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NO. 4-12-0619

FILED
January 22, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from
Plaintiff-Appellee,	) Circuit Court of
v.	) McLean County
JERMAINE D. EVANS,	) No. 11CF331
Defendant-Appellant.	)
	) Honorable
	) Robert L. Freitag,
	) Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction was reversed where the trial court erred in finding the State had not purposefully discriminated against a prospective juror on the basis of her race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

¶ 2 After a December 2011 trial, the jury convicted defendant, Jermaine D. Evans, of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)). In January 2012, the trial court sentenced defendant to a 12-year prison term. Defendant appeals, contending the court erred by failing to find the State peremptorily struck two prospective jurors on the sole basis of their race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). We agree and reverse defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 In May 2011, the State charged defendant with unlawful delivery of a controlled substance within 1,000 feet of a church (720 ILCS 570/407(b)(2) (West 2010)) and unlawful

delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)). Just before trial, the State dismissed the charge for unlawful delivery of a controlled substance within 1,000 feet of a church. The same day, the parties began selecting the jury.

¶ 5 Before jury selection, the trial court explained how it would conduct the process. The court explained each side would have seven peremptory challenges, the jury would be selected in panels of four, and the parties would not be allowed to "back strike" panel members. The court further explained it would question the prospective jurors all at once and would then allow each party to supplement the court's questioning with its own questions.

¶ 6 During jury selection, the trial court asked the prospective jurors whether they, or any family members or close friends, had ever been parties to a lawsuit. Prospective juror S.H., among others, responded in the affirmative. When asked by the court to explain, S.H. stated, "I have a brother I think it was for drugs. I don't know. It's been a while, but I wasn't at the court; and my sister, she was fighting, and I did attend. And for myself, I think it's called bad check under two hundred dollar [*sic*] and traffic not getting over in the other lane." S.H. explained her bad check case had been resolved over 10 years ago. Prospective juror A.T.C. did not respond to the court's question regarding past involvement with the court system.

¶ 7 The trial court also asked the prospective jurors whether they, or any family members or close friends, had ever been the victim of a crime. S.H. indicated her car had been vandalized in McLean County in the past year and charges had been filed. A.T.C. did not respond to this question.

¶ 8 The State was permitted to question the prospective jurors. The State first questioned A.T.C. because of a discrepancy between his juror questionnaire and his lack of response to the trial court's questions. The following interchange took place between the assistant

State's Attorney and A.T.C.:

"Q. You've had several family members murdered. Do you mind telling us who they were?

A. They not [*sic*] from this town, small town, Danville, Illinois.

Q. Are you originally from Danville?

A. Yes, sir.

Q. How many? Do you mind?

A. Total, okay, well, several, just several.

* * *

Q. I guess let me ask you is there anything about having family members that have been victims of those crimes that would affect your ability to be a fair and impartial juror here today for us?

A. No, sir."

¶ 9 During his questioning, defense counsel elicited more information regarding the murder of A.T.C.'s family. The following exchange occurred between defense counsel and A.T.C.:

"Q. [A.T.C.], I want to ask you a question about your family situation. Any of those murders or homicides involve drugs?

A. Still pending, don't know. There is questions, family still have questions.

Q. How close were you to the individuals that were killed.

A. First cousins.

Q. First cousins?

A. Second cousins. Majority first cousins.

Q. And you said to your knowledge you don't know if drugs were involved.

A. I didn't go to any of the cases, but to my knowledge, no."

¶ 10 At the conclusion of *voir dire*, the trial court excluded six jurors for cause. After the challenges for cause, the parties began selecting the jury. The State used its fifth peremptory challenge on A.T.C. Defendant objected to the State's strike on *Batson* grounds. The court responded to defendant's objection as follows:

"THE COURT: The court notes for the record that juror number 98, [A.T.C.], appears to be an individual of African American descent at least by appearance. The defendant is indicating that they believe the State should be called upon to exercise or to explain their reason for excusing that juror. Of course, the issue raised by a *Batson* challenge is one in which the court must first make a finding that there is a pattern of discrimination based on race. At this point, this being the first individual of a potential African American race, at least I believe of all the others who have been coming before, I don't believe there is a pattern at this point, so because of that, I'm not going to require the State to give an explanation at this point in time."

¶ 11 The State used its very next peremptory challenge on S.H. Defendant renewed his objection on *Batson* grounds, and the following exchange took place:

"THE COURT: All right. The court notes from the record—for the record, I should say, [S.H.] appears also to be an individual of African American race, and she has now been excused by the People as well. At this point, there have been two potential jurors who appear to be African American. The State has excused both of them. The issue is whether that *prima facia* [*sic*] is a showing of a pattern of striking based on race. Since there are only three, I believe, possible African Americans in the panel here, one that we haven't reached yet, the State has struck the first two. So I am going to ask the State for a race-neutral explanation for your dismissal of [A.T.C.] and [S.H.]

