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2012 IL App (3d) 110050-U

Order filed August 31, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0050
	)	Circuit No. 10-CF-926
LENELL GREEN,	)	
	)	Honorable
Defendant-Appellant.	)	Daniel J. Rozak,
	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justice O'Brien concurred in the judgment.  
Justice Carter concurred in part and dissented in part.

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**ORDER**

¶ 1 *Held:* (1) Defendant made a *prima facie* showing of gender discrimination during jury selection; and (2) defendant's sentence was not an abuse of discretion.

¶ 2 After a jury trial, defendant, Lenell Green, was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)) and sentenced to eight years' imprisonment. On appeal, defendant argues that: (1) the trial court erred when it found that he had not made a *prima facie* showing that

the State used its peremptory challenges in a discriminatory manner; and (2) his sentence is excessive. We affirm and remand with directions.

¶ 3

### FACTS

¶ 4 Defendant was charged by indictment with criminal sexual assault, and the case proceeded to a jury trial. During jury selection, the State used its peremptory challenges to excuse nine women and one man from the jury.

¶ 5 After selecting 12 jurors, defendant challenged the State's use of peremptory challenges. Defendant argued that "the last seven or eight challenges by the State were all females[.]" The trial court found that defendant had raised an inference of discrimination and shifted the burden to the State to offer a gender-neutral explanation. The State provided reasons for using 9 of its 10 peremptory challenges to excuse female jurors, and the court took the matter under advisement.

¶ 6 The following day, the court reversed its ruling that defendant had made a *prima facie* showing of discrimination. The court stated that it had previously looked at the number of men versus the number of women the State had excused, but it did not think that the numbers alone were sufficient to prove a *prima facie* case. The court asked defendant if he had any additional arguments. Defendant responded that 9 out of the 10 challenges made by the State were women, and there were two men on the jury for each woman, even though the venire was evenly split between men and women. Defendant did not see any reason for excusing these jurors apart from their gender. The court denied defendant's motion, and the case proceeded to trial.

¶ 7 At trial, the State's evidence showed that defendant and two other young men had forcible sex with the 18-year-old victim. Afterwards, she was forced into a car while wearing only her underwear, and one of the other men drove her to an alley and left her there. Defendant was found

guilty of criminal sexual assault.

¶ 8 At sentencing, the evidence showed that defendant was 17 years old at the time of the offense. He had no prior criminal or juvenile record. In imposing the sentence, the court considered the factors in mitigation and aggravation. While reviewing the factors in mitigation, the court noted that: "[t]he victim in this case was punched in the face. She was punched elsewhere. She had several physical injuries and marks on and about her body. She was put out in the cold, almost completely naked[.]" Additionally, the court noted that it had given "very serious and thorough consideration" to defendant's youth and potential for rehabilitation and sentenced defendant to eight years' imprisonment.

¶ 9 Defendant filed a motion to reduce sentence, arguing that the trial court had not given proper consideration to rehabilitative factors. The court denied the motion, and defendant appealed.

¶ 10 ANALYSIS

¶ 11 I. *Batson* Challenge

¶ 12 Defendant argues that the trial court erred when it ruled that he had not made a *prima facie* showing of gender discrimination.

¶ 13 A trial court's determination of whether a *prima facie* showing of discrimination has been made will not be disturbed unless it is against the manifest weight of the evidence. *People v. Williams*, 173 Ill. 2d 48 (1996).

¶ 14 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court established a three-step analysis to determine whether the State used its peremptory challenges to remove venirepersons on the basis of race. See *People v. Easley*, 192 Ill. 2d 307 (2000). First, a defendant must make a *prima facie* showing that the State exercised a peremptory challenge on the basis of race. *Id.* Second, the

burden shifts to the State to provide a race-neutral reason for excluding the juror in question. *Id.* Finally, the trial court weighs the evidence and determines if defendant has proved purposeful discrimination. *Id.* In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), this test was extended to jurors excused on the basis of their gender. See *People v. Blackwell*, 171 Ill. 2d 338 (1996).

¶ 15 To establish a *prima facie* case of discrimination, a defendant must show that " 'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' " *People v. Harris*, 206 Ill. 2d 1, 27 (2002) (quoting *Batson*, 476 U.S. at 94). The following factors are relevant in determining whether a *prima facie* case of purposeful gender discrimination has been established:

"(1) gender identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against female venirepersons; (3) a disproportionate use of peremptory challenges against female venirepersons; (4) the level of female representation in the venire as compared to the jury; (5) the questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded female venirepersons were a heterogeneous group sharing gender as their only common characteristic; and (7) the gender of the defendant, victim and witnesses." *People v. Rivera*, 227 Ill. 2d 1, 12-13 (2007).

