2015 IL App (1st) 132201-U

SIXTH DIVISION
December 18, 2015

No. 1-13-2201

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD ELLIOT, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 14198 Honorable Thaddeus L. Wilson, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant was entitled to a limited remand to enable the trial court to conduct a full three-step inquiry into his *Batson* claim.

¶ 2 After a jury trial, defendant Edward Elliot was convicted of first degree murder for the shooting death of Anthony Cox and sentenced to 60 years' imprisonment. In this direct appeal, defendant raises five claims of error. First, he contends that the trial court conducted an improper *Batson* hearing, and asks that we remand the case for a third-stage *Batson* hearing. Second, he contends that he is entitled to a new trial because the court allowed the State to introduce a hearsay statement from a non-testifying witness identifying defendant as the shooter.

Third, he argues that he is entitled to a new trial because the State misstated forensic evidence during closing argument. Fourth, he argues a portion of his sentence imposed pursuant to the mandatory firearm enhancement statute should be vacated because the jury did not specifically find that he personally discharged a firearm. Fifth, he contends that his 60-year sentence is excessive and asks that we reduce his sentence to 45 years' imprisonment. Because we find that the trial court failed to conduct a proper *Batson* inquiry, we remand the case to the trial court for the limited purpose of conducting a proper *Batson* inquiry and decline, at this time, to reach defendant's other arguments.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to our holding. Defendant was charged in a multi-count indictment with 24 counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2010)), 2 counts of attempted murder (720 ILCS 5/8-4(a) (West 2010)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). Defendant elected to have a jury trial, and jury selection began on April 8, 2013.

¶ 5 During *voir dire*, the State exercised peremptory challenges to veniremen Allen Jackson, Jolienne Nickel, Michelle Rubio, Jacquiline Tines, and Jessie Davis, in that order. Jackson, Tines, and Davis stated in open court that they were African-American, Nickel said she was Caucasian, and Rubio said she was Hispanic. After the judge announced that the State had struck Tines, but before announcing that the State had struck Davis, defense counsel objected, stating "they have only used peremptories on people of race, people of color." Immediately thereafter, the following colloquy occurred:

"[ASSISTANT STATE'S ATTORNEY]: Really?

Because I thought Michelle Rubio was a female white.

THE COURT: Hispanic.

[DEFENSE COUNSEL]: She's a latino. She said it.

[ASSISTANT STATE'S ATTORNEY]: That shows you exactly how I felt about it because I thought she was a white girl.

***

Honestly, I have written down that Michelle Rubio is a female white. Maybe I didn't hear her.

I will say this, it is impossible to hear the jurors. I mean, I had to strain. Their backs are absolutely facing 100 percent to us, so it's impossible to hear. So if she said she was Hispanic, I probably missed it. But as far as she's concerned, I didn't even know. She doesn't look Hispanic and I didn't hear her say it."

¶ 6 The court then announced the State's final strike against Davis. Defense counsel replied "[a]gain, Judge, now with the exception of one strike, *** every strike has been used for a person of color." The court did not explicitly state that defendant made a *prima facie* case of discrimination. Nonetheless, the court asked the prosecutor to provide race-neutral explanations for its strikes. The State explained: (1) that it struck Davis because he was dishonest when answering questions on his juror questionnaire form; (2) that it struck Tines because she was a convicted felon and was the victim in a stabbing, and because her grandfather had been murdered; and (3) that it struck Jackson because he was convicted of second degree murder and was not forthcoming about other criminal charges he had faced in the past. With respect to Rubio, however, the State said nothing. Defense counsel did not object to the State's failure to provide a race-neutral explanation for striking Rubio. When the prosecutor finished explaining

the basis for her strikes, the court stated "it appears there's a race-neutral basis" and denied defendant's *Batson* objection.

¶ 7 Ultimately, the jury found defendant guilty and the trial court sentenced him to 60 years' imprisonment. This appeal followed.

¶ 8 ANALYSIS

¶ 9 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the fourteenth amendment prohibits the State from exercising peremptory strikes against prospective jurors on the basis of race. *Id*. at 90. The court established a three-step procedure to analyze allegations of race discrimination in jury selection. First, the defendant must make a *prima facie* case of purposeful discrimination by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id*. at 94. If the defendant succeeds in establishing a *prima facie* case, "the burden shifts to the State to come forward with a neutral explanation" for its challenges. *Id*. at 97. Finally, the trial court must consider the State's explanations and determine whether the defendant has established a case of purposeful discrimination. *Id*. at 98.

