

**NOTICE**

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2014 IL App (4th) 130370-U

NO. 4-13-0370

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

December 18, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TYRONE HARRIS,	)	No. 12CF1769
Defendant-Appellant.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Pope and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not clearly err when it denied defense counsel's *Batson* challenge and allowed the State to exercise a peremptory strike against an African-American venirewoman.

¶ 2 Following a February 2013 jury trial, defendant, Tyrone Harris, was found guilty of burglary (720 ILCS 5/19-1(a) (West 2010)). In March 2013, the trial court sentenced defendant to three years' imprisonment, followed by two years of mandatory supervised release (MSR), and awarded him 142 days' credit for time served. Defendant appeals, arguing the trial court erred by denying his *Batson* claim (*Batson v. Kentucky*, 476 U.S. 79 (1986))—namely, the State impermissibly used a peremptory challenge against one African-American venireperson. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 2, 2012, the State charged defendant by information with burglary (720 ILCS 5/19-1(a) (West 2010)). The charge alleged on November 1, 2012, defendant knowingly and without authority entered Walmart with the intent to commit therein a theft.

¶ 5 *A. Voir Dire*

¶ 6 In February 2012, the trial court began jury selection. The court explained each side would have seven peremptory challenges and the parties would not be allowed to "back strike" panel members. The venire itself originally consisted of 34 individuals. The court divided the venire into groups of four for purposes of jury selection. Each group of four potential jurors was asked a series of group and individual questions, first by the trial court and then by counsel for each party. Answers to group questions were typically recorded as "indicating in the affirmative" or "indicating in the negative." Nonverbal responses were not otherwise recorded. Once a panel was closed, the court repeated the process until 12 jurors and 1 alternate juror were selected.

¶ 7 Following the State's challenge to Juror 144, defendant indicated he felt there was a *Batson* issue with respect to the State's challenge. The trial court held a hearing outside the presence of the jury. The court noted the racial composition of the venire: 32 Caucasians and 2 African-Americans. There was some debate among the parties as to whether one of the jurors was African-American. The trial court ultimately found she was, and the parties do not dispute this finding on appeal. The record reflects defendant is African-American. The court further noted the State exercised three peremptory challenges in the process of selecting eight potential jurors—the first two were directed toward Juror 4 and Juror 90, a Caucasian female and Caucasian male, respectively. The State's third peremptory challenge was directed toward Juror 144, an African-American female.

¶ 8 The trial court proceeded to the first step under *Batson* and asked defense counsel to state its reason for objecting. Defense counsel noted defendant is African-American and the State used its peremptory challenge to exclude 50% of African-American venirepersons. Defendant asserted Juror 144 worked in retail just like other venirepersons whom the State accepted and "I couldn't find anything distinguishing about her that would offend the sensibilities of a Prosecutor. So I think it raises the initial question, why was the preempt [*sic*] used on her." The trial court addressed whether defendant made a *prima facie* showing of discrimination:

"THE COURT: The Defendant, as counsel has observed for the record, is African American. The juror who was struck was African American. And I believe, I can't say with 100% certainty unless I ask, but I believe this was the only African American juror in the venire of 34 persons. \*\*\*

I need to look at such things as the pattern of strikes against a venire of this protected class, although there was no pattern, there was only one I believe. The questions and statements during the *voir dire*. And the challenges by Mr. Bennett were no different than his questions of others.

Was there disproportionate use of peremptory challenges against this protected class? Well, once again, that can't be determined since there's only one. Level of representation of protected class compared to the entire venire; one out of 34, I believe. I don't know anything about the race of the potential witnesses. \*\*\*

This is a bit of an unusual situation, in that the only option the People had with regard to a protected member of a protected class, they in fact, exercised.

Under these circumstances, I'm going to require the parties to address the second stage of this process, which is establishing a race neutral justification for the strike."

¶ 9 The trial court proceeded to *Batson's* second step and asked the State to provide a race-neutral explanation for striking Juror 144. The State responded as follows:

"MR. BENNETT [(assistant State's Attorney)]: \*\*\*

Initially, juror number 144, I had no reservations about, but during the questioning of juror number 99, her body language changed. She appeared disinterested in the proceedings and did not appear to, at least to the State, that she was interested in serving, basically at that point. In fact, when the State moved to strike \*\*\* juror number 144, she audibly said, [']thank you[']. Based upon those, it's the body language and her apparent disinterest, particularly as the venire went on[.]"

