2015 IL App (1st) 130904-U

No. 1-13-0904

November 13, 2015

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLIE BASS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CR 686 The Honorable Joseph G. Kazmierski Jr., Judge presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

Held: Defendant's conviction for first degree murder is affirmed where (1) the trial court properly found that he failed to set forth a *prima facie Batson* claim and (2) he received effective assistance of counsel.

¶ 1 Following a jury trial, defendant, Charlie Bass, was convicted of first degree murder and sentenced to 55 years in prison. He appeals, arguing that (1) the trial court failed to conduct a

proper inquiry after his attorney raised a *Batson* claim and (2) his attorney provided ineffective assistance of counsel by failing to mount meaningful challenges to essential portions of the State's case. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant with, *inter alia*, the first-degree murder of Netisha Stroger, his long-time girlfriend, after Netisha died from a gunshot wound to the head.

¶ 4 During *voir dire*, defense counsel raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), after the State exercised its third, fourth, and fifth peremptory challenges. Defense counsel stated as follows. "I am going to object, based on—we have had one African-American called to the panel, and these are—the other two individuals are, the other two are minorities. I believe they are Hispanic." Counsel then further stated he "would object on the grounds of Batson." Thereafter, the trial court instructed a staff member to retrieve his "stack of cards." In looking at the cards, the court noted that the jurors were randomly sent over from the jury room and the selected jurors came from three of the four panels comprising part of the venire. The judge then stated that "[a]t this point a prima facie case of discrimination has not been shown."

¶ 5 The matter proceeded to trial, at which the evidence established the following.

¶ 6 Netisha and defendant were living together on July 26, 2009, along with Netisha and defendant's child and Netisha's child from another relationship. At around 3 p.m. that day, Netisha left for her job as a nurse's assistant.

¶ 7 Rita Mullins testified that she and defendant were in a dating and sexual relationship. Mullins went to defendant's home almost every day while Netisha was at work. She knew that defendant and Netisha were living together and had a child together. Mullins called defendant at

around 5 p.m. on July 26 while Netisha was at work. When defendant answered, he asked Mullins to "hold on." As she waited, Mullins could hear defendant talking to somebody else. Defendant and Mullins then continued their conversation. After their conversation ended, Mullins called defendant again about a minute later. When defendant answered, he told Mullins that he was on a landline with Netisha when Mullins had called earlier and that Netisha had heard their conversation and that she would not call him, write to him, send him money, or visit him in jail. Defendant was awaiting trial on a burglary charge.

¶ 8 Mullins testified that when she was at defendant's apartment on one occasion, she observed him put a handgun in a case and place it under a sink. She was "not sure" whether a picture of the handgun that officers eventually recovered showed the gun she observed defendant holding, as she "only saw the nose of it." She acknowledged that in a handwritten statement that she made, she stated the gun she observed defendant holding had a very long barrel and was about seven inches long. She also acknowledged that in her statement and testimony she gave before a grand jury, she identified a picture of a gun similar to the one recovered in this case as looking like the gun she observed defendant holding. However, Mullins stated she "didn't actually see the gun" and only observed defendant "putting it into the case."

¶ 9 Beginning at around 3:15 a.m. on July 27, defendant made three phone calls to 911 to report that Netisha was injured. The State introduced recordings of defendant's calls, and the parties stipulated that the recordings were accurate and contained accurate time stamps. The State then played the recordings for the jury. In the first call, placed at 3:15 a.m., defendant tells the operator to send the police "quick" and that he arrived home to find his girlfriend lying on the floor, bleeding. In the second, placed at 3:18, defendant asks the operator where the paramedics are. He states his girlfriend is bleeding out of her mouth and eyes and is breathing but

unconscious. In the third call, placed at 3:23, defendant sounds calmer and explains that he called previously and arrived home to find his girlfriend on the floor, bleeding.

