FOURTH DIVISION
June 29, 2017

No. 1-15-0206

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 16748(01)
	)	
LEROY OWENS,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for first degree murder is affirmed; defendant failed to make a *prima facie* showing of a *Batson* violation, therefore the trial court properly declined to require the prosecution to state a neutral basis for its peremptory strikes of four minority venirepersons; defendant failed to demonstrate that the trial court's sentence was influenced by trial counsel's submission of duplicative letters in support of mitigation at sentencing, therefore the trial court properly denied defendant's posttrial motion alleging ineffective assistance of counsel because defendant cannot satisfy the prejudice prong of the *Strickland* test.

¶ 2 The State charged defendant, Leroy Owens, with multiple offenses arising from a home invasion and robbery during which he shot and killed Anthony Anglin. The State tried defendant

and a codefendant in severed, but simultaneous, jury trials. The jury found defendant guilty of first degree murder and the trial court sentenced him to 60 years' imprisonment with an additional 15 years added based on defendant's possession of a firearm during the commission of the offense. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This court previously affirmed the conviction of the co-defendant in this case in *People v. Robinson*, 2016 IL App (1st) 151133-U. That order contains a recitation of the evidence adduced at the trial. This appeal does not challenge the sufficiency of the evidence to convict but focuses on what transpired during jury selection and during sentencing. We will only briefly summarize the events that led to defendant's arrest and trial and focus the discussion on the events that are pertinent to defendant's appeal.

¶ 5 Defendant and Jonathan Robinson entered the home of the decedent, Anthony Anglin, to rob his son, Langford Anglin. During the course of the robbery while searching Langford's bedroom, defendant pointed a gun at Langford's guest, Casheona King, and threatened to shoot her. King positively identified defendant. Defendant ran from the bedroom and shortly thereafter King heard a gunshot. King went downstairs to discover Anthony Anglin lying on the living room floor. Later that night defendants asked a friend who was not involved in the robbery to drive them home. The vehicle only had one working headlight and after traveling only a few blocks police stopped the vehicle. Police found Owens was in possession of a mask and a stack of money folded in rubber bands in his pocket.

¶ 6 Defendant and Robinson were tried in simultaneous separate jury trials. During jury selection for defendant's trial, the trial court sat a panel of four potential jurors from the venire and proceeded with questioning after which the parties could elect to accept the juror, move to dismiss the juror for cause, or exercise a peremptory strike against the juror. During jury

selection the court and the attorneys questioned four jurors the State would ultimately use a peremptory strike against. For purposes of this appeal only, we will refer to those jurors by number in the order they were stricken by the State.

¶ 7 Juror 1 (the juror the State used its first peremptory strike against) was an African-American woman from the northwest side of Chicago. Juror 1 had both an undergraduate degree and MBA in accounting. She was single and had an eight-month old child. Juror 1 had been arrested for fighting but not charged, and her brother had been charged and served "a couple months" for home invasion in Michigan within the past year. Juror 1 witnessed a murder while in college and testified in court on that matter. She also formerly dated a Chicago Police Department officer.

¶ 8 Juror 2 (the second juror the State used a peremptory strike against) was an African-American male from the northwest side of Chicago. Juror 2 was unemployed and receiving disability. His disability requires him to take medication three times a day. Juror 2 stated he had been arrested for "spanking" his daughter approximately six years earlier.

¶ 9 Juror 3 was a Latino male then living in the western suburbs. He worked as an auto mechanic and completed high school and automotive trade school; he was married with no children. Juror 3 said that his uncle had been "in and out of prison his whole life." His uncle had most recently been released at the beginning of the year after serving a sentence for robbery. Juror 3 did not visit his uncle in prison. Juror 3 had a cousin who was murdered in 1990. There was a trial resulting from the murder but Juror 3 did not attend any of those court proceedings. On about five occasions Juror 3 had visited a friend of the family who was imprisoned for murder.

¶ 10 Juror 4 was a 21-year-old African-American woman from the westside of Chicago who lived with her retired mother. Juror 4 attended college for a year and a half and had a one-year-

old child. Juror 4 stated that when her boyfriend was young he was charged with DUI and possession of drugs, and two additional charges she could not remember. One of those additional charges "had something to do with [Juror 4] and her mom" when her boyfriend cracked a door. Juror 4 visited the jail to post his bond for that arrest. She also went to court with her boyfriend for that charge and for his DUI. Juror 4 stated she was sexually assaulted but the offender was never caught. She knew one Chicago Police Department officer through her church. She stated that the majority of her family was lawyers but she did not know what areas of law they practiced because she does not speak to them.

¶ 11 During the first jury selection conference *in camera*, the defense exercised three peremptory strikes first. The trial court called Juror 1 into chambers for additional questioning about possible undisclosed criminal convictions under an alias. Juror 1 stated the alias was not her. The State exercised a peremptory challenge as to Juror 1 and defense counsel immediately informed the court "we are going to exercise a *Batson* challenge on [Juror 1.]" Defense counsel stated: "I don't see. Is it because she was a witness on a murder, is that why ***." The following colloquy then took place.

> "THE COURT: The State doesn't have to give their reasons at this time. Hold on one second. How do you think you have made a *prima facie* showing that a peremptory challenge was exercised on the basis of race when this is the first challenge that the State has made?
>
> MR. GRANICH [Defendant's attorney]: Judge, looking at [Juror 1], I don't see any reason where she couldn't be fair to either side, other than her race. She didn't indicate she had—if anything, Judge, I kind of felt that we might have more of a reason to excuse her. She seemed to be you know, I don't see any other reason for the State to excuse her other than based on race. She didn't give any

indication under any question that there would be any other reason the State could use other than a race reason to excuse her.

THE COURT: Okay. I do not find that you have made a *prima facie* showing. There is no pattern. There is no practice of excusing anybody based on race that I have seen. It is the first challenge that the State has used. And the defense has challenged three people already. The State has challenged one. That's denied."

