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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-657-2

Filed 3 October 2023

Forsyth County, Nos. 17 CRS 55391, 17 CRS 55399-400, 17 CRS 56332

STATE OF NORTH CAROLINA

v.

BRODERICK TYWONE RUTH

Appeal by Defendant from judgments entered 9 May 2019 by Judge Stanley L. Allen in Forsyth County Superior Court. This case was originally heard in the Court of Appeals on 7 September 2021. *See State v. Ruth*, 2022-NCCOA-23, 866 S.E.2d 921 (2022) (unpublished). By order filed 6 April 2023, the North Carolina Supreme Court remanded the case to this Court.

*Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State.*

*Appellate Defender Glenn Gerding and Assistant Appellate Defenders Amanda S. Hitchcock and Heidi E. Reiner, for Defendant-Appellant.*

WOOD, Judge.

This case is before us on remand from the North Carolina Supreme Court “for reconsideration in light of [the Supreme Court’s] decision in *State v. Campbell*,” 384 N.C. 126, 884 S.E.2d 674 (2023). *State v. Ruth*, 384 N.C. 185, 884 S.E.2d 747 (2023). Accordingly, we address Defendant’s *Batson* challenge, 476 U.S. 79, 106 S. Ct. 1712,

90 L. Ed.2d 69 (1986), in light of our Supreme Court's holding in *Campbell*.

**I. Factual and Procedural History**

This case arises out of Defendant's actions in the early morning hours on 10 July 2017 after Officer Frank Sanchez pulled Defendant over for driving through a stop sign. Defendant got out of his vehicle during the traffic stop and fired at Officer Sanchez, who took cover and subsequently managed to return fire. Defendant returned to his vehicle and sped from the scene. After a high-speed chase in which Defendant eventually abandoned his vehicle, he emerged from a wooded area and surrendered. Defendant was arrested and indicted for felony fleeing to elude arrest; assault with a firearm on a law enforcement officer; discharging a firearm into an occupied vehicle in operation; possession of a firearm by a felon; attempted murder; and assault with a deadly weapon with intent to kill. The State provided notice to Defendant of aggravating factors on 18 January 2018.

Defendant's trial was held during the 6 May 2019 criminal session in superior court in Forsyth County. Defendant already had filed a *Batson* motion on 1 May 2019, and the State argued to the trial court before the commencement of trial that the motion was premature because jury selection had not begun. The entirety of jury selection voir dire was performed off the record. During jury selection, the State initially challenged for cause potential jurors Shelton, Weisman, McClain, Stinson, and Parrish. Ms. Stinson said "no" when the trial court asked her whether she would be able to render a verdict based on the facts and law. Ms. Weisman had scheduled

medical treatments, and the trial court deferred her jury duty to the next jury notice she would receive. The trial court denied the State's challenge for cause of Ms. McClain because she stated she could render a verdict based on the facts and law. The trial court denied the State's challenge for cause of Ms. Stinson because she argued she did not want to judge anyone, but the trial court stated she would only be rendering a verdict, not a judgment. The trial court denied the State's challenge for cause of Ms. Parrish because she stated she could render a verdict based on the facts and law but would have to find a babysitter.

The State then proceeded to peremptorily challenge jurors Stinson, McClain, and McGregor. Defendant made a *Batson* challenge as to jurors McClain and McGregor. The trial court asked the State its reason for excusing jurors McClain and McGregor, and they held a discussion at the bench off the record. Thereafter, five new jurors were seated for jury selection. The State peremptorily challenged Ms. Quinn, and Defendant's counsel stated, "Asking for an objection." The trial court excused Ms. Quinn.

A new juror, Brian Speas, was seated. The State challenged Mr. Speas for cause, and Defendant made a *Batson* challenge. The trial court asked Mr. Speas whether he could listen to the evidence and render a verdict, to which he replied, "I can't do it." The trial court told Mr. Speas he had stated twice previously he could render a verdict based on the facts and law just minutes ago, to which he replied,

“Well, I can—if you heard me twice, I can, but—.” The trial court denied the State’s motion for cause.