¶ 10 Chicago police sergeant Michael Kelly testified that he responded to a call regarding an injured female at around 3:25 a.m. on July 27. Upon arriving at 3718 West Grenshaw, Kelly observed a white Cadillac parked in the alley with its headlights on. Tierre Randle, who was later identified as defendant's cousin, was sitting inside the Cadillac. Kelly spoke with Randle briefly before entering defendant and Netisha's apartment. Inside, Kelly observed Netisha lying on the ground, being tended to by the Chicago Fire Department. He also observed defendant in the bedroom of the apartment, and he spoke to him briefly. When Kelly eventually exited the home, he observed Randle standing on the sidewalk near the home's entrance.

¶ 11 The State introduced surveillance footage from three security cameras attached to a building near 3718 West Grenshaw. The parties stipulated that the footage fairly and accurately showed the activity that the three security cameras recorded and that the time and date stamps on the surveillance footage were correct. As the State played the videos, it asked Kelly several questions regarding the footage. Kelly testified that the beginning of the second surveillance video had a timestamp of 2:45 and 34 seconds and that at 2:45:43, he could see headlights in the alley next to 3718 West Grenshaw. At 2:45:47, a vehicle could be seen in the alley. Kelly could observe the vehicle's headlights emanating onto the other side of Grenshaw. At 2:45:55, a break could be observed in the headlights, and at 2:46:40, the vehicle pulled into the street and subsequently returned down the alley. The State then played a third video showing a close-up of the area where the vehicle pulled in the alley. Kelly testified that the vehicle was the same white Cadillac in which he saw Tierre Randle.

¶ 12 On cross-examination, defense counsel elicited testimony from Kelly regarding the quality of the surveillance footage. Kelly acknowledged that he could not observe the driver of the car, the number of occupants in the car, or the car's license plate. When asked whether he could observe what was happening while the car was parked in the alley, Kelly testified that he "could tell that there [was] a figure walking in front of headlights going from the passenger side to the driver's side." He could not determine the race, sex, or age of that person. He also could not tell if the person reentered the car.

¶ 13 Chicago police detective Mary Nanninga testified that she arrived at 3718 West Grenshaw at approximately 4:15 a.m. and recovered Netisha's cell phone, a car key with a remote, and a key to Netisha and defendant's apartment. Nanninga later learned the car key was for a red Dodge Charger that she had observed outside the home. Nanninga did not observe any damage to the front door of the apartment building or the front or back doors of Netisha's and defendant's apartment.

¶ 14 Nanninga spoke to defendant at around 4 a.m. Defendant told her that Netisha left for work at around 3 p.m. and Randle picked him up in Randle's white Cadillac DeVille shortly thereafter. Defendant and Randle drove around to various locations on the West Side, drinking. When Randle dropped defendant off at around 3:15 a.m. that night, defendant entered through the front door, which was locked, and found Netisha unconscious on the floor, bleeding from the mouth and nose. Defendant said he then called 911. He did not mention calling anybody else before calling 911.

¶ 15 Nanninga testified that defendant told her that only he and Netisha had keys to the apartment and he did not notice any signs of forced entry or missing or misplaced items.

Nanninga asked defendant whether he knew who would want to shoot Netisha. After stating that he did not, defendant spontaneously stated he did not shoot Netisha.

¶ 16 Nanninga spoke to defendant again at the police station at approximately 10:25 a.m. the next day. During that conversation, defendant did not mention Netisha overhearing him on the phone with Mullins. Defendant again told Nanninga that Randle dropped him off around 3:15 a.m. and he immediately called 911. Nanninga told defendant that Randle was outside the apartment when the police arrived at the scene, and defendant said he did not know why Randle was there.

¶ 17 Nanninga also testified regarding the surveillance footage obtained from outside Netisha and defendant's apartment. She testified that at the 2:45 mark in the video, she could see a white or light-colored vehicle pull up in an alley and stop next to 3718 West Grenshaw. She could then see a person exit the passenger's side and run in front of the vehicle toward 3718 West Grenshaw. At the 3:15:33 timestamp, she observed that the back lights of a parked Dodge Charger flashed as if they were activated by a remote. Nanninga could observe a person approach the driver's side of the Charger and proceed toward 3718 West Grenshaw. At the 3:27 a.m. mark, the white vehicle that she observed earlier in the video returned to its earlier position.