¶ 12 The trial court continued with the jury selection conference. After some further discussion, the State next moved to dismiss Juror 2 for cause on the basis of an undisclosed arrest. The State also asked the court to question Juror 2 about his disability. The court questioned Juror 2 in chambers. Juror 2 said his medication did not affect his ability to hear or understand and that he was not taking any medicine that would affect his ability to sit for a period of time or to listen and comprehend. Juror 2 was also asked about arrest records of an individual with the same name. Juror 2 stated he had a DUI arrest in the 1970's and a 2007 arrest for "marijuana." When Juror 2 left the court's chambers the State asked that he be excused for cause. The court stated that Juror 2 "did disclose now a 2007 arrest that we didn't ask him about, but I don't think we proved that the 2010 was him. He said maybe yes, maybe no." The court denied the State's request to excuse Juror 2 for cause. The defense exercised additional peremptory challenges, and then the court tendered the panel to the State. The State asked to excuse Juror 2 and Juror 3. The court offered two more jurors to complete the panel, including Juror 4. The State exercised a peremptory challenge against Juror 4. As soon as the State excused Juror 4, defendant's attorney stated as follows:

"MR. GRANICH: Judge, at this point the State has exercised challenges only for people of color, only for black women, black men and [a] Hispanic man. So now

> I believe there is beginning to be a pattern, and again I don't believe there was any race neutral reason for [Juror 4]. So again, Judge, I feel at this point they have now only used their challenges for non-white potential jurors. So I would renew a *Batson* challenge."

¶ 13 The trial court initially responded to defense counsel by stating: "I am looking at the people that the State has excused. And I am looking at them as compared to the people that are on the jury and as compared to the people that defense has excused." The court pointed out that the defense had excluded a white male, a white female, and an Indian "who would have made perfectly good jurors." The court stated it would not require the State to give any race neutral reasons at that time. The court continued: "I am looking at the people that were excused, and there are people that the State left on that were African-American, who the defense kicked off." The court stated it did not find that the State was "trying purposely to kick African-Americans off the jury." The court said: "So I am not finding that the kicking off of the individual persons here are solely on the basis of race because the State had left other African-Americans on the jury. So at this stage I am denying the request."

¶ 14 Defense counsel stated he did not believe that the proper inquiry was "to compare what the defense is doing with what the State is doing." Defense counsel stated he had exercised peremptory challenges against people of different races and genders, which he argued "shows that there is not a sort of gender or race that I am looking to excuse." Defense counsel argued that, on the contrary, the State "so far has only used their peremptory challenges for Black people and one Hispanic. So *** I feel that there is a sort of race basis going on." The court stated:

> "THE COURT: I am looking at the people very carefully because that's a very serious charge, and I certainly wouldn't want that to go on in this courtroom,

> to see whether they excluded venire persons for a heterogeneous group, sharing race as their only common characteristics. And that certainly is not the case.
>
> I am not going to put what I believe is the State's strategy, if you will, because I am not requiring them to give race neutral reasons at this point. [But] I certainly will say, and their answers to the questions are already of record, so I don't need to repeat them, I do not believe that they excluded persons who shared race as their only common characteristics. So that respectfully will be denied."

¶ 15 The trial court informed the members of the venire who had been selected for the jury then proceeded with a second group of potential jurors. The State exercised two more peremptory challenges. The race of the potential jurors the State struck is not contained in the record. The jury was empanelled and the trial commenced. As previously stated, a recitation of the pertinent evidence can be found in our decision in *People v. Robinson*, 2016 IL App (1st) 151133-U. We will not repeat it here, as defendant has not challenged the sufficiency of the evidence to sustain his conviction, and we have set forth the basic information explaining the crime. Following trial, the jury found defendant guilty of first degree murder and the cause proceeded to sentencing.

¶ 16 The trial court began the sentencing hearing in December 2014. Defendant's attorney informed the court defendant's mitigation witnesses were not in court and asked the court to continue the matter. The court initially responded it could not continue the matter because the court did not believe it would have another date available before the judge was to retire. Defense counsel informed the court defendant had just informed the attorney that defendant wanted to have witnesses testify in mitigation. Defendant's attorney had not asked defendant before if defendant had any mitigation witnesses he wanted to testify. The court asked defendant who defendant wanted to testify. Defendant said "Mother, neighbors." The court stated it would take

a recess to allow defense counsel to confer with defendant to determine what defendant believed he needs and whether or not that could be accomplished that day. The court added: "I am completely surprised by the fact that you did not ask your client whether or not he had mitigation witnesses before today's date because this was continued from October from the motion for new trial."

¶ 17 The trial court proceeded with the sentencing hearing as to Robinson and allowed the State to present testimony from aggravation witnesses common to defendant and Robinson. Anthony Anglin's widow and two daughters read their victim impact statements. The State had nothing further in aggravation as to Robinson but asked that if defendant were granted a continuance to present mitigation evidence the State be allowed to present further aggravation evidence on the next date. The court stated it was going to allow defendant to present mitigation witnesses within the month of December, therefore the State would be allowed to call its additional aggravation witnesses at that time. When the sentencing hearing recommenced later in December, the State informed the court it had one additional witness in aggravation. The court remarked that it had just received letters from the defense in mitigation. The State presented the testimony of a Cook County Sheriff's officer assigned to the jail where defendant was housed. The officer testified that a nine-inch piece of sharpened metal, or a "shank," was found in defendant's cell. Defendant had a cell mate at the time. The court also admitted as evidence in aggravation a letter defendant wrote to Jamal Wright while defendant was in jail. In the letter defendant wrote "I'm going to write down that I was with you," and "if I ever needed a favor, bro, it's now."

¶ 18 The trial court turned to the defense for its evidence in mitigation. Defendant's attorney stated the "only mitigation I have are the four letters I filed and presented to you today," then the following exchange occurred:

> "THE COURT: Okay. The last date when we were going to proceed to sentence, you asked for a continuance for live witnesses. Do you have any live witnesses to present?
>
> MS. CARBELLOS [Defendant's attorney]: No, I don't. They chose to write letters.
>
> THE COURT: Okay. In—would you like to begin with argument then?
>
> MS. VALENTE [Assistant State's Attorney]: Yes.
>
> THE COURT: Okay."