MR. GHRIST [(assistant State's Attorney)]: Your Honor, for [A.T.C.], his answers as to having family members that were victims of other crimes, simply that several had been murdered, he could not give an exact number. When Mr. Welch asked him about those and whether they were drug related, he said he didn't know. The family had questions, and just kind of the vagueness around those questions was the reason that I have dismissed [A.T.C.] or asked that [A.T.C.] be dismissed I should say.

THE COURT: [S.H.]?

MR. GHRIST: [S.H.], [S.H.] had a brother with prior drug offenses. She also herself had a prior for passing a bad check. That in itself wasn't that big of deal but the producer—the brother

with prior drug offenses and charges was the reason for [S.H.'s] dismissal.

THE COURT: Mr. Welch?

MR. WELCH [(defense counsel)]: Well, Your Honor, [S.W.] had a nephew that had a drug case, and if the People say that [S.H.'s] prior—Her own prior involvement with the system is not of significance, it was the brother with the drug case, I don't know the distinction between her then and [S.W.].

THE COURT: Well, Mr. Welch, you excused [S.W.], so I don't know what that has to do with—

MR. WELCH: After they passed on her, I thought.

THE COURT: Oh, okay, I'm sorry, I see what you're saying.

MR. WELCH: Yeah.

THE COURT: All right. I got it. Mr. Ghrist, any further response?

MR. GHRIST: No. I don't—I don't think that the case law in *Batson* requires me to give my entire theory as to jury *voir dire*. That was the reason that I excused [S.H.].

THE COURT: All right, well the court having considered the explanations offered by the People, the position of the defense, I guess theoretically certainly there is a difference between [S.W.] and [S.H.] in that one was a nephew, one was a brother, perhaps a closer relationship, I don't know. And with regard to the other

> gentleman, [A.T.C.], I think Mr. Ghrist has offered an appropriate explanation there. I think it's a little closer call on [S.H.], frankly; but I think there is at least some race-neutral distinction between her and [S.W.], who has previously been accepted, so at this point I'm not going to find that there is an established pattern of exclusion based on race. So the *Batson* motion at this point is denied."

¶ 12 The parties agreed on 12 jurors, leaving no prospective jurors in the venire. Jury selection was continued to the next day so an alternate could be selected. The next day, the alternate was chosen and the matter proceeded to trial.

¶ 13 At trial, the following evidence was presented. Lisa Hibbard worked with the Bloomington police department as a confidential informant. On April 22, 2011, the Bloomington police department set up a controlled buy, in which Hibbard was to buy cocaine from a person the department had been targeting, Edmonte Turner. Hibbard spoke with two Bloomington police officers prior to making the buy. The police officers searched Hibbard and gave her $100 in prerecorded bills with which to make the buy. The officers dropped her off outside a blood plasma center in Bloomington.

¶ 14 Hibbard placed a call to Turner and asked to buy crack cocaine. Turner said he was at Denny's eating and told Hibbard to "hang tight." After about 15 minutes, Hibbard placed another call to Turner and he said he was getting a drink and would be there soon. After a little more time passed Hibbard placed one more call to Turner, and he said he was on his way.

¶ 15 Soon after the last call, Turner pulled into the plasma center's parking lot and picked up Hibbard. Hibbard sat in the backseat of the vehicle Turner was driving because defendant was in the front seat. Hibbard placed the prerecorded bills on the center console and

defendant handed her a bag of crack cocaine. Hibbard had never met defendant until that night. Defendant did not say a word to Hibbard.

¶ 16 Turner pulled away from the plasma center while Hibbard was still in the vehicle. After driving about a block, Turner stopped and let Hibbard out of the car. Hibbard walked back toward the plasma center to meet with police. Hibbard gave the officers the crack cocaine she purchased and told them defendant, not Turner, had "served" her the drugs. Hibbard did not see who took the money from the console.

¶ 17 After Turner and defendant let Hibbard out, the police stopped their vehicle. Detective Kevin Raisbeck of the Bloomington police department searched both Turner and defendant. Detective Raisbeck found approximately $1,000 on Turner but did not find the prerecorded bills. Detective Raisbeck found $220 on defendant, $100 of which consisted of the prerecorded bills given to Hibbard. No drugs were found on either Turner or defendant.

¶ 18 At the close of evidence, defendant moved for a directed verdict. The trial court denied the motion. The jury returned a verdict of guilty and the court set the sentencing for January 19, 2012. Defendant filed a posttrial motion arguing (1) the evidence was insufficient to sustain the conviction, (2) the court erred in denying his motion for a directed verdict, and (3) the court erred in refusing to give defendant's proposed jury instruction. The court denied the motion and sentenced defendant to a 12-year prison term.