¶ 18 Nanninga acknowledged on cross-examination that in the surveillance footage, she could not see the license plate number of either car, nor could she tell how many people were in the white vehicle or the race or gender of those people.

¶ 19 Denise Stroger Jr., Netisha's sister, testified she financed the purchase of a red Dodge Charger in March 2008 and gave it to Netisha. The car's key had a remote, and the car's front and rear lights blinked whenever somebody pressed the button on the remote to unlock the car. Denise gave Netisha two keys to the car, but only one key was recovered in this case.

¶ 20 Denise testified that after learning of Netisha's death on July 27, she went to Netisha's home to speak with the police. While there, she observed the red Dodge Charger in front of the home and requested permission to remove it from the scene. Nanninga gave Denise the car key that she had found in the bedroom, and Denise's aunt later drove the car to Denise's and Netisha's mother's home at 5102 West Huron.

¶ 21 At around noon on July 27, Erika Huntley, who was Netisha's best friend and defendant's sister, arrived at Denise's mother's home. After speaking with Huntley, Denise opened the Charger's door, reached underneath the seat, and felt a gun. The police were called. Detective Marco Garcia testified that he arrived at the home at approximately 12:45 p.m. and, after speaking to Denise, looked underneath the driver's seat and found a handgun. Fred Bojic, an evidence technician, photographed and recovered the gun. On July 28, Denise awoke at her mother's home to find that the Charger's driver's side window was "busted out," the doors were open, and "stuff was thrown around in the car."

¶ 22 Detective Garcia called Nanninga to tell her that a handgun had been recovered. Defendant was then placed under arrest, and Nanninga recovered two cell phones from him. Detective Michael Kennedy of the Chicago Police Department testified that Netisha's and defendant's cell phones were examined and he viewed the content from their phones. The trial court admitted into evidence photos of the text messages recovered on defendant's and Netisha's phones. Kennedy testified that text messages taken from Netisha's phone showed defendant texting her "Let go to City Hall in the morning" and Netisha responding, "You know it's fucked up. Now you saying City Hall because you got caught up." Another message from defendant stated, "I love you." Pictures taken from defendant's phone likewise showed defendant texting Netisha, "Let go to City Hall in the morning" and "I love you."

¶ 23 The State also entered into evidence the phone records for several phone numbers. The parties stipulated that although the phone numbers were registered to other people, they belonged to several people involved in the case including defendant, Netisha, Huntley, Mullins, and Randle. Nanninga was able to see from the phone records that defendant was simultaneously on a phone call with Mullins at the same that he was on the phone with Netisha. The records also showed that defendant used his cell phone to call Randle at 3:12 a.m., and Randle called him at 3:14 a.m. Defendant called 911 at 3:15 a.m. and 3:18 a.m. He then called Randle at 3:20 and 3:22. He called 911 again at 3:23 a.m. before calling Randle at 3:25 a.m. The phone records also showed that on the morning of July 27, Huntley and Randle made a series of phone calls to each other.

¶ 24 A latent print examiner was unable to find any fingerprints suitable for comparison on the handgun, fired cartridge casing, or the live cartridges in the gun. Swabs obtained from the handgun also were not suitable for DNA testing. Defendant's clothing and shoes were sent to the laboratory, but blood was not identified on those items. A gunshot residue kit was performed on both of defendant's hands. His left hand tested positive for gunshot residue, while his right did not. Both of Netisha's hands tested positive for gunshot residue. Robert Berk, a trace evidence analyst for the Illinois State Police, testified that the findings as to defendant were consistent with someone discharging a firearm. He further testified that defendant still had a "significant amount" of residue on his hand 4 hours and 45 minutes after the shooting.

¶ 25 The parties stipulated that Dr. Michel Humilier of the Cook County Medical Examiner's Office would testify to a reasonable degree of medical certainty that Netisha's cause of death was a gunshot wound and that her death was a homicide. Fred Tomasek of the Illinois State Police,

an expert in the field of firearms identification, testified that the gun recovered from the Charger was the same gun that fired the bullet that killed Netisha.