¶ 10 The trial court asked defense counsel to respond to the State's proffered reason. Defense counsel stated:

"MR. KUEHL [(assistant public defender)]: Well, these are the kinds of things people observe. I didn't observe what counsel did. But frankly, the panelist was between me and counsel, so I wasn't able to observe a lot. I did move around a little

so I could see. An audible statement of [']thank you['] \*\*\* doesn't indicate disinterest or uninterest or anti-interest or any—anything like that. Just kind of a normal juror[] reaction. \*\*\*

I don't think those observations by counsel rise to the level of a reason to strike somebody from the jury, when they otherwise had all the qualifications that others [in the jury] have, that is, retail sales. \*\*\* I'm not sure everybody on the panel was excited about being on the panel, but that—to me that's not a race neutral reason for bumping number 144."

¶ 11 In evaluating the *Batson* claim under step three, the trial court declined to consider Juror 144's expression of thanks for being dismissed because it came after the State exercised its peremptory challenge. The court further observed:

"THE COURT: \*\*\* [A]fter Mr. Bennett questioned the first four jurors, he exercised a peremptory challenge on juror number 4. Juror number 4 is a woman who I believe is 64 years of age, and is—let me confirm this—is a clinical social worker. Mr. Bennett excused her, did not excuse juror number 144 at that time. A replacement of juror number 4 took the jury box to be voir dired.

\*\*\* Mr. Bennett is accurate when he says, I didn't excuse juror 144 the first chance I had. And he represent[s] or suggests to the Court that this wasn't a choice that [he] made initially, it's one that [he] made upon further reflection when [he] saw further

responses, mannerisms, body language and so forth from Juror 144.

I really can't confirm or deny the factual observations that Mr. Bennett has made about juror 144's further behavior, mannerisms, body language and so forth, after juror 4 was excused, other than to say it's certainly possible. I certainly can't deny it. I, frankly, wasn't paying as close attention to any signals any of the jurors were sending by their demeanor or body language.

I will say that it's incumbent upon the Court, first of all, to determine whether Mr. Bennett's articulated reasons for the strike is plausible or whether I think it's persuasive. As far as his personal representation, I find them credible, and I find his explanation to be plausible. Because I find him to be credible and the explanation to be plausible, I find the race neutral justification he's advanced to be persuasive, such that it has not resulted in the Defendant meeting the burden by a preponderance of the evidence of proving purposeful discrimination."

¶ 12 The trial court denied defendant's *Batson* challenge. The parties agreed on 12 jurors and 1 alternate juror, leaving 17 prospective jurors in the venire. After the alternate was chosen, the matter proceeded to trial.

¶ 13 B. The Trial

¶ 14 Since neither party disputes the evidence or the underlying factual record, we briefly summarize the evidence. Jacob Montgomery testified he was working as an asset-protection employee for Walmart on November 1, 2012. At 2:19 p.m., Montgomery was in the electronics area of the store when he noticed defendant place eight packages of compact discs (CDs) and digital video discs (DVDs) in his cart. Montgomery followed defendant through the store. He observed defendant turn down an aisle, pull a plastic Walmart bag out of his pocket, and put the CDs and DVDs in the plastic bag. At this point, Montgomery called his supervisor, Jeff Myers, for assistance while following defendant through the store. As defendant approached the front of the store, he removed the bag from the cart, and he left the store without going through a register.

¶ 15 Montgomery confronted defendant inside a vestibule between two sets of automatic exit doors. He identified himself as a security officer and asked defendant to return to the store. Defendant ignored Montgomery and continued walking. Montgomery was joined by Myers and the two blocked defendant from exiting the store. Defendant forced his way through Montgomery and Myers and dropped the CDs and DVDs during the struggle. Montgomery and Myers called the police while they observed defendant run across Highcross Road into a wooded area.

¶ 16 Officer Preston James, an Urbana police officer, testified he was dispatched to a barber shop at 4th Street and Tremont Street, where Champaign police officers pulled a vehicle over with a suspect matching defendant's description. Upon arrival, Officer James noticed the suspect standing near a vehicle with muddy clothes. Officer James brought the suspect back to Walmart, where Montgomery and Myers identified him as the shoplifter. Defendant was later arrested.

¶ 17 After hearing all of the evidence, the jury found defendant guilty of burglary. The trial court denied defendant's motion for a new trial. In March 2013, the trial court sentenced defendant to three years' imprisonment with two years' MSR.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues his constitutional right to equal protection was violated when the State failed to provide a genuine, race-neutral reason for striking Juror 144, an African-American venireperson, as required by *Batson*, 476 U.S. at 94. Specifically, defendant contends the demeanor-based reasons the State articulated for striking Juror 144 were not "clear and reasonably specific." The State responds by arguing defendant failed to make a *prima facie* case of discrimination and failed to meet his ultimate burden of persuasion.