¶ 19 Defendant filed a motion to reconsider his sentence, arguing the trial court failed to take into account certain mitigating factors. The court denied the motion to reconsider sentence.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Forfeiture of Issue on Appeal

¶ 23 The State argues defendant has forfeited review of his *Batson* claim because he failed to raise the issue in his posttrial motion. As a general rule, parties must raise objections at trial *and* in its posttrial motion to preserve a claim of error on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988). The supreme court, however, has relaxed the forfeiture rule where a defendant asserts constitutional error and makes a timely objection in the trial court, and the issue is one that can be raised in collateral proceedings. *People v. Mitchell*, 152 Ill. 2d 274, 285, 604 N.E.2d 877, 884 (1992) (quoting *Enoch*, 122 Ill. 2d at 190, 522 N.E.2d at 1131-32).

¶ 24 In this case, defendant is raising a constitutional issue. See *Batson*, 476 U.S. at 84. Defendant made a timely *Batson* objection to the prosecutor's use of peremptory challenges in the trial court. Further, "[a] *Batson* claim is clearly an issue which can be later raised in a post-conviction hearing petition ***." *Mitchell*, 152 Ill. 2d at 285, 604 N.E.2d at 884. We will review defendant's *Batson* claim.

¶ 25 B. The *Batson* Framework

¶ 26 When a defendant claims the State has improperly challenged jurors on the basis of their race in violation of *Batson*, the trial court engages in a three-step evaluation of the defendant's claim. "First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race." *People v. Easley*, 192 Ill. 2d 307, 323, 736 N.E.2d 975, 988 (2000). To determine whether a defendant has met this threshold showing, the trial court must look at the totality of the circumstances surrounding the peremptory challenge. *Davis*, 231 Ill. 2d at 360, 899 N.E.2d at 245.

¶ 27 If the trial court determines the defendant has made the requisite showing, the burden shifts to the State to provide a race-neutral explanation for why it has exercised peremptory strikes on the jurors in question. *Easley*, 192 Ill. 2d at 323-24, 736 N.E.2d at 988. The State's

offered reason need not be persuasive or plausible, and the court assesses only the facial validity of the reason. *Id*. at 324, 736 N.E.2d at 988. "Absent an inherent discriminatory intent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. Defense counsel may then rebut the State's proffered explanation as pretextual. *Id*.

¶ 28 Finally, the trial court will evaluate the evidence "in light of the *prima facie* case, the prosecutor's reasons for challenging the venireperson, and any rebuttal by defense counsel," and must determine whether the defendant has met the burden of showing purposeful discrimination. *Id*.

¶ 29 C. The Trial Court's *Batson* Ruling

¶ 30 Defendant contends the trial court erred in failing to find he met his burden of proving purposeful discrimination. Specifically, defendant contends the trial court "erred substantively, because each of the prosecutor's two explanations 'falters upon closer examination' under step three. [Citation.]" Defendant's brief at 22. Defendant asserts the State's race-neutral explanations were too implausible to be believed and the court erred in accepting them.

¶ 31 1. *Standard of Review*

¶ 32 Defendant contends the proper standard of review for this case is *de novo* where, as here, the trial court "made no character assessments or findings of fact on the record in conducting its detached analysis of the strikes of [S.H.], [S.W.], and [A.T.C.]." Further, defendant contends the trial court analyzed the *Batson* issue as a matter of law, which warrants *de novo* review. In support of this position, defendant cites *Davis*, 231 Ill. 2d at 364, 899 N.E.2d at 247. Defendant's reliance on *Davis* is misplaced.

¶ 33 In general, a trial court's ultimate ruling on a *Batson* claim is a matter of fact. *Mitchell*, 152 Ill. 2d at 288, 604 N.E.2d at 886. Trial courts are in the best position to analyze a

Batson claim, as they are present during the jury selection process. *Davis*, 231 Ill. 2d at 364, 899 N.E.2d at 247. As such, the trial court's determination is "entitled to great deference on appeal." *Mitchell*, 152 Ill. 2d at 289, 604 N.E.2d at 886. Thus, reviewing courts will not overturn the trial court's determination absent clear error. *Davis*, 231 Ill. 2d at 364, 899 N.E.2d at 247. "A finding is clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made." *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 36, 976 N.E.2d 447; see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

¶ 34 Illinois courts have adopted, however, a bifurcated standard of review where a trial court has raised a *Batson* issue *sua sponte*. *Davis*, 231 Ill. 2d at 364, 899 N.E.2d at 247. Under this bifurcated standard, "the court's findings of fact, including any specific observations of record bearing on demeanor or credibility, will be accorded deference; however, the ultimate legal determination based on those findings is one that [a reviewing court] make[s] *de novo*." *Id*.