¶ 26 Following the presentation of evidence, the matter proceeded to closing arguments. During the State's closing, it argued, *inter alia*, that defendant's motive for killing Netisha was that she would not call him, send him money, or visit him jail because she found out about his relationship with Mullins. The State also argued that although defendant told Nanninga he arrived home at 3:15 a.m., the surveillance footage showed Randle's white Cadillac in the alley at 2:45 a.m. and defendant exiting the car. In addition, the prosecutor posited that the lights on the Dodge Charger flashed in the surveillance video because defendant had taken his gun to hide it underneath the driver's seat of the car. The prosecutor also posited that defendant sounded calm in the third 911 call because he had "his story together" by then and knew at that point that the gun was in the car.

¶ 27 During his closing, defense counsel argued, among other things, that the quality of the surveillance videos made it impossible to see Randle's car or who was inside the car. Counsel further posited that the gunshot residue could have been transferred from Netisha to defendant if defendant was holding her. He also noted that although defendant had gunshot residue on his left hand, no evidence was presented reflecting that defendant was left-handed.

¶ 28 The jury found defendant guilty of first degree murder. It also found that he personally discharged a firearm that proximately caused death to another person during the commission of his offense. At a later hearing, the trial court sentenced defendant to 30 years in prison for first degree murder plus an additional 25 years in prison for personally discharging a firearm. This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues (1) the trial court failed to conduct a proper inquiry after his attorney raised a *Batson* claim and (2) his attorney provided ineffective assistance of counsel by failing to mount meaningful challenges to essential portions of the State's case. We address defendant's arguments in turn.

¶ 31 A. The Trial Court's *Batson* Inquiry

¶ 32 Defendant first contends the trial court erred by failing to conduct a proper inquiry after he raised a *Batson* claim during jury selection. He maintains that instead of determining whether he set forth a *prima facie* showing that the State was using its peremptory challenges to exclude minority jurors, the court instead looked at its juror selection cards and observed that the jurors were selected randomly. Thus, defendant argues, the court employed an incorrect standard to determine that a *prima facie* showing had not been made. The State responds that the court correctly determined that defendant failed to set forth a *prima facie* case of discrimination, and its comments regarding the juror selection cards were not the basis for its finding.

¶ 33 Initially, we note that the State argues defendant waived his ability to challenge the trial court's *Batson* determination based on his failure to preserve the record. The State maintains the record does not reflect the races of any of the venirepersons who were questioned during *voir dire*. However, our court has recognized that a party's statement on the record regarding the race of the excluded venirepersons is an acceptable means of making a record for purposes of a *Batson* claim. See *People v. Partee*, 268 Ill. App. 3d 857, 865 (1994). Here, defense counsel stated that he was objecting based on the fact that "we have had one African-American called to the panel, and these are—the other two individuals are, the other two are minorities. I believe they are Hispanic." Thus, to the extent defense counsel identified the three challenged

venirepersons as African-American or Hispanic, we decline to apply waiver. The State also argues defendant waived the *Batson* issue by failing to raise it in his posttrial motion. We reject the State's claim, as "a defendant who objects to the State's use of peremptory challenges but fails to raise a *Batson* claim in a posttrial motion does not waive his or her claim on review." *People v. Primm*, 319 Ill. App. 3d 411, 419 (2000); see also *People v. Sanders*, 2015 IL App (4th) 130881, ¶¶ 24-25 (reviewing the defendant's *Batson* claim on the merits, despite his failure to raise it in a posttrial motion, because the supreme court has relaxed the rules of forfeiture where a defendant raises a constitutional issue at trial that can be later raised in a postconviction petition). Accordingly, we will review defendant's claim on the merits.

