2016 IL App (3d) 150843-U

Order filed April 25, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

In re D.M.,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
a Minor	)	Kankakee County, Illinois,
	)	
(The People of the State of Illinois,	)	
	)	
Plaintiff-Appellee,	)	Appeal No. 3-15-0843
	)	Circuit No. 14-JD-184
v.	)	
	)	
D.M.,	)	Honorable
	)	Michael J. Kick,
Defendant-Appellant).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's denial of defendant's *Batson* challenges was not clearly erroneous.

¶ 2 Defendant, D.M., having been found guilty of robbery by a jury, challenges the process by which that jury was selected. Specifically, defendant argues that the State's use of peremptory challenges on two African-American venirepersons violated the Equal Protection Clause. U.S. Const., amend. XIV. We affirm.

¶ 3 FACTS

¶ 4 On October 10, 2014, the State charged defendant in a delinquency petition with aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)). The State later amended the petition to include a charge of robbery (720 ILCS 5/18-1 (West 2014)). The State also filed notice of its intent to prosecute defendant as a habitual juvenile offender (705 ILCS 405/5-815 (West 2014)) and violent juvenile offender (705 ILCS 405/5-820 (West 2014)). Because of the State's intent to proceed under those statutes, the parties agreed that defendant was entitled to a trial by jury.

¶ 5 Jury selection commenced on November 4, 2014. One of the venirepersons questioned by the court was Patricia Winston. The court asked if Winston knew of any reason she could not be fair or impartial in the case; Winston responded that she did not. This exchange followed:

> "[THE COURT:] Do you know the Minor, any members of his family the attorneys or any of their associates?
>
> [WINSTON:] No, I don't—can I ask one question though? Where are they from? Did they used to live in Pembroke or anything?
>
> UNIDENTIFIED FEMALE: No, it's okay.
>
> [WINSTON:] No? Just look kind of familiar from somebody 20 years ago.
>
> [THE COURT:] I gotcha. Do you know the Minor or any members of his family?
>
> [WINSTON:] No."

The court proceeded to ask Winston a series of standard *voir dire* questions. At the conclusion of the court's line of questions, without asking any questions of its own, the State asked that Winston be excused.

¶ 6 Later in the selection process, the court questioned venireperson Johnathon Hawkins. The examination began as follows:

> "[THE COURT:] Mr. Hawkins—
>
> [HAWKINS:] Yes.
>
> [THE COURT:] —please state your name, your address, your occupation, spouse's name and children.
>
> [HAWKINS:] My name is Johnathon Hawkins.
>
> [THE COURT:] Can you speak up please?
>
> [HAWKINS:] My name is Johnathon Hawkins, I live in Kankakee, no kids, single, I work at Tysons."

The court proceeded to ask Hawkins the standard *voir dire* questions. None of Hawkins' answers provided any grounds for an excusal for cause. At the conclusion of the court's questioning, the State declined to ask any questions and asked that Hawkins be excused. The defense immediately asked to approach the bench.

¶ 7 Outside of the venire's presence, defense counsel explained her request for the sidebar:

> "I just would like to preserve the record, Your Honor, that the State has used two—two preemptory [*sic*] challenges and both challenges have been for African American jurors. I think there's a disturbing pattern starting to emerge and I just wanted to have that noted on the record. If it continues, there's case law that says that

> the State can't just use challenges to get rid of African American jurors when the defendant is—the Minor is African American also.
>
> THE COURT: So is there a race-neutral basis for excusing him?
>
> [THE STATE:] Yes. I believe he is—I know that I prosecuted a Johnathon Hawkins on a prior occasion and when I saw the name Jonathon [*sic*] Hawkins on the juror sheet I immediately called Grace from Probation. And I couldn't get my own office to answer the phone so I called Grace. She confirmed we did have a Jonathon [*sic*] Hawkins on probation between 2/20/10 to 2014. Rather than asking him in front of the other jurors, which may embarrass him or make other jurors think I'm asking embarrassing questions in front of them, I thought it would be easier to just excuse him and move on to the next one rather that to determine if it was the same John Hawkins. Even if it wasn't, if he felt I wrongly accused him then he may have had a bias against me because of that because I wrongfully accused him of being the same Johnathon Hawkins but I didn't know."

The court pointed out that Hawkins, if he was the person the State thought him to be, testified falsely by stating he had never been party to a criminal case. The court suggested that the State could "supplement the record if he happens to be the same person." The court subsequently excused Hawkins. Notably, though defense counsel did refer to two peremptory challenges, the

trial court inquired only as to the State's basis for excluding Hawkins, making no reference to Winston.

¶ 8 Juror selection concluded on the same day as it began. The following day, November 5, 2014, defendant filed a "Renewed *Batson* Motion." In the motion, defendant alleged that the State had used its only two peremptory challenges on African-American venirepersons, Winston and Hawkins. Defendant pointed out in the motion that in each case the State sought excusal of the potential juror without conducting any *voir dire*. Defendant sought relief pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

¶ 9 The parties addressed the renewed *Batson* motion in court on November 5, 2014, before the jury entered the courtroom. Defense counsel referred to the motion as "a follow up [*sic*] to [her] oral motion." The State informed the court that it had not read defendant's motion. The court allowed the State until the next morning to respond to defendant's motion.