After the parties' argument and defendant's statement on his own behalf the court announced its sentence.

¶ 19 The trial court stated it had listened to the testimony in aggravation and mitigation and read the letters provided by defendant's family. The court then stated:

> "THE COURT: There is a letter from his aunt who is a Chicago police officer which reads almost exactly like a letter written by Reverend Booker Steven Vance, almost a duplicate, talking about his—both saying the very same sentences. He has a creative side, he's an artist. He wasn't a leader but just hung out with the wrong crowd. He needed encouragement and support.
>
> Early on it was clear he had some mental health challenges, although the defendant in his pre-sentence investigation claims he has no mental health issues or mental health challenges whatsoever, so there's no basis in the record to support that, either from the defendant's reporting, the pre-sentence investigation, or his own statements claiming that his childhood was normal. He denies experiencing any abuse, neglect, or involvement with the Department of Children and Family Services."

¶ 20 The trial court went on to state that defendant's mother "wrote the most heartfelt letter that I have seen in a long time." In her letter, defendant's mother accepted responsibility for defendant's actions based on her drug addiction, but, the court noted, defendant's sister stated that by defendant's late teen years their mother had resolved her drug addiction and found the family a home "in an okay neighborhood, some good, some bad," and he "had friends, he graduated from high school." The court recounted that defendant's sister's letter stated his sister did not understand what steered defendant wrong because their mother had "turned it around." The court stated to defendant: "That's not an excuse for your conduct." Next, the court stated that defendant's statement to the court was "an insult to the Anglin family." Defendant had stated he knew how they felt because he lost four people close to him in the past year to violence. The court stated that defendant showed no sympathy for the family and that the court had heard no sincere apology or any sense defendant "had any real true heartfelt responsibility." The court added that defendant was entitled to maintain his innocence and the court was not taking that into consideration.

¶ 21 The trial court continued by stating it would not take into consideration or give any weight to the testimony concerning the "shank" because the court could not say defendant was the one who possessed the shank. The court said it did take into consideration everything in the presentence investigation report. The court disregarded assertions defendant had psychological issues because those assertions were not supported by any medical evidence and were contrary to defendant's own denial of any mental health issues. The court discussed some of the evidence from trial and said to defendant:

> "THE COURT: Not only did you kill Mr. Anglin in cold blood, not only did you invade the [privacy] of their home, not only did you point the gun at Casheona King and tell her that this was her last day on this Earth, and for some

> unknown reason, Mr. Robinson was able to dissuade you, not from killing Mr. Anglin, but saving Casheona King's life. You didn't save it. I don't find you gave her any mercy. It was your intention to pop her, as you said."

The court additionally stated it would take into consideration the fact defendant was still under supervision after being released from prison after an armed robbery conviction when he committed this offense. The court noted that defendant's mother "cleaned up her act" but defendant did not and that defendant "had a chance to straighten out [his] act after the armed robbery" but did not.

¶ 22 At his point the trial court returned to defendant's letters in mitigation from an aunt and reverend (the duplicative letters). On that subject the court stated as follows:

> "THE COURT: These character references have very little weight in this Court's estimation because I am most especially taken into consideration not the letter written by the aunt because it's pretty much a duplicate of the reverend, it's like they both pretty much wrote the same letter. They have very little weight with this Court."

The court stated that the letters from defendant's mother and sister did have weight for "the kind of character they possess, which is good character" and "for the effort that [defendant's] mother turned her life around" and turned defendant's life around. The court concluded as follows:

> "THE COURT: So you had 15 good years of a clean mother who presented a beautiful home. You had a high school diploma and every opportunity in life, and you threw it away. You threw it away, you terrorized Casheona King, terrorized Mr. Mata (phonetic) when you committed the armed robbery, and you murdered in cold blood Mr. Anglin.

> I take all of that in consideration, and I find that there's not sufficient mitigation in any respect to justify anything but the maximum sentence in this case. I sentence you to 60 years in the Illinois Department of Corrections, plus I sentence you to the mandatory 15 years enhancement for 75 years in the Illinois Department of Corrections."

¶ 23 This appeal followed.

¶ 24 ANALYSIS

¶ 25 Defendant argues that the trial court failed to follow the three-step procedure outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986) in response to defense counsel's challenge to the State's use of peremptory strikes choosing instead to focus on the defense's peremptory strikes. Defendant also argues trial counsel provided ineffective assistance by submitting nearly identical letters in mitigation at his sentencing.

¶ 26 *Batson*

¶ 27 Defendant argues that had the court followed the proper procedure it would have found "the *prima facie* showing required in the first step of *Batson*."

> "Once a defendant alleges his or her rights have been violated because the State has used its peremptory challenges in a racially discriminatory way, *Batson* requires the trial court conduct a three-part inquiry: (1) determine whether the defendant has established a *prima facie* case of purposeful discrimination; once a *prima facie* case is shown, (2) the State has the burden to articulate a nondiscriminatory, race-neutral explanation based on the facts of the case; and considering the State's explanation, (3) the court then must determine whether the defendant has shown purposeful discrimination. [Citation.] *** A trial judge's determination of whether a *prima facie* case has been shown will not be

> overturned unless it is against the manifest weight of the evidence. [Citation.]" (Internal quotation marks omitted.) *People v. Williams*, 2015 IL App (1st) 131103, ¶ 44 (citing *People v. Rivera*, 221 Ill. 2d 481, 500 (2006)).

¶ 28 In this case defendant argues "[a]dherence to that *three-step inquiry* would have found sufficient evidence to support an inference of discrimination, meeting the *prima facie* showing required in the first step of *Batson*." (Emphasis added.) Defendant's argument is flawed to the extent it suggests the trial court had to complete the three-step inquiry outlined in *Batson* to determine whether defendant made a *prima facie* showing of purposeful discrimination. The second step in the inquiry is to require the State to articulate a race-neutral explanation for its use of peremptory challenges. *Id.* However, "[t]he existence of a *prima facie* case is *prerequisite* for the court to demand an explanation. [Citation.]" (Emphasis added.) *Id.* Defendant was required to establish a *prima facie* showing of purposeful discrimination *before* the trial court proceeded with the remainder of the three-step inquiry. "[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." *Johnson v. California*, 545 U.S. 162, 170 (2005).