¶ 16 Here, defendant made a *prima facie* showing of gender discrimination. The State used its peremptory challenges to exclude predominantly female jurors; only four of the impaneled jurors were female, while the venire was evenly balanced between the genders; the State exercised a pattern of strikes against female venirepersons; it used a disproportionate number of peremptory challenges against female venirepersons and the excluded persons and the victim were female. The totality of these facts give rise to the inference that the State was using its challenges for a discriminatory

purpose.

¶ 17 In light of the circumstances in the present case, we find that defendant established a *prima facie* case of gender discrimination. Therefore, we remand the case to the trial court with directions to consider the State's gender-neutral reasons for its peremptory challenges. If the trial court finds that the State did not discriminate against female jurors, defendant's conviction and sentence shall stand. However, if the court finds that the State used its peremptory challenges to purposefully discriminate against female jurors, the court should vacate defendant's conviction and sentence and order a new trial.

¶ 18 II. Sentence

¶ 19 Defendant next argues that his sentence was excessive for two reasons: (1) his rehabilitative potential, and (2) the trial court considered an improper factor in aggravation because it mentioned that the victim was put out in the cold, almost completely naked, which defendant was not accountable for.

¶ 20 A trial court has wide discretion in sentencing a criminal defendant, and we review the trial court's sentencing decision for an abuse of discretion. *People v. Sweeney*, 2012 IL App (3d) 100781.

¶ 21 We first address whether the trial court failed to adequately consider defendant's potential for rehabilitation. The trial court specifically considered defendant's youth and his potential for rehabilitation before pronouncing his sentence. The record does not otherwise indicate that the court failed to give adequate consideration to defendant's potential for rehabilitation. We find no error in this regard.

¶ 22 Next, we consider whether a new sentencing hearing is warranted because the trial court allegedly considered an improper factor in aggravation. Though defendant has forfeited review of

this issue by failing to raise it at trial, we review it for plain error. We begin the plain error analysis by determining whether the trial court erred. *People v. Thompson*, 238 Ill. 2d 598 (2010). Although the court improperly mentioned in considering the factors in mitigation that defendant caused the victim harm by leaving her nearly naked in the cold. This factor did not lead to a greater sentence and does not require a new sentencing hearing. See *People v. Ryan*, 336 Ill. App. 3d 268 (2003) (a new sentencing hearing is not required where the record reveals that the weight placed on an allegedly improper factor was so insignificant that it did not lead to a greater sentence). A review of the record indicated that the brutal nature of the offense weighed most heavily in the court's mind, and was the paramount factor in its sentencing. The trial court did not abuse its discretion; we affirm defendant's sentence.

¶ 23

#### CONCLUSION

¶ 24 The judgment of the circuit court of Will County is affirmed and remanded with directions.

¶ 25 Affirmed and remanded with directions.

2012 IL App (3d) 110050-U, *People v. Lenell Green*

¶ 26 JUSTICE CARTER, specially concurring in part and dissenting in part.

¶ 27 I agree with the majority's conclusion on the sentencing issue. However, I write separately as to the second part of that issue because I believe it was proper for the trial court to consider defendant's conduct of leaving the victim nearly naked in the cold since defendant was part of the group who had made the victim leave the house in her underwear. In commenting on that matter, the trial court did not specify whether it was referring to the victim being put out of the house, which was conduct that defendant took part in, or whether it was referring to defendant being put out of the

car, which was conduct that defendant did not take part in. Thus, I do not believe that the record establishes that the trial court considered an improper factor or improper evidence in sentencing.

¶ 28 I also do not agree with the majority's conclusion and analysis on the *Batson* issue. The record indicates that upon further consideration, the trial court found that a *prima facie* showing of gender discrimination had not been established by defendant. The trial court explained that it did not feel that the numbers alone were sufficient to prove a *prima facie* case of gender discrimination and that the defense's pattern of excusing male subjects from the jury left the State primarily with female subjects from which to choose. In my opinion, the trial court's ruling in that regard is not against the manifest weight of the evidence and must, therefore, be affirmed on appeal. See *Williams*, 173 Ill. 2d at 67.

¶ 29 For the reasons stated, I specially concur in part and dissent in part from the majority's order.