The State then peremptorily challenged Mr. Speas, and Defendant again made a *Batson* challenge. The jurors were excused for the afternoon recess, and the trial court stated, “[G]o ahead and let the State get their four *Batson* objections. You want to explain those on the record, Madam D. A.?” The State responded, “Your Honor, is the Court finding there’s a *prima facie* showing?” The trial court stated, “No—well, I’m saying he made an objection. I want you to put on the record why you excused those.” The State responded, “Let me see if I can,” and then proceeded to explain:

[Ms. McClain] indicated she would have a hard time rendering a verdict, in this case, and in sitting in judgment of the defendant. State’s motion for cause was denied, and the State used a preemptory because the State believes that Ms. McClain would have a difficult time, even having all the evidence in front of her rendering—to return a verdict of guilty. The other juror, I believe that was the only black juror from the first pass. And then Mr. Speas, same reasoning as Ms. McClain. The State initially alleged or challenged him for cause because he indicated that he could not be fair to the State, that he could not render a verdict even if the evidence was presented. So the State challenged him for cause. The challenge for cause was denied and the State used a preemptory.

Defendant’s counsel stated, “I believe Ms. McGregor was African-American.” The State replied, “I don’t know if we can say that, and I don’t think any questions were asked with regard to her race. Usually on this sort of situation, it’s on the record for the jurors to self-identify, and we did not follow that procedure.” During the

exchange, the State made no mention of juror Quinn. The trial court then took a fifteen-minute recess.

The trial court came back into session, and Defendant's counsel requested to be heard on the record regarding his *Batson* challenges. Defendant's counsel stated: "For the record, I would point out the defendant, in this case, is African-American. The alleged victim is not, and that at least three of the five challenges were African-American. I would contend four were African-Americans, and I would contend that those are all *Batson* violations, at least some of them. The trial court asked Defendant's counsel, "Why do you say that?" Defendant's counsel replied:

Madam D. A. said that Ms. McClain was taken off because she would have problems being fair, indicated—Ms. McClain said yes, I can figure things out. Mr. Speas went back and forth . . . but I think ultimately, he said he could be fair. Ms. Quinn was also African-American. I think the only reason, that racially neutral reason would be her brother's in jail, but she had very little contact, as I understand, with her brother. Again, I would argue that Ms. McGregor, also African-American, said, according to my notes, that she can—she can't figure things out, that she can be fair to both sides.

The trial court asked Defendant's counsel, "Are you saying the State dismissed several ones for racial reasons that [they] are black?" Defendant's counsel replied, "I'm arguing four out of the five preemptory challenges were African-American." The trial court asked, "Are you saying the State did it because they were black?" Defendant's counsel replied, "Yes, I am." The trial court asked, "And what basis do you have for that?" Defendant's counsel replied, "They didn't present a racially

neutral argument, racially neutral reason for peremptory challenge.” The trial court then noted that defense counsel’s objection was “on the record” and permitted the jurors to return to the courtroom, at which time jury selection continued.

Defendant was acquitted of attempted murder but convicted of all other charges. The trial court arrested judgment on the conviction of assault with a deadly weapon with intent to kill. Thereafter, Defendant admitted to the presence of three aggravating factors: that the offense was committed to disrupt or hinder the enforcement of laws; that the offenses were committed against a law enforcement officer in the performance of his duties; and that the offenses were committed while Defendant was on pretrial release for another offense. Thereafter, Defendant timely gave oral notice of appeal in open court.

## **II. Analysis**

### **A. Standard of Review**

“The job of enforcing *Batson* rests first and foremost with trial judges” because they are best positioned “to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” *Campbell*, 384 N.C. at 131, 884 S.E.2d at 679 (brackets omitted). North Carolina appellate courts have adopted the “clear error” standard for review of the *Batson* inquiry. *State v. Wright*, 189 N.C. App. 346, 351, 658 S.E.2d 60, 63 (2008).