¶ 34 The equal protection clause prohibits a prosecutor from challenging potential jurors based solely on race. *Batson*, 476 U.S. at 89. The Supreme Court has set forth a three-step process for trial courts to follow when evaluating whether the State has exercised a peremptory challenge to remove a venireperson based on his race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008). First, the defendant must make a *prima facie* showing that the prosecutor exercised peremptory challenges based on race. *Id.* A court must consider " 'the totality of the relevant facts' " and " 'all relevant circumstances' " surrounding the challenges to determine whether they give rise to a discriminatory purpose. *Id.* (quoting *Batson*, 476 U.S. at 93-94). Factors the court may consider include (1) the racial identity between the party exercising the peremptory challenge and the excluded venire members; (2) a pattern of strikes against African-Americans; (3) a disproportionate use of peremptory challenges against African-Americans; (4) the level of African-American representation in the venire as opposed to the jury; (5) the prosecutor's questions and statements during *voir dire* and while exercising peremptory strikes; (6) whether the excluded African-Americans were a heterogeneous group sharing race as their only common

characteristic; and (7) the race of the defendant, victim, and witnesses. *Davis*, 231 Ill. 2d at 362. A court may also utilize "comparative juror analysis," which examines a prosecutor's questions to potential jurors and the jurors' responses to determine "whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group." (Internal quotation marks omitted.) *Id.* at 361.

¶ 35 "[T]he threshold for making out a *prima facie* claim under *Batson* is not high."*Id.* at 360. Indeed, a defendant need only produce " 'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' " *Id.* (quoting *Johnson v. California,* 545 U.S. 162, 170 (2005)). Nonetheless, the mere fact that a peremptory challenge has been exercised on a person that is the same race as the defendant, or the mere number of African-American venirepersons peremptorily challenged cannot, without more, establish a *prima facie* case of discrimination. *Id.* at 361. After a defendant has made a *prima facie* showing, the burden shifts to the State to provide a race-neutral explanation for striking the juror in question. *Id.* at 362-63.

¶ 36 As defendant correctly notes, ordinarily a trial court's ruling as to whether a *prima facie* case has been established is a question of fact that we review under the manifest weight of the evidence standard. *People v. Rivera,* 221 Ill. 2d 771, 784 (2006). Nonetheless, defendant maintains that the issue in his case is whether the court applied the correct legal test in considering his claim, which is a matter of law that should be reviewed *de novo*. In support of his argument, defendant relies on *People v. Wiley*, 156 Ill. 2d 464 (1993). As *Wiley* is clearly distinguishable, we disagree that it supports the proposition that we should apply a *de novo* standard of review.

¶ 37 In *Wiley*, defense counsel raised a *Batson* challenge on the basis that the prosecution had used six peremptory challenges to remove African-American venirepersons and nothing other

than race distinguished those venirepersons from the accepted jurors. *Wiley*, 156 Ill. 2d at 468. The trial court invited both defense counsel and the State to provide reasons for their peremptory challenges, and the State offered explanations for one of the prospective jurors. *Id.* at 469. Thereafter, the court denied the *Batson* motion. *Id.* In doing so, the court stated that the prosecutor had not excluded African-Americans "in any systematic manner" and that "no showing of any systemic exclusion" had been made. *Id.* at 470.

¶ 38 On appeal, the supreme court noted that the trial court's comments regarding "systematic exclusion" were reminiscent of the outdated standard set forth in *Swain v. Alabama*, 380 U.S. 202 (1965). *Wiley*, 156 Ill. 2d at 474. Although the *Wiley* court could not determine that the trial court had strictly applied the *Swain* test, it found that the court's comments were improper. *Id.* The supreme court then explained that it was "also persuaded by two additional factors." *Id.* at 475. First, the *Wiley* court noted, the trial court asked the State to provide reasons for its peremptory challenges, which "further obfuscate[d] an already conflicting record with regard to whether the trial court was properly applying the standard of *Batson*, including whether the trial court found the defendant had established a *prima facie* showing under *Batson*." *Id.* Furthermore, the supreme court found it "highly significant" that the excluded venirepersons were a heterogeneous group that shared race as their only common characteristic. *Id.*