> "When determining whether the defendant has demonstrated a *prima facie* case of discrimination against African-Americans, a trial judge should consider these seven factors: (1) the 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 number of African-Americans 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) the shared characteristics of the excluded African-American

> venirepersons compared to the venirepersons accepted by the prosecution; and (7) the racial make-up of the defendant, victim, and witnesses. [Citations.]" *Williams*, 2015 IL App (1st) 131103, ¶ 45.

¶ 29 The State argues the defendant failed to establish a *prima facie* case because the shared characteristics of the excluded venirepersons are different from the venirepersons accepted by the state—each "had a direct connection to the criminal justice system as a defendant, a witness, and/or a relative of someone involved in the criminal justice system." Moreover, those connections "were relatively recent and involved serious crimes." The venirepersons' connections to the criminal justice system provided race-neutral grounds for striking them from the jury. See, *e.g.*, *United States v. Jones*, 224 F.3d 621, 625-26 (7th Cir. 2000) ("In light of her previous experience with the criminal justice system, she could have preconceived notions, although not rising to the level of a challenge for cause, that make her an undesirable juror."); *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991) ("Prior encounters with the criminal justice system which might cause a juror to be hostile toward the government have been upheld as racially neutral explanations.").

¶ 30 Defendant argues the excluded venirepersons' interactions with the criminal justice system were not similar to each other. Although defendant points out the distinctions in the ways the excluded venirepersons interacted with the criminal justice system, none of those distinctions eliminates the core commonality between them. Each had a connection to the criminal justice system either directly or through a close association involved in a "serious offense."

¶ 31 Defendant argues the trial court failed to treat the first step of the *Batson* inquiry as the "low threshold" envisioned by the United States Supreme Court. See *Johnson*, 545 U.S. at 170 ("We did not intend the first step to be so onerous that a defendant would have to persuade the

judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination.”). Defendant asserts the trial court failed to consider relevant first-step factors (see *Williams*, 2015 IL App (1st) 131103, ¶ 45) and improperly “delved into the background of the venirepersons that Owens challenged and the State’s acceptance of some minority jurors, eschewing proper first-step factors.”

¶ 32 First *Batson* Challenge

¶ 33 Although on appeal defendant complains the trial court demonstrated its “penchant for eschewing proper first-step *Batson* analysis” when defendant challenged the State’s first strike, which was of an African-American woman (Juror 1), his arguments are based on the State’s exercise of “its first *four* peremptory strikes on minority venirepersons.” (Emphasis added.) Defendant’s only argument that the trial court failed to conduct a proper *Batson* inquiry after the State struck Juror 1 is that “even a single peremptory strike on the basis of race violates equal protection.” Regardless whether by failing to argue the point defendant has forfeited his argument the trial court failed to conduct a proper inquiry when defendant made his first *Batson* challenge—at a point where the State had only exercised one peremptory challenge—we would find no error occurred. The Fourth District rejected a similar argument in *People v. Sanders*, 2015 IL App (4th) 130881, ¶ 39. In *Sanders*, the defendant raised a *Batson* challenge after the State used peremptory challenges to exclude the first two African-American venire members. *Id.* ¶ 38. The trial court in that case “noted the difficulty of establishing a pattern with so few minority venire members.” *Id.* On appeal, the defendant argued the trial court’s ruling was incorrect as a matter of law, citing “the United States Supreme Court rule stating the ‘Constitution forbids striking even a single prospective juror for a discriminatory purpose.’ [Citation.]” *Id.* ¶ 39. The Fourth District held that the “[d]efendant’s reliance on this rule is

misplaced because, as mentioned earlier, the existence of a pattern is only one of many factors a defendant has in his arsenal to support a claim of purposeful discrimination in the selection of a jury." *Id.* "Where evidence of a pattern is an irrelevant factor, such as when there has only been one African-American challenged, a defendant must set forth other evidence which gives rise to an inference of discrimination. [Citation.]" *Id.* ¶ 40 (citing *People v. Davis*, 345 Ill. App. 3d 901, 910 (2004) (holding a "pattern of strikes" is an irrelevant factor in determining whether the defendant established a *prima facie* case of discrimination under *Batson* where there is only one African–American in the venire)).

¶ 34 In this case the trial court found "[t]here is no pattern. *** It is the first challenge that the State has used." We will not find that the trial court erred because it did not *sua sponte* address the remaining factors in the first step of the *Batson* inquiry. *Id.* ¶ 41. The extent of the argument in support of defendant's first *Batson* claim was the following:

> "MR. GRANICH [Defendant's attorney]: Judge, looking at [Juror 1], I don't see any reason where she couldn't be fair to either side, other than her race. She didn't indicate she had—if anything, Judge, I kind of felt that we might have more of a reason to excuse her. She seemed to be you know, I don't see any other reason for the State to excuse her other than based on race. She didn't give any indication under any question that there would be any other reason the State could use other than a race reason to excuse her."

This argument addresses at best (and only inferentially) racial identity between defendant and Juror 1 as well as the victim and witnesses. These factors do not weigh in favor of finding an inference of purposeful discrimination because the same racial identity between defendant and Juror 1 exists between Juror 1 and the victim. See *People v. Andrews*, 146 Ill. 2d 413, 433 (1992) (potential for discrimination in jury selection heightened where crime is "interracial [in]

nature"). At this point the State had not used peremptory challenges disproportionately against any group, no members of the jury had actually been selected yet (so the level of minority representation on the jury compared to the venire was not known), the defense did not raise any arguments concerning the prosecutor's questions during *voir dire*, and there was no group of excluded jurors to compare. Accordingly, defendant failed to establish a *prima facie* case of discrimination under the relevant *Batson* factors based on the exclusion of Juror 1.