### **B. Batson Objections**

An attorney's "privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause" of the federal Constitution which, we emphasize, "forbids striking even a single prospective juror for a discriminatory purpose." *Campbell*, 384 N.C. at 133, 884 S.E.2d at 680 (brackets omitted). The Supreme Court of the United States has held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, 90 L. Ed.2d at 83 (1986). Likewise, N.C. Const. art. I, § 26 prohibits race-based peremptory challenges, and "our courts have adopted the *Batson* inquiry for reviewing the validity of peremptory challenges under the North Carolina Constitution." *Campbell*, 384 N.C. at 133, 884 S.E.2d at 680 (brackets omitted).

The *Batson* inquiry has three parts. "First, the trial court must determine whether the defendant has met his or her burden of establishing a prima facie case that the peremptory challenge was exercised on the basis of race." *Id.* at 133, 884 S.E.2d at 680 (quotation marks and brackets omitted). A defendant can establish "a prima facie case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial," such as a "prosecutor's questions and statements during voir dire examination and in exercising his challenges[, which] may support or refute an inference of discriminatory purpose."

*Id.* at 134, 884 S.E.2d at 681. Other factors “for a trial court to consider” at step one include, but are not limited to:

the race of the defendant, the race of the victim, the race of the key witnesses, repeated use of peremptory challenges demonstrating a pattern of strikes against black prospective jurors in the venire, disproportionate strikes against black prospective jurors in a single case, and the State's acceptance rate of black potential jurors.

*Id.* at 134, 884 S.E.2d at 681. In step one, the prosecutor may rebut the defendant’s initial *Batson* challenge by arguing “that the defendant has failed to establish a prima facie showing of discrimination.” *Id.* at 134, 884 S.E.2d at 681 (brackets excluded).

“Where the trial court clearly ruled there had been no prima facie showing before the State articulated its reasons, this Court does not consider whether the State offered proper, race-neutral reasons for its peremptory challenge.” *Id.* at 136, 884 S.E.2d at 682 (quotation marks and ellipsis omitted). This Court does “not consider at step one the State's *post facto* reply to the trial court's request for a step two response.” *Id.* at 136, 884 S.E.2d at 682. On the other hand,

[i]f the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.



*State v. Hoffman*, 348 N.C. 548, 551–52, 500 S.E.2d 718, 721 (1998).

If the trial court finds a defendant has met his burden of establishing a prima facie case of discrimination at step one, then the inquiry proceeds to step two in which “the burden shifts to the prosecutor to offer a racially neutral explanation to rebut the defendant’s prima facie case.” *Campbell*, 384 N.C. 126 at 134, 884 S.E.2d 674 at 681 (brackets omitted). “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.” *Id.* at 134–35, 884 S.E.2d at 681.

Regardless of the State’s “justification for its strike” in step two, the inquiry proceeds to step three in which “the trial court must determine the persuasiveness of the defendant’s constitutional claim.” *Id.* at 135, 884 S.E.2d at 681 (quotation marks omitted). The burden is “on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination. The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent.” *Id.* at 135, 884 S.E.2d at 681.

In the present case, the trial court never explicitly ruled on whether Defendant made a prima facie showing of discrimination. After the jurors left the courtroom, the trial court asked the State its reasons for its peremptory objections. The State replied, “Your Honor, is the Court finding there’s a prima facie showing?” The trial court stated, “No—well, I’m saying he made an objection.” So, then, the trial court stated it was not making a finding, then wavered, and simply noted Defendant made

an objection. The trial court then proceeded to step two of the *Batson* inquiry by prompting the State to explain its reasons for the peremptory challenges: “You want to explain those on the record, Madam D. A.?” The State then explained its peremptory challenges without objection to doing so.