¶ 39 The *Wiley* court went on to state that while generally a trial court's *Batson* determination is reviewed under the manifest weight of the evidence standard, "in light of the considerations" it had outlined, it could not afford the court's decision such deference. *Id.* at 476. Furthermore, it found insufficient facts in the record to justify a *de novo* review. *Id.* In sum, the supreme court concluded the court's disposition of the defendant's *Batson* motion was "erroneous" and that defense counsel had set forth a *prima facie* case under *Batson*, pursuant to which the State should

have been required to provide reasons for its peremptory challenges as to all of the excluded jurors. *Id.* at 476-77. The *Wiley* court therefore remanded for further proceedings. *Id.* at 477.

¶ 40 Thus, in *Wiley*, not only did the trial court seemingly employ the incorrect standard in analyzing the defendant's *Batson* claim, but the court also never clearly ruled on whether the defendant made a *prima facie Batson* showing. By contrast, in this case the court clearly made a determination that such a *prima facie* showing had not been made. Accordingly, we see no reason to depart from the manifest weight of the evidence standard.

¶ 41 Turning to the merits of the defendant's argument, we find no error in the trial court's finding that defendant failed to set forth a *prima facie Batson* claim. Unlike in *Wiley*, the court's comments in this case do not suggest the court may have employed an incorrect standard when assessing defendant's *Batson* claim. Instead, the court's comments reflect that it was considering two things—defendant's claim that only one African-American had been called to the panel, and defendant's claim that the State was improperly using peremptory strikes against minority jurors. The court first addressed defendant's assertion regarding the number of African-Americans that were called to the panel by reviewing its juror selection cards. It then stated that defendant had not established a *prima facie Batson* showing.

¶ 42 Although the trial court did not explain the reasons for its finding that a *prima facie Batson* showing had not been made, the court is presumed to know the law and apply it properly, and that presumption may be overcome only by an affirmative showing to the contrary. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). Here, defense counsel's sole argument relating to *Batson* was that the State had exercised peremptory strikes against one African-American and two Hispanic venirepersons. Yet, "the mere number of [minority] venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis*, 231 Ill. 2d at 361;

see also *Rivera*, 221 Ill. 2d at 512 ("[t]he number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the *voir dire* answers of those who were struck compared to the answers of those who were not struck."). Furthermore, our supreme court has made clear that "[t]he focus in *Batson* and its progeny has been on the exclusion of the members of a single, identifiable group, not of different groups considered together." *People v. Harris*, 164 Ill. 2d 322, 344 (1994). In light of the foregoing, we presume the court rejected defendant's *Batson* claim based on the fact that his only argument was that the State had stricken one African-American venireperson and two Hispanics.

¶ 43 Notably, defendant does not point us to anything in the record that would support a finding that the State engaged in purposeful discrimination. Instead, defendant maintains that the trial court cut him off from setting forth his *prima facie* case. The record does not support defendant's assertion. In making his *Batson* claim, defense counsel stated as follows.

> "I am going to object, based on—we have had one African-American called to the panel, and these are—the other two individuals are, the other two are minorities. I believe they are Hispanic.
>
> I would object on the grounds of Batson."

Counsel made no further statements, did not attempt to provide any additional facts, and did not in any way persist in making his claim after the court's review of its juror cards. Thus, we find no support in the record for his claim that the court precluded him from making a *prima facie* case. See *Sanders*, 2015 IL App (4th) 130881, ¶ 31 (rejecting the defendant's claim that he was not given an opportunity to establish a *prima facie Batson* case and noting, *inter alia*, that "at no

point did defense counsel interject or request the court to consider anything other than his initial assertion" that the State had excused two minority jury members).