¶ 35 Second *Batson* Challenge

¶ 36 Defendant argues that when he raised a *Batson* challenge for the second time, after the State used its first four peremptory challenges against minority venirepersons, the trial court again failed to conduct a proper *Batson* inquiry. Defendant asserts the trial court erroneously "suggested that no inference of discrimination could arise because the State had not used strikes on some minority venirepersons" and rushed to conclude that the excluded venirepersons did not share race as their only common characteristic.

¶ 37 Defendant argues the trial court's view that an inference of discrimination only arises when the State strikes every minority venireperson was rejected by our supreme court in *Andrews*. In *Andrews*, the supreme court retained jurisdiction but remanded the appeal to the trial court "for a hearing to allow defendant to attempt to establish a *prima facie* case of racial discrimination under *Batson*." *Andrews*, 146 Ill. 2d at 418. The trial court found the defendant had failed to establish a *prima facie* case and proceeded to resentence the defendant. *Id.* at 418-19. The defendant moved for a briefing schedule in our supreme court limited to the issue of jury selection. *Id.* at 419. The defendant argued that the trial court's determination he had failed to establish a *prima facie* case was against the manifest weight of the evidence. *Id.* Our supreme court found that "the State's use of eight out of eight peremptory challenges to exclude black venirepersons demonstrates both a pattern of strikes, and the disproportionate use of strikes,

against black venire members." *Id.* at 430. The court also found "the excluded black venirepersons were a heterogeneous group with race as their only common characteristic distinguishing them from the accepted nonblack jurors" and "the interracial nature of the crimes with which [the] defendant was charged support[ed] the inference that the prosecutors' peremptory challenges were racially motivated." *Id.* at 433. The court held the evidence was "more than sufficient to raise the inference of discrimination required to establish a *prima facie* case under *Batson*." *Id.* The court noted "the fact three black venirepersons were impaneled on [the] defendant's jury, while relevant, is not by any means dispositive of this issue." *Id.* The inquiry is whether the State discriminated against the jurors who were excluded, not whether the State did not discriminate against the jurors who were accepted. *Id.* "[T]he complete exclusion of a racial group is not required for a *prima facie* case to be established under *Batson*." *Id.* at 434.

¶ 38 Here, defendant asks this court to reject, under *Andrews*, the claim he ascribes to the trial court that "because the State accepted two African-American jurors, Owens did not show *prima facie* discrimination." In other words, defendant asserts the trial court held defendant failed to make a *prima facie* showing of discrimination simply because two African-Americans were on the jury. In *Andrews*, the court held the presence of three black jurors on the defendant's jury was not sufficient to *defeat* the *prima facie* case of racial discrimination established by the evidence. *Id.* Regardless whether defendant is correct about the trial court's holding, defendant was first required to establish a *prima facie* case of discrimination with regard to the excluded jurors.

¶ 39 We note parenthetically defendant's argument the trial court improperly relied on the presence of African-Americans on the jury is incongruous with our mode of review in cases such as this. In *Andrews*, our supreme court stated "the standard we apply in reviewing the trial

judge's determination on this issue is not whether the judge abused his discretion. Rather, it is our role to review the evidence in its entirety and to determine if the trial judge's ruling is against the manifest weight of the evidence." *Andrews*, 146 Ill. 2d at 428. Notwithstanding the fact this court reviews the evidence, not the basis of the trial court's ruling, considering defendant's argument about the trial court's rationale we find defendant's argument mischaracterizes the entire record on this point.

¶ 40 When the defense raised the second *Batson* challenge, the trial court did initially respond by comparing the excused venirepersons with those on the jury. The court stated "I am not finding that the kicking off of the individual persons here are solely on the basis of race because the State had left other African-Americans on the jury. So at this stage I am denying the [*Batson*] request." A comparison of the number of minorities on the venire to the number of minorities impaneled is a relevant factor (*id.* at 434-35), but the presence of minorities on the jury should not be dispositive (*id.* at 433). The trial court in this case did not rely on that factor alone. After the trial court made the statement quoted above defense counsel asked to make a record. Defendant's attorney argued the court should not engage in a comparative analysis of the defendant's strikes and the State's strikes. Defendant's attorney additionally argued the defense exercised its strikes against "all sorts of different races, for different sex, for different reasons," but the State "so far has only used their peremptory challenges for Black people and one Hispanic." The court responded that the jurors the State struck were not a heterogeneous group sharing race as their only common characteristic and denied defendant's motion under *Batson*. The heterogeneity of the peremptorily excluded venire members is a circumstance that is highly relevant for *Batson* purposes. *Andrews*, 146 Ill. 2d at 431. The trial court did not hold that defendant failed to make a *prima facie* case of discrimination only because minorities were represented on the jury. To the extent defendant argues it did, defendant's argument fails.

¶ 41 The State relies on *Williams* to argue that due to the absence of evidence of the race of everyone in the first and second panel of venirepersons defendant has failed to demonstrate the evidence establishes a pattern of strikes against minorities or disproportionality in the State's use of peremptory strikes. In *Williams*, the defendant raised a *Batson* challenge in the first round of questioning 14 members of the venire. *Williams*, 2015 IL App (1st) 131103, ¶ 47. "Of the five excused members of the venire, the first was a Caucasian male, and the next four were African-Americans." *Id.* The *Williams* court stated "[a]s to the second circumstance, a pattern of strikes arguably develops, but the court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the strikes. [Citation.]" *Id.* ¶ 48. The *Williams* court found that the State's strikes in the first round failed to "present the whole picture as it includes only the first of the three rounds of *voir dire*." *Id.* The court noted that the State used two more strikes in the second and third rounds but the record did not reflect the race of those individuals. The court held "[l]ooking at only the first round does not represent the totality of relevant facts and circumstances. [Citation.] Accordingly, with an incomplete record, we are unable to find a racial pattern to the State's exercise of its peremptory challenges." *Id.* (citing *People v. Gutierrez*, 402 Ill. App. 3d 866, 894 (2010)).