¶ 10 On November 6, 2014, the court announced that it would allow the *Batson* motion to proceed, stating: "[O]rdinarily you can't raise a *Batson* motion after the jury's been sworn in. But [defense counsel] did raise it initially before the jury was sworn in. So I'm allowing her to continue with that objection at this time." After hearing arguments from defense counsel, the court stated that the defense had "established a *prima facie* case under *Batson* based on the fact that *** the State only exercised two peremptory challenges, both of those were for African Americans, both of those eliminated any African Americans from the jury in this case." The court then provided the State with an opportunity to provide race-neutral reasons for the use of its peremptory challenges.

¶ 11 In regard to its excusal of Hawkins, the State reasserted its previous explanation, namely, the prosecutor's belief that she had previously prosecuted Hawkins. The State also explained that

it "did not want to further ostracize [Hawkins] or other people on the jury by questioning him about a juvenile prior or making him go outside the presence of the jury." The State also added a second justification for its excusal of Hawkins:

> "[I]n addition, you have his young age. He sat in the chair, he appeared very disinterested with the process. He had to be addressed by the court not to mumble. His response to the court when the court ordered him not to mumble was also concerning. He did seem to show a very disinterest in the process and a lack of respect for authority when he wanted to mumble and slump and not appropriately address the issue."

¶ 12 In regard to its excusal of Winston, the State explained:

> "[T]hat's the one that engaged in the soliloquy with the Minor's mother wanting to know whether or not she knew her from Hopkins from about 20 years ago. Back in the day, don't I know you, are you sure we don't know each other; well, maybe not. You don't know. You get into the course of the trial, maybe she remembers why she knew him, then maybe you have a mistrial. The friendliness with the Defendant's mother certainly gives—absolutely is a race neutral reason for *** that particular juror."

Further, in regard to its failure to conduct any inquiry of the two venirepersons at issue, the State pointed out that it had not asked "a single question to a white person either."

¶ 13 The court denied defendant's *Batson* motion, stating:

> "[B]ased on the totality of the evidence in this case and my own observations of the jury selection process and the State's explanation, I find the State has a race-neutral basis for the challenges of the two jurors in question and I find there's no *Batson* violation."

The matter then proceeded to trial.

¶ 14 Following the trial, the jury found defendant guilty of robbery and not guilty of aggravated robbery. The court imposed upon defendant a determinate sentence in the Department of Juvenile Justice as both a violent and habitual juvenile offender.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant renews his *Batson* challenge. More precisely, defendant argues that the race-neutral justifications offered by the State were pretextual and incredible, and that the trial court's decision to the contrary was clearly erroneous. We disagree.

¶ 17 The State denies an African-American defendant the equal protection of law where "it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85 (citing *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880)). Though a defendant has no right to be tried by a jury that includes members of his own race, he *does* have, under the Equal Protection Clause, "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86. The exclusion of even one potential juror on racial grounds is a violation of the Equal Protection Clause and requires the reversal of any subsequent conviction. *People v. Kindelan*, 213 Ill. App. 3d 548, 555 (1991) (citing *People v. McDonald*, 125 Ill. 2d 182, 200 (1988)).

¶ 18 In *Batson*, the United States Supreme Court elucidated the three-step process by which the claim of an equal protection violation is adjudicated. See *Batson*, 476 U.S. at 93-98. First, a defendant must make *prima facie* showing of discrimination in the selection of the jury. *Id*. at 95. If the trial court finds that such a showing has been made, the burden shifts to the State to offer a race-neutral explanation for the striking of the juror or jurors in question. *Id*. at 97. If the State offers such an explanation, the trial court must determine if the defendant has established purposeful discrimination. *Id*. at 98.

¶ 19 The *Batson* Court noted that the trial court's ultimate decision is essentially a determination of the credibility of the State's proffered race-neutral justification. *Id*. at 98 n.21. Accordingly, the Court pointed out, that finding by the trial court is entitled to "great deference" upon review. *Id*. The Court emphasized this point again in *Hernandez v. New York*, 500 U.S. 352, 365 (1991), noting that the evaluation of the prosecutor's state of mind, based upon demeanor and credibility, "lies 'peculiarly within a trial judge's province.' " (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Accordingly, a trial court's findings as to whether the State engaged in purposeful discrimination[1] in the jury selection process will not be disturbed upon review unless those findings are clearly erroneous. *People v. Ramey*, 151 Ill. 2d 498, 519 (1992).

¶ 20 I. Hawkins

¶ 21 Defendant argues that the State's initial explanation for striking Hawkins—the prosecutor's belief that she had previously prosecuted him—was incredible, and thus a mere

[1]"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." *Hernandez*, 500 U.S. at 359.

pretext for racial discrimination. Defendant points out that the State never offered any evidence that potential-juror Johnathon Hawkins was the same person previously prosecuted by the State. In further support of his argument, defendant relies on *People v. Mitchell*, 228 Ill. App. 3d 167 (1992), for the proposition that a prosecutor's unsupported belief that a potential juror was previously prosecuted does not withstand *Batson* scrutiny.