¶ 44 The authority on which defendant relies, *People v. Bohanan*, 243 Ill. App. 3d 348 (1993) is clearly distinguishable. In *Bohanan*, the State made a *Batson* motion, pointing out that the State had excluded two black females and one black male. *Id.* at 350. Immediately thereafter, the trial court instructed the prosecutor to provide "some cogent reasons." *Id.* The appellate court found the aforementioned exchange showed that the trial court never allowed counsel to establish a *prima facie Batson* claim. *Id.* The *Bohanan* court explained that defense counsel should have been afforded the chance to demonstrate "all relevant circumstances" giving rise to an inference of purposeful discrimination, and the trial court's actions "indicate[d] an unfortunate misunderstanding that numbers alone are sufficient to establish a *prima facie* case." *Id.* at 350-51. The *Bohanan* court went on to explain that the court incorrectly "collapse[d]" the *Batson* procedural steps into an evaluation of the State and defense contentions at the same time, and the State's explanations should not have been weighed at the *prima facie* stage of the proceedings. *Id.* at 351.

¶ 45 Thus, the defense attorney in *Bonahan* was precluded from establishing a *prima facie Batson* case because the trial court essentially advanced the matter to second-stage proceedings when it asked the State to explain the reasons for its peremptory strikes. By contrast, no such similar advancement occurred here. The court provided defendant the opportunity to make his case without input from the prosecutor. However, defendant's only argument was that three minority jurors—from different minority groups—had been excused. Accordingly, we find no error in the trial court's treatment of defendant's claim or its determination that defendant failed to set forth a *prima facie* claim of discrimination.

¶ 46 B. Ineffective Assistance of Counsel

¶ 47 Defendant next argues that he received ineffective assistance of counsel. In particular, defendant posits that counsel was ineffective for failing to mount any meaningful challenge to the State's "problematic" video and 911 evidence and failing to file a motion to suppress the text messages obtained from his cell phone.

¶ 48 Claims of ineffective assistance of counsel are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. Pursuant to *Strickland*, a defendant must show counsel's performance was deficient and that he suffered prejudice as a result. *Id.* With respect to the deficiency prong, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). The choice of defense theory is ordinarily a matter of trial strategy (*People v. Guest*, 166 Ill. 2d 381, 394 (1995)) and "matters of trial strategy are generally immune from claims of ineffective assistance of counsel" (*Manning*, 241 Ill. 2d at 327 (internal quotation marks omitted.)). To satisfy the prejudice prong of *Strickland*, a defendant "must show a reasonable probably exists that, but for counsel's unprofessional errors, the result of the proceeding would have different." *Henderson*, 2013 IL 114040, ¶ 11.

¶ 49 1. *The Surveillance Videos and 911 Calls*

¶ 50 Defendant contends that counsel rendered ineffective assistance by failing to point out the "problematic" timestamps on the 911 calls and surveillance videos. He observes that the State's theory at trial was that he arrived home at 2:45 a.m., shot Netisha shortly before 3:15 a.m., called 911 twice, stashed the gun in the Charger, then called 911 a third and final time. He further notes the State theorized he was calm in the third 911 call because he had hidden the gun by then.

However, defendant points out, the time stamps on the surveillance tapes and the 911 calls show that he made his first 911 call at the same time that the lights on the car flashed in the surveillance video, which was when he purportedly unlocked the Dodge Charger. He maintains it was impossible for him to simultaneously call 911 and stash the gun, and he also argues counsel should have used the videos and calls to refute the State's theory that he was calm in the third call because he had stashed the gun by then. Defendant maintains there could be no strategic decision for counsel's failure to do so.

¶ 51 We reject defendant's claim that counsel was ineffective, as defendant has failed to show counsel was deficient or that defendant suffered any prejudice from counsel's purported deficient performance. First, contrary to defendant's assertions, defense counsel did, in fact, comment on the State's timeline of events during his opening statement. In particular, counsel stated as follows.

> "The first call comes in at exactly 3:15 and some seconds. Now, this light that flashes on and off on some car that is not identifiable, you will see when that light flashes off because the screens that you will see show right down to the second. And I ask you to take notes to remember those times.
>
> Seconds after those lights flash off, you hear this frantic call from my client who has his girlfriend, his fiancée in his arms, who has been shot in the head and is dying."