¶ 42 In reply in this case defendant argued the race of jurors considered in subsequent panels is irrelevant because his argument is just that the trial court failed to conduct a proper first-step *Batson* inquiry at the point in the proceedings where the State had exercised all of its peremptory challenges against "minority" venirepersons. Defendant asserts that because "the State had used 100% of is peremptory challenges on 'minority' venirepersons who were otherwise heterogeneous, Owens raised a *prima facie* showing of discrimination." This argument must fail because it only takes into consideration three of the seven factors the trial court should consider in determining whether a *prima facie* case of discriminatory jury selection has been established.

See *People v. Williams*, 173 Ill. 2d 48, 71 (1996). Those factors being a pattern of strikes against minorities, a disproportionate use of peremptory challenges against minorities, and whether the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic. See *id.* As to the first two factors on which defendant relies defendant further replied the *Williams* court improperly construed *Gutierrez* to stand for the proposition that the record should reflect the race of venirepersons struck and considered *after* a defendant raises a *Batson* challenge to permit the court to find a *prima facie* case of discrimination. Defendant argues that in *Gutierrez*, the court reasoned that the racial makeup of all of the venirepersons was relevant (only) because they were all considered before the defendant made his *Batson* challenge at the close of jury selection.

¶ 43 In *Gutierrez*, the defendant made a *Batson* challenge after the jury was seated. *Gutierrez*, 402 Ill. App. 3d at 891. The State had exercised three peremptory challenges on the first day of jury selection and the race of those three venirepersons was unknown. *Id.* On the second day the State exercised peremptory challenges against three African-American venirepersons. *Id.* The trial court denied the defendant's *Batson* challenge and remarked that " 'I think *** you're looking at what we are doing today, not the entire jury selection process.' " *Id.* Looking to whether there was a pattern of strikes against African-American venire members, the *Gutierrez* court began by noting that "[w]hile the proportionality analysis compares the number of peremptories used against African Americans versus the number used against Caucasians, the pattern analysis compares the number of African Americans that could have been, but were not, struck by the State." *Id.* at 892. The court found that before exercising peremptory challenges against three African-Americans on the second day of jury selection, "the State had accepted two panels that included four African-Americans." *Id.* The court noted "[o]ur supreme court has previously found that when a *Batson* claim is made regarding discrimination against a particular

race, the unchallenged presence of jurors of that race on the seated jury tends to weaken the basis for a *prima facie* case of discrimination." *Id.* at 892-93. The court held that the defendant had cited no authority holding that the State's use of its final four peremptory challenges against African-Americans suggests discrimination. *Id.* at 894. "In addition, it is well established that the court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the strikes. [Citation.]" *Id.* (citing *People v. Davis*, 231 Ill. 2d 349, 360 (2008)). Thus, the court held, "it was proper for the trial court to consider the entire jury selection process." *Id.*

¶ 44 We reject defendant's contention that the race of venirepersons struck and considered *after* the defendant raises a *Batson* challenge is *not* a relevant consideration in the totality of factors to be considered in determining whether a *prima facie* case of discrimination was established unless the *Batson* challenge was made at the close of jury selection. We find no such limitation in the well-established rule that in considering a *Batson* challenge "the court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the strikes." *Gutierrez*, 402 Ill. App. 3d at 894. See also *Davis*, 231 Ill. 2d at 365 (remanding for *Batson* hearing where record did not reflect total number of African-Americans in the venire or "the total number of African-Americans that were struck by use of peremptory challenges by the State"). We agree, however, that the racial makeup of later jury panels and whether the State struck any minorities after a defendant makes a *Batson* challenge is not dispositive. See, *e.g.*, *People v. Hayes*, 244 Ill. App. 3d 511, 514 (1993) ("although a pattern of strikes and disproportionality of strikes are factors which weigh in the defendants' favor, they are not dispositive"). Nonetheless, "the party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party." *Davis*, 231 Ill. 2d at 365. Still, in reply to the State's argument the absence

of a complete record of the entire jury selection process—particularly the racial composition of the venire—keeps defendant from establishing his *prima facie* case, defendant points out that his argument is confined to the point in the proceedings when the State had used all of its peremptory challenges against minorities during the first panel. However, this is the same procedural posture found in *Williams*, where the defendant raised a *Batson* challenge during the initial round of jury selection, at a point when four jurors from the venire were seated. *Williams*, 2015 IL App (1st) 131103, ¶¶ 21-22. Therefore, defendant's argument the deficiencies in the record do not hinder review of his particular claim fails.

¶ 45 Even considering the issues based only on the proceedings to the point defendant made his *Batson* challenge, defendant's argument the trial court failed to conduct a proper *Batson* inquiry and that consideration of the appropriate factors demonstrates defendant made a *prima facie* showing of discrimination, fails. Defendant argues this case is similar to *Andrews* in that, in each case the trial court focused on the number of minorities on the jury rather than the venirepersons who were struck, and in each case the State used 100% of its peremptory strikes against minorities (in this case at the time of the *Batson* challenge, not in the entire jury selection process as in *Andrews*). Defendant asserts the evidence establishes:

(1) the State engaged in a pattern of strikes against minorities;

(2) the proportion of strikes against minorities raised an inference of discrimination; and

(3) the excluded persons were a heterogeneous group whose only common characteristic was being a minority.

¶ 46 Defendant's only argument concerning the State's questions during *voir dire* and in exercising challenges is that the State questioned venirepersons in hopes of finding grounds for cause and when it did not it struck those persons anyway. That assertion does not provide any

evidence of discriminatory intent by the State.[1] Defendant does not discuss the race of the defendant, victim, and witnesses, or the level of minority representation in the venire as compared to the jury. The latter factor is unknown because the race of the entire venire is not contained in the record. "[T]he absence of evidence on this figure renders it a neutral factor in this determination." *Andrews*, 146 Ill. 2d at 435. The former factor does not weigh in favor of finding discrimination in striking minority jurors because the victim, defendant, and witnesses are all minorities. See *People v. Garrett*, 139 Ill. 2d 189, 205 (1990) ("Defendant and the victim were both Black, according to the State's undisputed argument at the *Batson* hearing, and there is no evidence that the witnesses differed racially from defendant; thus, two more possible bases for inferring purposeful racial discrimination by the State in jury selection are weakened or eliminated.").

