State had exercised two-thirds of its total peremptory challenges to excuse African American jurors.

. . . .

9. Beyond biographical questions, the State asked all the prospective jurors essentially the same approximately fifteen (15) questions with very little, if any, follow-up, and most of the State's questions were designed to elicit "yes" or "no" answers or were framed as requests for jurors to raise their hands in response to the question. When an individual juror's answers raised issues, which might reasonably have warranted further probing, the State nearly always failed to do so thereby resulting in a dearth of information from which this Court may discern whether or not an inference of discrimination exists.

10. ["The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about

is evidence suggesting that the explanation is a sham and a pretext for discrimination.” *Miller-El v. Dretke*, 545 U.S. 231, 244, 125 S.Ct. 231;162 L. Ed. 196 (2005), citing *Ex Parte Travis*, 776 So. 2d 874, 881 (Ala. 2000). However, where, as here, the prosecutor engages in a meager examination of every prospective juror, including the challenged jurors, the prosecutor’s questions or comments leave scant evidence from which the Court may determine whether or not the State impermissibly discriminated against the challenged jurors.

. . . .

14. Where Defendant cited data showing two-thirds of the State’s peremptory challenges were used to excuse African-American jurors and where he questioned the State’s motive in excusing two African-American prospective jurors following the same limited voir dire as the prosecutor conducted with every other prospective juror, but where he has not otherwise identified, nor has the Court observed, aspects of the prosecutor’s actions or demeanor to support a finding of racial discrimination, the Defendant has failed to show by a preponderance of the evidence that the State’s motive in excusing [the jurors] was purposeful racial discrimination.

On 12 November 2021, Defendant timely filed written Notice of Appeal.

Issue

The dispositive issue on appeal is whether the trial court erred in again denying Defendant’s *Batson* objection to the State’s peremptory challenge to strike two African-American prospective jurors during jury selection.

Analysis

This Court reviews a *Batson* challenge with “great deference” to the trial court’s determination regarding “whether the defendant has satisfied his burden of proving purposeful discrimination[,] . . . overturning it only if it is clearly erroneous.”

State v. Hobbs, 374 N.C. 345, 349, 841 S.E.2d 492, 497 (2020) (citations and quotation marks omitted). “Such ‘clear error’ is deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed.” *State v. Clegg*, 380 N.C. 127, 141, 867 S.E.2d 885, 897 (2022) (citation and quotation marks omitted).

“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 party raising the claim must make a *prima facie* showing of intentional discrimination under the “totality of the relevant facts” in the case. Second, if a *prima facie* case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving “purposeful discrimination.”

State v. Waring, 364 N.C. 443, 474-75, 701 S.E.2d 615, 636 (2010) (citations omitted).

As we previously concluded in *Smith I*, the trial court—at trial and on remand—acknowledged Defendant established a *prima facie* case and correctly noted the State provided race-neutral explanations for its peremptory challenges. Thus, we limit our analysis to whether the trial court again erred at the third step of the *Batson* inquiry in determining Defendant did not meet the burden of proving purposeful discrimination.

At the third step of the inquiry, “the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.” *Waring*, 364 N.C. at 475, 701 S.E.2d at 636 (citation and quotation marks omitted). “[T]he defendant bears the burden of showing purposeful discrimination.” *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499 (citations omitted). “The trial court must consider the prosecutor’s race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties.” *Id.* (citation and quotation marks omitted). “[T]he 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.” *Id.* (citation and quotation marks omitted).

“In assessing the entire milieu of the voir dire, the [court] must compare [its] observations and assessments of [potential jurors] with those explained by the State, guided by [the court’s] personal experiences with voir dire, trial tactics and the prosecutor and by any surrebuttal evidence offered by the defendant.” *State v. Porter*, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990) (citation and quotation marks omitted).

This determination:

involves weighing various factors such as susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.

State v. Fair, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citation and quotation marks omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The trial court should also consider “the prosecutor’s demeanor, and the explanation itself.” *State v. Bond*, 345 N.C. 1, 21, 478 S.E.2d. 163, 173 (1996), *reh’g denied*, 345 N.C. 355, 479 S.E.2d 210, *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997).

On remand, the trial court proceeded to the third step of the *Batson* inquiry. In its Order denying Defendant’s *Batson* challenge, the trial court concluded Defendant “failed to show by a preponderance of the evidence that the State’s motive in excusing [the jurors] was purposeful racial discrimination.” Further, the trial court reasoned, “a mere suspicion of a racially discriminative motive is not sufficient to sustain a *Batson* challenge.” On the Record before us, the trial court properly considered the State’s “race-neutral explanations in light of all the relevant facts and circumstances, and in light of the arguments of the parties.” *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499. Specifically, in its Order, the trial court outlined its consideration of the following factors in making its determination: the susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination. *See Fair*, 354 N.C. at 140, 557 S.E.2d at 509.

Thus, on remand, the trial court properly conducted the three-step *Batson* analysis, “assessing the entire milieu of the voir dire[.]” *See Porter*, 326 N.C. at 499,

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391 S.E.2d at 151. Therefore, Defendant has failed to show, and we cannot conclude, the trial court's determination was clearly erroneous. Consequently, we affirm the trial court's Order denying Defendant's *Batson* challenge.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order denying Defendant's *Batson* challenge is affirmed.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).