¶ 21 A. *Batson* Framework

¶ 22 In *Batson*, the United States Supreme Court established a three-step process for evaluating alleged discrimination in jury selection:

"The Court held that the party objecting to the exercise of a peremptory challenge is first required to establish a *prima facie* case of purposeful discrimination 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] If the objector demonstrates a *prima facie* case, the burden then shifts to the other party to explain his challenge by articulating a nondiscriminatory, 'neutral' explanation related to the particular case to be tried. [Citation.] Finally, the trial court considers the reasons provided for the peremptory strike.

As part of that process, the objector may argue that the reasons given are pretextual. The trial court then makes a final determination as to whether the objector has established purposeful discrimination. [Citation.]" *People v. Rivera*, 221 Ill. 2d 481, 500, 852 N.E.2d 771, 783 (2006) (quoting *Batson*, 476 U.S. at 93-94).

¶ 23 To determine whether the defendant has established a *prima facie* case of purposeful discrimination, the trial court must consider the totality of the facts and the relevant circumstances surrounding the peremptory challenge. *People v. Davis*, 231 Ill. 2d 349, 360, 899 N.E.2d 238, 245 (2008). The trial judge should consider the following factors:

" '(1) racial identity between the [party exercising the peremptory challenge] 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 [of the challenging party] 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.' " *Rivera*, 221 Ill. 2d at 512-13, 852 N.E.2d at 790 (quoting *People v. Williams*, 173 Ill. 2d 48, 71, 670 N.E.2d 638, 650 (1996)).

The "threshold for making out a *prima facie* claim under *Batson* is not high: a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (Internal quotation marks omitted.) *Davis*, 231 Ill. 2d at 360, 899 N.E.2d at 245.

¶ 24 "The existence of a *prima facie* case is a prerequisite for the court to demand an explanation." *Rivera*, 221 Ill. 2d at 510, 852 N.E.2d at 788. However, "[o]nce 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 v. New York*, 500 U.S. 352, 359 (1991). Because a trial court's ruling on the State's race-neutral explanation limits review of a defendant's assertion of discrimination, our supreme court has reiterated that in implementing *Batson*, "the first and second steps in the process 'should not be collapsed into a single, unitary disposition that dilutes the distinctions between a \*\*\* *prima facie* showing of discrimination and the \*\*\* production of neutral explanations for its peremptory challenges.'" *Rivera*, 221 Ill. 2d at 500-01, 852 N.E.2d at 783 (quoting *People v. Wiley*, 156 Ill. 2d 464, 475, 622 N.E.2d 766, 771 (1993)).

¶ 25 Under the second step, the State must articulate a race-neutral explanation. Race-neutral "means 'an explanation based on something other than the race of the juror.'" *Davis*, 231 Ill. 2d at 363, 899 N.E.2d at 246 (quoting *Hernandez*, 500 U.S. at 360). "In assessing an explanation, the trial court focuses on the *facial* validity of the prosecutor's explanation." (Emphasis in original.) *People v. Easley*, 192 Ill. 2d 307, 324, 736 N.E.2d 975, 988 (2000). Indeed, nearly any race-neutral reason will suffice at the second stage, even those which are arbitrary, irrational, or silly. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¶ 26 The third step in the *Batson* inquiry requires an evaluation of the prosecutor's credibility. Where the race-neutral reason for a challenge invokes a juror's demeanor, such as inattention, the trial court's firsthand observations are "of crucial importance." *Davis*, 231 Ill. 2d at 363-64, 899 N.E.2d at 247. "In such situations, the trial court must evaluate not only whether the prosecutor's demeanor belies discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id.* at 364, 899 N.E.2d at 247.

¶ 27 "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* at 363, 899 N.E.2d at 247. A reviewing court defers to the trial court's judgment and will not disturb its *Batson* ruling unless it is clearly erroneous. *Id.* at 364, 899 N.E.2d at 247.

¶ 28 B. *Batson* and this Case

¶ 29 1. *Prima Facie* Case

¶ 30 In this case, defense counsel objected to the State's use of a peremptory strike against Juror 144. Defendant argued the strike eliminated 50% of African-American venirepersons and Juror 144 worked in retail just like other venirepersons whom the State accepted. The trial court found defendant raised an inference of discriminatory purpose and established a *prima facie* case of discrimination.