Furthermore, defendant's assertion that the State's timeline of events was impossible overlooks that defendant called 911 from his cell phone. It was certainly possible for defendant to call 911 from his cell phone at the same time that he was stashing the gun, and none of his comments during the 911 calls conclusively establish that he was inside the apartment looking at Netisha

when he was on the phone. Finally, as to his contention that defense counsel should have used the 911 calls and video footage to dispute the State's theory that he sounded calm in the third call because he had hidden the gun by then, defendant fails to overcome the presumption that counsel's decision not to do so was the product of sound trial strategy. *Manning*, 241 Ill. 2d at 327. We note that during trial, defense counsel elicited testimony from both Kelly and Nanninga regarding the poor quality of the surveillance footage. In his closing argument, counsel posited that the quality of the videos made it impossible to discern the license plate on the car, the number of people in the car, or the genders or races of the people in the car. Thus, counsel evidently sought to focus on the poor quality of the surveillance videos rather than focus on comparing the timestamps between the videos and 911 tapes. We fail to see how this was in any way an unsound strategy.

In any event, even if defendant were able to show his attorney was somehow deficient, he cannot show that he suffered any prejudice in light of the strong evidence against him. In addition to the 911 tapes and surveillance footage, the State also presented evidence that gun residue was found on defendant's left hand nearly five hours after the shooting, that he called Randle before calling 911, that he spontaneously told Nanninga he did not shoot Netisha, that the bullet that killed Netisha came from the gun recovered in Netisha's and defendant's Dodge Charger, and that there were no signs of forced entry to the apartment. Based on the foregoing, defendant cannot show he was prejudiced by counsel's decisions with respect to the 911 recordings and surveillance videos and the text messages establishing defendant's motive.

¶ 52 2. *The Text Messages*

¶ 53 Defendant also argues that defense counsel was ineffective for failing to file a motion to suppress the text messages on the grounds that they constituted the fruit of an illegal search. We disagree.

¶ 54 As previously detailed, a defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance of counsel. In other words, he must show that his attorney's performance was deficient and that he was prejudiced by the deficient performance. *Henderson*, 2013 IL 114040, ¶ 11. To establish prejudice resulting from counsel's failure to file a motion to suppress, a defendant must show that the motion was meritorious and a reasonable probability exists that the outcome of his trial would have been different if the evidence had been suppressed. *Id.* ¶ 15. "The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile." *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 55 Here, defendant cannot establish that a motion to suppress the text messages would have been meritorious. As defendant notes, the validity of warrantless cell phone searches was in question across the nation until the decision in *Riley v. California*, ___U.S.___, 134 S. Ct. 2473 (2014). In *People v. Davis*, 2014 IL App (4th) 121040, ¶¶ 22-24, the Fourth District rejected the defendant's claim that his attorney should have filed a motion to suppress text messages that were obtained without a warrant. The *Davis* court explained that based on the uncertainty in the law at the time of the defendant's August 2012 trial, a motion to suppress had a "questionable chance of success," as a reasonable argument could have been made that a warrantless cell phone search was valid pursuant to the search incident-to-arrest exception. *People v. Davis*, 2014 IL App (4th) 121040, ¶ 24. Thus, given the state of the law regarding warrantless cell phone

searches before the *Riley* decision, defendant cannot show a motion to suppress would have been meritorious in this case.

¶ 56 Furthermore, even assuming a motion to suppress would have been successful, defendant cannot show the outcome of his trial would have been any different if the text messages from his phone were suppressed given that the exact same messages taken from his phone were also obtained from Netisha's phone. Defendant has offered no argument as to how the messages from Netisha's phone would have been suppressed. Thus, even if the trial court had suppressed the messages from defendant's phone, those same messages would nonetheless have been admitted at trial. Furthermore, as previously detailed, the State presented strong evidence of defendant's guilt in this case. In light of the strength of the State's evidence, we fail to see how the outcome of defendant's trial would have been any different even if both the messages from defendant's phone and Netisha's phone were suppressed.

¶ 57 In sum, defendant has failed to show counsel was ineffective.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the trial court's judgment.

¶ 60 Affirmed.

¶ 61