2012 IL App (2d) 110404-U
No. 2-11-0404
Order filed November 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT J. BUNCH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 09-CF-2452 Honorable George Bridges, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant did not defeat the presumption that the trial court evaluated his claim of racial discrimination in jury selection under the applicable *Batson* standard rather than the outdated *Swain* standard; (2) we vacated defendant's successive (and thus unauthorized) DNA analysis fee..

¶ 2 Following a jury trial, defendant, Robert J. Bunch, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 38 years' imprisonment. Defendant appeals, contending that the trial court relied on an overruled legal standard in denying his challenge to the State's use of a peremptory challenge during jury selection and that an order requiring him to pay

a $200 DNA analysis fee is void because he had already provided a DNA sample pursuant to a previous conviction. We affirm in part and vacate in part.

¶ 3 Defendant was indicted on nine counts of murder, all involving the shooting death of Jonathan Rush. During jury selection, the State used a peremptory challenge to strike juror number 391. Defense counsel objected, arguing that the challenge violated the Supreme Court's holding in *Batson v. Kentucky,* 476 U.S. 79 (1986), which prohibits racial discrimination in the use of peremptory challenges. Counsel noted that both defendant and the prospective juror were African-American and that there existed no apparent reason to strike the juror other than his race.

¶ 4 The trial court responded as follows:

> "All right. First of all, from the entire venire that came up there were four African American [*sic*], two of which were in our intial [*sic*] 12, one of them was [1]66 who has been seated. And we continue to have two remaining jurors. You have not made a prime [*sic*] facie case. I will not ask the State to respond to the bias or non race reason for their challenge."

¶ 5 Following the trial, the jury found defendant guilty. Defendant moved for a new trial, arguing, *inter alia*, that the trial court erred in denying his *Batson* challenge. The trial court denied the motion and subsequently sentenced defendant to 38 years' imprisonment. Defendant timely appeals.

¶ 6 Defendant contends that the trial court erred in handling his challenge to the State's striking of an African-American member of the venire. Defendant argues that, rather than deciding the issue under the *Batson* standard, the trial court applied the test set out in *Swain v. Alabama*, 380 U.S. 202 (1965), which *Batson* overruled. We disagree.

¶ 7 In *Batson*, the Court held that a prosecutor's use of peremptory challenges to strike venire members of a defendant's race solely because of their race violates the equal protection clause (U.S. Const., amend. XIV). *Batson*, 476 U.S. at 89. The Court overruled *Swain* to the extent *Swain* held that, to demonstrate racial discrimination in the jury selection process, a defendant had to show the systemic exclusion of African-Americans from venires. Under *Batson*, a defendant may directly challenge the prosecution's exclusion of African-American venire members in his or her particular case. *Id.* at 96. To do so, a defendant must first make out a *prima facie* case of the racially discriminatory use of peremptory challenges. *Id.* As examples of how a defendant could make such a showing, the Court listed a " 'pattern' " of strikes against minority jurors or a prosecutor's questions during *voir dire* that would support an inference of discriminatory purpose. *Id.* at 97.

¶ 8 If a defendant successfully makes out a *prima facie* case, the burden shifts to the State to provide a race-neutral explanation for challenging the minority jurors. However, the explanation need not rise to the level of a challenge for cause. *Id.*

¶ 9 In *People v. Evans*, 125 Ill. 2d 50 (1988), our supreme court, citing other state and federal decisions, added to the nonexclusive list of factors that could be relevant to a finding of discriminatory jury selection. These included the disproportionate use of peremptory challenges against African-Americans, the level of African-American representation in the venire as compared to the jury, whether the excluded African-Americans were a heterogeneous group sharing race as their only common characteristic, the race of the defendant and the victim, and the race of the witnesses. *Id.* at 63-64. The court further held that simply because African-American venire members are challenged does not, in and of itself, "raise the specter or inference of discrimination." *Id.* at 64 (citing *Batson*, 476 U.S. at 101 (White, J., concurring)); see also *People v. Andrews*, 146

Ill. 2d 413, 430-31 (1992) (in deciding whether a defendant made a *prima facie* case, court should consider more than simply the number of minority jurors excluded).

¶ 10 It is difficult to see how the trial court's remarks quoted above show that it disregarded *Batson*. A trial judge is presumed to know the law and apply it properly, and this presumption may be overcome only by an affirmative showing to the contrary in the record. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). Here, the trial court responded to defendant's challenge by stating that he had failed to make out a *prima facie* case. This is the first step of the inquiry that *Batson* prescribes.

¶ 11 Defendant points to the trial court's subsequent remarks, that one African-American juror had been seated and two more remained in the venire, as some type of reference to systematic exclusion of African-American venire members. Defendant views this as a reference to *Swain*. Defendant's contention fails, given that the existence of a pattern of strikes against minority jurors is one of the examples *Batson* gave of a way to show possible discrimination. Thus, the trial court properly found that excluding one of four African-American venire members did not demonstrate a pattern of discriminatory strikes.

¶ 12 The court's further reference to the two remaining African-American venire members, while somewhat more obtuse, can be viewed as a comment that excusing one of four African-American venire members could not be considered a disproportionate use of peremptory challenges against African-Americans, one of the factors *Evans* listed as being relevant to the first-stage inquiry. While other explanations for the trial court's remarks are possible, the presumption that the judge knows and properly applies the law prohibits us from construing any ambiguity in the court's remarks to mean that the court *improperly* applied the law. Rather, we adopt the construction of the remarks consistent with a proper application of the law.

¶ 13 The cases defendant cites do not require a different result. In *People v. Wiley*, 156 Ill. 2d 464 (1993), the trial court explicitly referred to a lack of "systematic exclusion" of minority jurors. *Id.* at 470. This, as well as other factors, persuaded the court to remand for further *Batson* proceedings. *Id.* at 474-75. Here, there was no explicit reference to "systematic exclusion" and none of the other irregularities cited in *Wiley* is present. *People v. Buckley*, 168 Ill. App. 3d 405 (1987), was pending on direct review when *Batson* was decided, so it was not difficult to conclude that the trial court there had not followed *Batson* in ruling on the defendant's challenge.

¶ 14 Notably, defendant does not challenge on the merits the trial court's conclusion that he failed to make out a *prima facie* case. He points to nothing, other than the fact that defendant and the excluded venire member shared the same race, to show purposeful discrimination by the prosecutor. This, in and of itself, is insufficient. *Evans*, 125 Ill. 2d at 64.

¶ 15 Defendant argues at some length that there were no apparent reasons for excluding juror number 391 other than his race. Defendant puts the proverbial cart before the horse. Unless defendant made a *prima facie* of discrimination—and defendant does not contend that he did—the State was not required to proffer race-neutral reasons for the strike.

¶ 16 Finally, defendant contends that the order requiring him to pay a $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) is void because he had already provided a DNA sample pursuant to a previous conviction. The State confesses error. Section 5-4-3(j) does not authorize multiple DNA samples—and corresponding fees—from a single person. *People v. Marshall*, 242 Ill. 2d 285, 301-03 (2011). Thus, we vacate the portion of the order imposing a DNA analysis fee.

¶ 17 The judgment of the circuit court of Lake County is affirmed in part and vacated in part.

¶ 18 Affirmed in part and vacated in part.