¶ 31 The State argues defendant failed to establish a *prima facie* case and the trial court erred by proceeding to the second stage. However, as noted above, once the State offers a race-neutral explanation and the trial court rules on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a *prima facie* showing is moot. See *Hernandez*, 500 U.S. at 359.

¶ 32

## 2. Race-Neutral Justification

¶ 33 We turn to whether the State provided a race-neutral reason for excusing Juror 144. Here, the prosecutor explained he had not formed any opinion about Juror 144, but as *voir dire* continued, she appeared disinterested in the proceedings and her body language changed. A juror's demeanor is a legitimate basis for a peremptory challenge. *People v. Mack*, 128 Ill. 2d 231, 240, 538 N.E.2d 1107, 1112 (1989).

¶ 34 Defendant argues the State failed to meet its burden of production under stage two because it failed to provide a clear and reasonably specific description of Juror 144's disinterested behavior. However, the United States Supreme Court made perfectly clear "even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." *Johnson v. California*, 545 U.S. 162, 171 (2005).

The Court explained:

"In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the *prima facie* case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's *prima facie* case." *Id.* at 171, n.6.

"The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." *Id.* at 171.

¶ 35

### 3. Evaluation of Trial Court's Findings

¶ 36 "The demeanor of a prospective juror has traditionally been a factor of importance in jury selection." *People v. Young*, 128 Ill. 2d 1, 20, 538 N.E.2d 453, 457 (1989). A juror's demeanor is accepted as a legitimate basis for a peremptory challenge. *People v. Aguirre*, 242 Ill. App. 3d 469, 474, 610 N.E.2d 771, 775 (1993). An inference of purposeful racial discrimination is raised where the State accepts white jurors having the same characteristics as African-American venirepersons who were excused for having the characteristic. *People v. Andrews*, 155 Ill. 2d 286, 295, 614 N.E.2d 1184, 1189 (1993). A trial court's finding on the issue of discrimination rests largely on credibility determinations and will not be set aside unless clearly erroneous. *Rivera*, 221 Ill. 2d at 502, 852 N.E.2d at 784.

¶ 37 In *People v. Gray*, 326 Ill. App. 3d 906, 912, 761 N.E.2d 1237, 1241-42 (2001), the prosecutor explained he used a peremptory challenge to exclude an African-American venirewoman because during the jury selection process she was checking her watch as she was being questioned and she was looking around the courtroom. The trial court denied the *Batson* challenge. Defendant appealed, arguing the trial judge failed to assess the facial validity of the State's explanation. On appeal, the court held the trial court did not clearly err when it accepted the State's race-neutral explanation. The court reasoned the trial judge "assess[ed] the validity of the State's concern that [the venirewoman] seemed disinterested and distracted" and the State's explanation of her inattentiveness was a valid race-neutral reason for excluding her. *Id.*, 761 N.E.2d at 1242.

¶ 38 Similarly, here, the prosecutor provided a valid race-neutral reason for excluding Juror 144. Specifically, the prosecutor explained he initially had not formed an opinion about Juror 144, but as *voir dire* continued, he noticed a change in her body language and she appeared

disinterested in the proceedings. This is a clear and reasonably specific explanation for exercising a peremptory challenge. See *People v. Talley*, 152 Ill. App. 3d 971, 987, 504 N.E.2d 1318, 1327-28 (1987) (prosecutor gave a clear and reasonably specific explanation where he excused an African-American venireperson because he " 'was not too happy with [the person's] demeanor and how he answered the questions' "). The trial court in this case evaluated the prosecutor's credibility, closely scrutinized his demeanor-based explanation, and found his explanation credible and plausible. The court observed, "Mr. Bennett is accurate when he says, [he] didn't excuse juror 144 the first chance [he] had. And he represent [*sic*] or suggests to the Court that this wasn't a choice that [he] made initially, it's one that [he] made upon further reflection when [he] saw further responses, mannerisms, body language and so forth from juror 144." Our review of the record reveals nothing which would undercut the trial court's finding. The State's explanation gave no hint of racial animus. Rather, it was based on legitimate, nondiscriminatory reasons. Since the trial court was in the best position to observe and evaluate the prosecutor's explanation for exercising his peremptory challenge on the basis of Juror 144's demeanor, its findings are given great weight. See *Snyder v. Louisiana*, 552 U.S. 472, 477, 479 (2008) (Deference is heightened when a litigant's race-neutral reason for striking a prospective juror involves the juror's demeanor; there is no way for an appellate court to review this sort of intangible, which appears nowhere on our "cold" transcript.).