¶ 22 In *Mitchell*, the State exercised peremptory challenges on two African-American venirepersons. *Id*. at 172. As to the first potential juror, the State offered no race-neutral reason when given the opportunity, declaring only that the defense knew the reason. *Id*.

> "As to the other black juror, James Harris, the State explained its peremptory challenge on the basis that it had a rap sheet indicating a man with the same name, same age, and same build was once arrested in Los Angeles. However, as defendant notes, there is nothing in the record to suggest that prospective juror James Harris had ever been to Los Angeles, much less that he had ever been arrested there. Moreover, the State's failure to ask the judge to clarify any discrepancies as to Harris' identity lends weight to the argument that their excuse for striking him as a potential juror was clearly pretextual. Thus, the State's explanation for its challenge was not 'clear, legitimate, trial-specific, and race-neutral' as required by *Batson*." *Id*.

¶ 23 Initially, we note that the *Mitchell* court reversed Mitchell's conviction and remanded for a new trial on the grounds that prejudicial and pervasive remarks by the trial court had rendered Mitchell's trial unfair. *Id*. at 171. It was only after announcing its reversal that the court

addressed the alternate *Batson* argument. *Id*. at 171-72. Accordingly, we must be mindful "that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). In fact, because the State failed to provide any basis for the exclusion of the first juror in *Mitchell*, the court's analysis with respect to Harris was itself unnecessary to the *Batson*-based ruling. *Id*. at 172.

¶ 24 *Mitchell* is also distinguishable from the case at bar on two key factual grounds. As a practical matter, *Mitchell*—a First District case—involved a Cook County venireperson with the same name and age as a person who was once arrested in Los Angeles. That there might be a separate person in Los Angeles with the same name and age as a person from Cook County seems wholly reasonable, and thus would cast serious doubt on the State's assumption that the potential juror must be the arrestee from Los Angeles. In the present case, however, it is far more reasonable to believe that the Johnathon Hawkins previously prosecuted in Kankakee County might be the same Johnathon Hawkins subsequently called for jury duty in Kankakee County. More importantly, the prosecutor in the present case, rather than relying on a mysteriously obtained "rap sheet," had a firsthand recollection of previously prosecuting a Johnathon Hawkins.

¶ 25 Moreover, the State in the present case—unlike in *Mitchell*—explained that it was essentially stuck between a rock and a hard place. If it didn't utilize its peremptory challenge on Hawkins, it risked having on the jury a person who had lied about never having been party to a criminal case. If it did inquire, and was incorrect, it risked offending Hawkins by accusing him both of lying and of a previous crime. Indeed, such accusations also might not sit well with the

other members of the venire in the courtroom.[2] Thus, even if the venireperson was *not* the previously prosecuted Johnathon Hawkins, the State determined that the path of least resistance was to simply exercise a peremptory challenge. The trial court's determination that this race-neutral explanation was credible was not clearly erroneous. Because we find that the State provided a sufficient race-neutral reason for its excusal of Hawkins, we need not consider whether its later, demeanor-based explanation was similarly credible.

¶ 26 II. Winston

¶ 27 Defendant also argues that the State's race-neutral reason for excusing Winston was incredible and a pretext for racial discrimination. Specifically, defendant contends that Winston asserted that she did not know defendant or anyone in his family, and that the brief exchange between Winston and defendant's mother in the court room was insufficient to infer any sort of friendliness between the two.

¶ 28 Initially, we note that because the trial court accepted the State's explanation for Winston's excusal, we may infer that the unidentified speaker who spoke during the *voir dire* of Winston was, in fact, defendant's mother. At jury selection, Winston asked the court whether D.M. or his family formerly lived in Pembroke. It was at this point that D.M.'s mother interjected: "No, it's okay." Winston, apparently responding directly to D.M.'s mother—as indicated by her initial response of "No?"—explained that someone looked familiar. The above facts establish that not only did Winston express an initial concern that she might be familiar

[2]Defendant repeatedly suggests that the State should have inquired into Hawkins' criminal history in a private sidebar. However, this suggestion does not address the State's concern that Hawkins—if accused both of lying and of being a criminal—might reasonably take offense and subsequently be biased against the State.

with defendant's family, but she conducted a brief exchange with defendant's mother on that topic.

¶ 29 Winston's conduct gave the State two legitimate reasons for concern. First, though Winston eventually testified that she was not acquainted with defendant or his family, the State recognized the risk that Winston's original suspicion might prove true. In other words, Winston might realize during trial she did know a member of defendant's family after all. Second, though we acknowledge that Winston's interaction with defendant's mother could hardly be described as "friend[ly]," as described by the State at the *Batson* hearing, any interaction with a defendant's family can put the State on notice of a venireperson's potential bias. Given these multiple concerns, it was reasonable for the State to play it safe by excusing Winston. Accordingly, we cannot find that the trial court's decision to accept the State's race-neutral explanation was clearly erroneous.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 32 Affirmed.