We note that an appellate court does not consider the State’s reasons in step two of the *Batson* inquiry only if “the trial court *clearly* ruled there had been no prima facie showing before the State articulated its reasons.” *Campbell*, 384 N.C. 126, 136, 884 S.E.2d 674, 682 (emphasis added) (ellipsis omitted). Here, it is not at all clear the trial court ruled there was no prima facie showing. We could just as equally interpret the trial court’s response of “No” to mean it simply was not making *any* finding regarding Defendant’s prima facie showing as to mean the trial court was making a specific finding that Defendant *had not made a prima facie showing*. The trial court’s statement of “No” is even less clear because it paused, then seemed to qualify or walk back the statement by saying, “well, I’m saying [Defendant] made an objection.” Finally, the fact that the trial court prompted the State to proceed to step two of the *Batson* inquiry by explaining its reasons for its peremptory challenges lends credence to the notion that the trial court either did not make a ruling regarding

a prima facie showing or (admittedly less likely) it had found there was a prima facie showing.<sup>1</sup>

Because the trial court “require[d] the prosecutor to give h[er] reasons without ruling on the question of a *prima facie* showing, the question of whether [D]efendant . . . made a *prima facie* showing [became] moot.” *Hoffman*, 348 N.C. at 551, 500 S.E.2d at 721. Normally, then, the trial court should have proceeded through steps two and three of the *Batson* inquiry, whereupon “it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.” *Id.* at 551–52, 500 S.E.2d at 721. Here, however, the trial court made no findings—nor any ruling at all—regarding Defendant’s *Batson* challenges. Rather, after arguments from the State and Defendant’s counsel, the trial court stated, “That’s on the record. Bring the jury in please, Sheriff.” Then the jury selection continued.

Normally, we would remand the matter to the trial court to make appropriate findings. This is because the prima facie showing became moot, and it was therefore the “responsibility of the trial court *to make appropriate findings*” on the ultimate question of the *Batson* inquiry—whether the State’s reasons for its peremptory challenges were “a credible, nondiscriminatory basis for the challenge[s] or simply

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<sup>1</sup> Arguably, step one of the *Batson* inquiry became moot as early as when the trial court asked the State to explain its peremptory challenges to jurors McClain and McGregor by having the State give its reasons for the challenges without ruling on the prima facie showing.

pretext.” *Hoffman*, 348 N.C. at 551–52, 500 S.E.2d at 721 (emphasis added). Here, however, as we discussed in *Ruth I*, the State never offered a race-neutral reason for its peremptory challenge of Ms. Quinn, so even if the trial court provided findings for us to review, we still would have to remand the matter to the trial court for a new trial. Therefore, we echo our words in *State v. Wright*:

We appreciate the challenges faced by the prosecutor and the trial court in attempting to comply with the requirements of *Batson*; however, we are duty bound to follow the plain language of the law. As the prosecutor failed to provide a race-neutral explanation as to *each* challenged juror mentioned by the defendant the trial court clearly erred in not granting defendant's *Batson* motion.

189 N.C. App. at 354, 658 S.E.2d at 65. Where the State does not offer a race neutral reason for *each* peremptory challenge at issue, regardless of whether there were valid reasons for some of the peremptory challenges, a new trial is warranted. *Id.* at 354, 658 S.E.2d at 65.

### **III. Conclusion**

Because the trial court never explicitly ruled on whether Defendant made a prima facie showing of discrimination, the issue of whether Defendant made a prima facie case became moot when the trial court proceeded to steps two and three of the *Batson* inquiry. At step two, the State failed to provide any explanation whatsoever for striking one of the challenged jurors. Consequently, “we are duty bound to follow the plain language of the law. As the prosecutor failed to provide a race-neutral explanation as to *each* challenged juror mentioned by the defendant the trial court

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clearly erred” by failing to comply with the requirements of *Batson*. *Id.* at 354, 658 S.E.2d at 65 (citation omitted) (emphasis in original). Accordingly, we remand the matter to the trial court for a new trial and need not reach Defendant’s remaining arguments on appeal.

NEW TRIAL.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).