¶ 39 Defendant asserts the trial court failed to closely scrutinize the prosecutor's demeanor-based explanation because it admitted it was not paying attention to Juror 144's behavior. We disagree. Requiring the trial court to observe a juror's demeanor would severely undercut the Illinois Supreme Court's and the United States Supreme Court's repeated observations the third step of *Batson* depends on an assessment of the *prosecutor's* credibility.

*Davis*, 231 Ill. 2d at 363, 899 N.E.2d at 247; *Hernandez*, 500 U.S. at 365. Not to mention, such a requirement would not be workable since a trial court may not always be in a position to observe and record a potential juror's demeanor. *Thaler v. Haynes*, 559 U.S. 43, 48 (2010) (noting none of the United States Supreme Court's decisions require a trial court to make a record finding of a juror's demeanor where the State justifies the strike based on demeanor alone).

¶ 40 We reject defendant's argument "the court should have required the State to articulate the specific behaviors that it relied upon when excusing Juror 144 for her 'disinterest.' " As already discussed, the prosecutor provided a clear and reasonably specific explanation for striking Juror 144. We further note, defendant ultimately carries the "burden of persuasion" (*Batson*, 476 U.S. at 93) and this burden "rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. It was incumbent upon defendant to make a record to support his contentions of discrimination, and defendant does not point to any statement in the record describing the outward appearance or body language of other venirepersons. Indeed, defendant makes no attempt to rebut the prosecutor's observations; nor does he attempt to conduct a comparative-juror analysis showing how Juror 144 was treated differently.

¶ 41 Defendant cites to *Mack v. Anderson*, 371 Ill. App. 3d 36, 861 N.E.2d 280 (2006), to support his argument the State failed to meet its burden of offering a "clear and reasonably specific" race-neutral explanation for striking Juror 144. *Mack* is distinguishable. In *Mack*, the defendants explained they excluded an African-American juror because she nodded her head when asked about awarding damages in a medical malpractice case and she seemed disinterested during the proceedings. *Id.* at 46, 861 N.E.2d at 292. On appeal, Justice Neville's plurality opinion held the trial court clearly erred because the record failed to support defendants' race-neutral reasons for excusing the juror. *Id.* at 53, 861 N.E.2d at 297. Justice Neville conducted a

comparative-juror analysis and found all jurors, both black and white, nodded their heads when answering questions and defendants did not excuse the white jurors. *Id.* at 50, 861 N.E.2d at 295. Moreover, the trial court failed to closely scrutinize defense counsel's proffered reason—it "rubber stamped" defendant's proffered reason stating, "Well, we've also seen jurors. We have all noticed body language with people. Sometimes that body language is favorable to us and sometimes it's not. \*\*\* [Defendants'] concerns seem to be [the jurors'] attitudes towards damages, which I believe is a race neutral reason.'" *Id.* at 47, 861 N.E.2d at 292. Justice Neville concluded the trial court clearly erred when it denied plaintiff's *Batson* motion.

¶ 42 Unlike *Mack*, the prosecutor in this case justified striking Juror 144 solely on the basis of her demeanor and did not offer a second, suspect justification. Moreover, defendant fails to show purposeful discrimination through a comparative-juror analysis because no evidence shows the State treated Juror 144 differently than non-African-American jurors. See *People v. Hudson*, 157 Ill. 2d 401, 428, 626 N.E.2d 161, 172 (1993) (the defendant asserting the *Batson* claim has the burden of preserving the record and any deficiencies or ambiguities in the record are to be construed against the defendant). Further, unlike *Mack*, the trial court in this case did not "rubber stamp" the State's proffered explanation. Rather, the court carefully assessed the prosecutor's credibility and closely scrutinized his race-neutral explanation in light of all the evidence. *Davis*, 231 Ill. 2d at 363, 899 N.E.2d at 247 ("the best evidence of discriminatory intent will often be the demeanor of the attorney who made the peremptory challenge"). We therefore find *Mack* distinguishable.

¶ 43 We conclude that the trial court's decision was not clearly erroneous. The State's use of a peremptory challenge against Juror 144 was valid because her body language changed

and she appeared disinterested in the proceedings. Defendant failed to meet his ultimate burden of persuasion because no evidence in the record shows the State discriminated against Juror 144.

¶ 44

### III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 46

Affirmed.