¶ 10 In the present case, it is clear from the record that the trial court did not comply with the necessary steps required by *Batson*. First, the trial court never conducted a formal inquiry into whether defendant had set forth a *prima facie* case of discrimination. To determine whether a defendant has set forth a *prima facie* case of discrimination, courts routinely employ a " 'comparative juror analysis' which examines 'a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.' " *People v. Davis*, 231 Ill. 2d 349, 361 (2008) (quoting *Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006)). Other factors

courts commonly consider when assessing whether the defendant has set forth a *prima facie* case are:

> "(1) racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African–American venirepersons; (3) a disproportionate use of peremptory challenges against African–American venirepersons; (4) the level of African–American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African–American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses." *People v. Williams*, 173 Ill. 2d 48, 71 (1996).

¶ 11 The record is barren of any evidence showing that the trial court conducted a comparative juror analysis or considered any of the factors enumerated above. Although the State suggested at oral argument that it had waived the issue by failing to object during *voir dire*, the rule of waiver is a limitation on the parties and not on the courts, and a reviewing court may ignore the waiver rule to achieve a just result. *People v. Hoskins*, 101 Ill. 2d 209, 219 (1984). In our legal system, racial discrimination in jury selection is universally recognized as a constitutional error of the highest magnitude. Its mere existence casts a pall over the entirety of a criminal proceeding so severe as to necessitate automatic reversal of a conviction without any regard to the strength of the evidence in support of a finding of guilt. See *Avery v. Georgia*, 345 U.S. 559, 561 (1953); *Winston v. Boatright*, 649 F. 3d 618, 628 (7th Cir. 2011); *United States v. Angel*, 355

F. 3d 462, 471 (6th Cir. 2004) ("[A]ny racial discrimination in jury selection constitutes structural error that requires automatic reversal."). It follows necessarily, then, that the *Batson* steps should be punctiliously followed, with the court's conclusions at each stage supported by explicit findings of fact.

¶ 12 The record also does not demonstrate that the requirements of the second stage were fulfilled. True, the trial court *did* entertain race-neutral explanations with respect to three of the four jurors peremptorily stricken by the State. But the process regarding Michelle Rubio remained flawed. The State said nothing about her when it offered its race-neutral explanations. The State would have us believe that the trial court accepted as true the prosecutor's statement, made *prior to* the initiation of formal *Batson* proceedings, that she did not know Rubio was Hispanic. The trial court very well may have accepted the prosecutor's statement as true and denied defendant's *Batson* challenge with respect to Rubio on that basis *sub silentio*. We cannot, however, indulge in such assumptions. Our supreme court has explained that when reviewing *Batson* challenges, we may not presume the existence of facts not disclosed by the record. *Davis*, 231 Ill. 2d at 364-65. That is in essence what the State is inviting us to do, and it is an invitation which we cannot accept.

¶ 13 Finally, with respect to the three jurors for whom the State did provide race-neutral explanations, the trial court should have made an on-the-record assessment of the State's explanations at the third stage. Not doing so is problematic because "a trial court's third stage finding on the ultimate issue of discrimination rests largely on credibility determinations." *People v. Rivera*, 221 Ill. 2d 481, 502 (2006). Unless the court's assessment of the State's race-neutral explanations (including any concomitant credibility determinations) is made of record, we cannot undertake meaningful appellate review of the trial court's *Batson* ruling.

¶ 14 Accordingly, we remand this case to the trial court so that it may conduct a *de novo* inquiry into defendant's *Batson* challenge with respect to each minority venireperson subject to a State peremptory strike. At the first stage, the trial court must explicitly state whether defendant has set forth a *prima facie* case of purposeful discrimination and it must support that conclusion by making specific, on-the-record findings of fact. At the second stage, the trial court must require the State to provide race-neutral explanations for each minority venireperson who was peremptorily stricken. At the third stage, the trial court must make an on-the-record assessment of the State's explanations and determine whether defendant has made a case of purposeful discrimination. Although the law does not require the court to entertain argument by defendant to the effect that the State's race-neutral explanations are pretextual (see *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 106), we strongly encourage the trial court to allow defendant to so argue so as to ensure a complete appellate record.

¶ 15 After the trial court conducts the *de novo Batson* hearing and makes its findings thereon, the clerk of the circuit court shall prepare a supplemental record of the post-remand proceedings, including transcripts of all proceedings, and file it with this court. This court will then enter an order scheduling supplemental briefing regarding the new *Batson* hearing. The trial court shall not conduct any proceedings other than those specified in this partial mandate.

¶ 16 CONCLUSION

¶ 17 The clerk of this court shall issue a partial mandate consisting of this Rule 23 order. We retain jurisdiction over all other issues raised in the briefs on the merits. The defendant shall file a status report on or before March 1, 2016.

¶ 18 Remanded with instructions; jurisdiction retained.