¶ 35 In this case, the trial court did not raise the *Batson* issue *sua sponte*. The court did not, as it did in *Davis*, raise the *Batson* issue by asking the State to supply an explanation for its challenge to a prospective juror without first receiving a formal objection from defense counsel. *Id*. at 366, 899 N.E.2d at 248. Instead, the court held *Batson* proceedings after defense counsel raised *Batson* objections as to the State's use of peremptory challenges against S.H. and A.T.C. The *Batson* claim at issue here was not raised by the trial court *sua sponte*. We will review the trial court's ruling on defendant's *Batson* claim for clear error.

¶ 36 2. *Prospective Juror S.H., No. 97*

¶ 37 Defendant asserts the State mischaracterized S.H.'s answers during *voir dire*, which bears negatively on the persuasiveness of the proffered reason and the assistant State's Attorney's credibility and renders the State's proffered reason implausible. Defendant urges this mischaracterization of S.H.'s testimony, when coupled with the fact the assistant State's Attorney's race-neutral explanation could have equally applied to S.W., proves the State purposefully discriminated during jury selection. We agree.

¶ 38 A mischaracterization of a prospective juror's *voir dire* testimony is evidence tending to prove purposeful discrimination, as such mischaracterization bears negatively on the proponent of the strike's credibility. See *Miller-El v. Dretke*, 545 U.S. 231, 244 (2005). In this case, the assistant State's Attorney mischaracterized S.H.'s *voir dire* testimony involving her brother's drug case. When explaining his reason for striking S.H., the prosecutor referred to her brother's multiple drug offenses and charges and used the word "producer". However, when S.H. explained her brother's involvement with the court system during *voir dire*, she did not refer to multiple drug cases involving her brother.

¶ 39 This mischaracterization of S.H.'s *voir dire* testimony shows the assistant State's Attorney may have had additional knowledge about S.H.'s brother or may have had an ulterior motive for striking S.H. The State's proffered reason for striking S.H. falls apart when this mischaracterization is accompanied by a side-by-side comparison of S.H., the struck juror, and S.W., a white juror who was accepted by the State.

¶ 40 The United States Supreme Court has explained a side-by-side comparison of the jurors struck and those allowed to serve is a powerful tool in determining whether the State purposefully discriminated in jury selection. *Id*. at 241. To put it more clearly, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an

otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id*. Further, when race is at issue, the "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id*. at 252.

¶ 41 In this case, when asked for a race-neutral reason for peremptorily striking S.H., the State responded it struck S.H. because she "had a brother with prior drug offenses." Since S.H. only mentioned one case involving drugs, this reason could have applied equally to a white juror, S.W., whom the State accepted.

¶ 42 During *voir dire*, S.W. testified her nephew had been involved in a case similar to the one at bar. S.W. further testified she attended those proceedings. If the State was concerned about S.H.'s brother's prior drug offense, then it surely should have been concerned about S.W.'s nephew's drug case, given the fact S.W. actually attended those proceedings and seemed close to her nephew. The State, however, accepted the panel containing S.W. and exercised a peremptory challenge on S.H.

¶ 43 This inconsistency is compounded by the fact, when asked to explain the lack of race-neutral distinction between S.H. and S.W., the assistant State's Attorney refused to respond. A prosecutor is not required to respond to a charge of pretext in *Batson* proceedings, but a refusal to do so after such response is requested by the trial court bears negatively on the persuasiveness of the proffered explanation. The prosecutor may well have been able to give a fuller, more persuasive explanation but declined to do so. The fact the trial court articulated its own perceived race-neutral distinction between S.H. and S.W. in making its ultimate *Batson* ruling does not change our analysis.

¶ 44 In light of the State's mischaracterization of S.H.'s *voir dire* testimony and a

side-by-side comparison of S.H., the struck juror, and S.W., a juror accepted by the State, we are left with a firm and definite conviction, based on this record, the trial court erred in denying defendant's *Batson* challenge. See *Fleming*, ¶ 36, 976 N.E.2d 447. Given our disposition of defendant's claimed error regarding S.H., we need not address his claimed error regarding A.T.C. See *Easley*, 192 Ill. 2d at 324, 736 N.E.2d at 988 ("The exclusion of even one prospective juror on account of race is unconstitutional and requires reversal of a defendant's conviction."). Accordingly, we reverse defendant's conviction and remand the cause for a new trial.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we reverse defendant's conviction and remand for a new trial.

¶ 47 Reversed and remanded.