¶ 47 The State responds that at this point, when defendant made his second *Batson* challenge, it had excused three African-Americans and one Latino and had accepted at least two African-Americans.[2] The State argues their strikes do not establish a pattern of striking minorities. We agree. "[A] pattern of discrimination does not develop 'anytime a party strikes more than one juror of any race or gender.' [Citation.]" *Williams*, 2015 IL App (1st) 131103, ¶ 46. "A

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[1] See *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) ("And a draft affidavit from the prosecution's investigator stated his view that '[i]f it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay.' [Citations.]" (Emphasis omitted.)).

[2] In this case the trial court stated "I am looking at the people that the State has excused. And I am looking at them as compared to the people that are on the jury and as compared to the people that defense has excused." "The court's consideration of this fact was proper. See *United States v. Nichols*, 937 F.2d 1257, 1264 (7th Cir.1991) (noting that 3 African American jurors were seated while the government still had peremptory challenges available which suggested the prosecutors had no discriminatory intent)." *Harris v. Hardy*, 680 F.3d 942, 952 (7th Cir. 2012). See also *People v. Austin*, 2017 IL App (1st) 142737, ¶ 39 ("Further, 'when a *Batson* claim is made regarding discrimination against a particular race, the unchallenged presence of jurors of that race on the seated jury is a factor properly considered [citations] and tends to weaken the basis for a *prima facie* case of discrimination.' [Citation.]").

'pattern' of strikes is created where the strikes affect members of a certain race to such a degree or with such a lack of apparent nonracial motivation that it suggests the possibility of racial motivation." *Andrews*, 146 Ill. 2d at 429. Defendant argues this case is analogous to *Andrews* because in both cases the State used all of its peremptory challenges against minorities. *Andrews* is distinguishable because in that case, the State exercised all of its peremptory challenges in the jury selection process against minorities (*Andrews*, 146 Ill. 2d at 429) whereas here, defendant's claim is only that the State exercised its first four peremptory challenges against minorities. Although proportionally at this stage of the jury selection the State had exercised all of its peremptory challenges against minorities and none against nonminorities, the trial court found there was not a "lack of apparent nonracial motivation" for those strikes. The trial court in this case found the excluded jurors did not share race as their only common characteristic. That finding is not against the manifest weight of the evidence.

¶ 48 Defendant argues a nonminority juror who the State chose to keep admitted that he had been arrested for possession of fireworks.[3] However, that argument is not appropriate at the *prima facie* stage of a *Batson* inquiry. "[I]f a [party's] proffered reason for striking [a prospective juror of one race] applies just as well to an otherwise-similar [juror of a different race] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s *third step*. [Citation.]" (Internal quotation marks omitted and emphasis added.) *Harris v. Hardy*, 680 F.3d 942, 949 (7th Cir. 2012). Regardless, the arrest of the nonminority venireperson is of an entirely different character than the interactions the excluded venirepersons had with the justice system. Juror 1 both had a brother who was convicted of home invasion and herself witnessed a murder. Juror 1 had also been arrested. Juror 2 had

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[3] The defense excused this juror.

multiple arrests, including one he initially failed to disclose. Juror 3 and Juror 4 did not have arrests. However, Juror 3's uncle was "in and out of prison" and he had a cousin who was murdered. Juror 4 was the victim of a crime and her boyfriend had involvement with the criminal justice system, including an offense against her and her mother. These facts further distinguish this case from *Andrews*. In that case, "[f]our members of the group had been crime victims themselves, or had crime victims within their family" while "[t]he other four had never been crime victims nor had any member of their families." *Andrews*, 146 Ill. 2d at 431. The excluded venirepersons' connection to the criminal justice system provided the trial court with an "apparent shared characteristic[] aside from race." *Id.* Therefore, the "pattern" and "homogeneity" factors do not weigh in favor of finding a *prima facie* case of purposeful discrimination in the jury selection process.

¶ 49 We note that we have treated defendant's *Batson* claim as directed against the striking of "minorities" from the jury. We acknowledge the State's argument it is improper to simultaneously consider different racial groups when addressing a single *Batson* claim. "To decide whether a *prima facie* case of racial discrimination occurred, we must give separate consideration to different racial or ethnic groups. [Citation.]" *People v. Golden*, 323 Ill. App. 3d 892, 903-04 (2001) (citing *People v. Harris*, 164 Ill. 2d 322, 344 (1994)). Defendant responded to the State's argument by asserting that the United States Court of Appeals for the Seventh Circuit rejected our supreme court's analysis in *Harris*. See *Harris*, 680 F. 3d at 953. The Seventh Circuit's decision in *Harris* did not discuss simultaneous consideration of different racial or ethnic groups. See *id.* Nonetheless, we have no need to address this question and decline to do so. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 157 (2002) ("Advisory opinions are to be avoided."). The trial court ruled that defendant failed to make a *prima facie* showing of purposeful discrimination in jury selection. Reviewing the evidence in its entirety, the trial

court's ruling is not against the manifest weight of the evidence—whether or not that group is limited to the three African-American venirepersons or is expanded to include "minority" venirepersons. Defendant failed to show the State engaged in a pattern of strikes "with such a lack of apparent nonracial motivation that it suggests the possibility of racial motivation." *Andrews*, 146 Ill. 2d at 429. Defendant also failed to show the excluded venirepersons' only common characteristic was being a minority. None of the other first-step *Batson* inquiry factors weigh in favor of finding a *prima facie* case of purposeful discrimination. Accordingly, the trial court's ruling is affirmed.

¶ 50 Ineffective Assistance of Counsel

¶ 51 Defendant argues he received ineffective assistance of counsel at sentencing because his attorney first promised live testimony then introduced only "duplicative and apparently disingenuous character letters." Defendant argues counsel's performance was deficient in that counsel failed to deliver live testimony after requesting a continuance for that purpose and after the court granted the continuance "begrudgingly" after "noting *** its chagrin that counsel 'did not ask [defendant] whether or not he had mitigation witnesses before today's date.' " Defendant asserts that "[a]ggravating the court further still was counsel's failure to produce that live testimony two weeks later, with no more explanation than a claim that the mitigation witnesses 'chose to write letters.' " Defendant states on appeal: "Despite the fact that an irritated court was certain to scrutinize those letters closely, sentencing counsel apparently failed to notice that two of them *** were almost exact duplicates." Defendant continues: "There could be no sound strategy behind introducing such plainly repetitive letters to a sentencing court already frustrated by counsel's delay in an effort to obtain live mitigation testimony. Those letters would not go unnoticed and were guaranteed to frustrate the court."

¶ 52 Defendant argues he was prejudiced by counsel's deficient performance because the letters "undermined an otherwise persuasive argument for a sentence closer to the 35-year minimum." Defendant claims "the circuit court harped on [those two letters] three times before issuing the harshest sentence allowable by Illinois law." He asserts he was a "strong candidate for rehabilitation" because he was "only 31 years old at the time and had been imprisoned just once before at age 24 following a conviction for armed robbery ***." Defendant states: "Instead, the circuit court slammed the door to any rehabilitation and societal reintegration when it sentenced Owens to the maximum 75 years while focusing intensely on the suspicious and largely duplicative character letters."

¶ 53 A defendant has a right to effective assistance of counsel at sentencing. *People v. Morgan*, 2015 IL App (1st) 131938, ¶¶ 73, 75. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) this deficiency was prejudicial to the defense. [Citations.]" *Id.* ¶ 75. "In the context of a sentencing hearing, prejudice must be assessed based on the totality of the evidence." *Id.* ¶ 80. "A court need not consider whether counsel's performance was deficient prior to examining the prejudice suffered by the defendant as a result of the alleged deficiencies. [Citation.] Where the ineffectiveness claim can be disposed of on the ground that the defendant did not suffer sufficient prejudice, the court need not determine whether counsel's performance constituted less than reasonably effective assistance." *People v. Flores*, 153 Ill. 2d 264, 284 (1992). "The trial court must consider all factors of mitigation and aggravation. [Citation.] Appellate courts treat sentencing decisions within the statutory range with great deference. [Citation.] *** [It] may not reverse the sentencing court just because it would have weighed the factors differently. [Citation.]" *People v. Scott*, 2015 IL App (1st) 131503, ¶ 48. "We presume a trial court has considered all of the relevant factors in mitigation before it, and without

affirmative evidence that the sentencing court failed to consider factors in mitigation, that presumption cannot be overcome." *Id.* ¶ 52. In this case we find defendant was not prejudiced by counsel's submission of the duplicative letters as evidence in mitigation; therefore, defendant's ineffective assistance of counsel argument fails.

¶ 54 The core concept of the argument on appeal is that defendant's trial counsel's failure to present live testimony after requesting a last-minute continuance for that purpose then following up that request with two duplicative letters so frustrated or outright angered the trial court that it either overlooked defendant's rehabilitative potential or vengefully sentenced him to the maximum term possible. On appeal defendant asserts the court "harped" and "focused intently" on the letters. He describes the court in response to this turn of events as "chagrined," "aggravated," "irritated," and "frustrated." These hyperbolic claims are not persuasive in the least. We have reviewed the trial court's comments at sentencing and find nothing to support the claim the trial court exhibited or harbored any animosity to defense counsel in response to either the initial request or later failure to present live witnesses in mitigation or the duplicative letters. *Supra*, ¶¶ 16-22. Nor do we find that the duplicative nature of the letters "influenced the circuit court to issue a maximum 75-year sentence" as defendant claims on appeal. Defendant claims the "court's repeated discussion of those letters indicated that they were at the forefront of its mind when issuing sentence." That contention is not supported by the record.

¶ 55 In the three instances in which the trial court referenced the letters, the court notes the two letters are "almost a duplicate" but then goes on to discuss their contents. The court discussed the allegations of mental health challenges but found them "not persuasive or compelling because it's not supported by [defendant's] own reporting, and there's no medical or physical support in the presentence investigation indicating any serious mental health ***." Finally, the court stated the letters have very little weight. On this point the court's earlier

comments are illuminating. The court earlier found the contents of the duplicative letters were belied by other evidence. In addition to the absence of evidence of "mental health challenges" the court also noted that in spite of the letters' claim that defendant "needed encouragement and support" defendant himself denied he "experienced any abuse, neglect, or involvement with the Department of Children and Family Services." Thus the trial court gave the two letters that were "pretty much a duplicate" little weight either because they were contradicted by more reliable evidence or because they were merely copies and thus insincere. In either case the record does not support finding the duplicative letters are what influenced the court's sentence. What was "on the trial court's tongue[4]" after considering the evidence in mitigation—including what was written in both the duplicative letters and the mother and sister's letters—and the evidence in aggravation—including that which contradicted the evidence in mitigation—was that defendant "had 15 good years of a clean mother who presented a beautiful home;" defendant "had a high school diploma and every opportunity in life, and ** threw it away;" defendant "terrorized Casheona King, terrorized Mr. Mata (phonetic) when [he] committed the armed robbery, and *** murdered in cold blood Mr. Anglin."

¶ 56 The record establishes that the trial court sentenced defendant based on factors independent of the duplicative nature of two of the four letters submitted as evidence in mitigation of the sentence. "Defendant has the burden of showing actual prejudice. [Citation.] To establish prejudice, defendant must demonstrate 'not simply a possibility of prejudice, but that the claimed prejudice worked to his actual and substantial disadvantage.' [Citation.]" *People v. Anderson*, 234 Ill. App. 3d 899, 911 (1992). Defendant failed to satisfy his burden to

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[4] "If it is on his tongue, it most assuredly must be on his mind." *People v. Wardell*, 230 Ill. App. 3d 1093, 1103 (1992).

show actual prejudice from the submission of the two letters. Therefore, defendant's claim of ineffective assistance of counsel fails.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 59 Affirmed.