



defendant's explanations for challenging the three prospective black jurors to be race-neutral and that plaintiff failed to carry her burden of establishing purposeful discrimination. At trial, plaintiff objected to defendant's reference to his pediatric progress notes when testifying and objected to defendant's request to admit the notes into evidence. The trial court allowed defendant to testify about his postoperative pediatric progress notes and admitted them into evidence over plaintiff's objections. We affirm.

¶ 3 BACKGROUND

¶ 4 On September 14, 2008, Shyra Smith was born with a congenital malformation known as imperforate anus. The condition remained undiagnosed until November 30, 2008, when Shyra's mother and next friend, plaintiff Shellrice Smith, took her to the emergency room of Good Samaritan Hospital with complaints of constipation. Doctors diagnosed Shyra's condition and transferred her to the University of Chicago for emergency surgery. The successful surgery lasted one hour and Shyra was discharged the next day.

¶ 5 Shyra's doctor, defendant Cezar B. Tolentino, M.D.<sup>1</sup>, had not diagnosed her condition despite seeing her for postnatal examinations on three occasions: October 1, 2008, October 15, 2008 and November 12, 2008. Nevertheless, plaintiff brought Shyra back to see defendant for a postoperative check-up and for minor medical issues on two additional occasions.

¶ 6 On January 22, 2016, plaintiff filed a lawsuit seeking damages resulting from defendant's alleged failure to diagnose and treat or refer Shyra for surgery. The parties set the case for trial and jury selection commenced on October 11, 2016.

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<sup>1</sup> The parties inconsistently refer to defendant as "Cesar" and "Cezar." For the purposes of this Order, we refer to defendant as "Cezar."

¶ 7 During *voir dire*, defendant exercised four peremptory challenges, three of which were used to remove prospective black jurors from the venire. Defendant exercised his fourth peremptory challenge on Anthony Spalla, a white male. Plaintiff objected to defendant's peremptory challenges to the three prospective black jurors, Veronica Gardner, Deborah Pogue and Melvin Sloan, as discriminatory and moved for a mistrial. In rebuttal, defendant explained that he had removed Gardner for having recently served as a plaintiff in a lawsuit, Pogue for admitting that she could not hear all of the evidence before deciding the case and Sloan for exhibiting a potential inability to comprehend medical terminology and issues. The trial court accepted each of defendant's explanations as race-neutral and excused the prospective jurors. The trial court denied plaintiff's motion for a mistrial and the parties proceeded to trial with three black jurors impaneled on the jury.

¶ 8 At trial, plaintiff objected to defendant's introduction of postoperative pediatric progress notes (Pediatric Notes) into evidence. Plaintiff argued that the Pediatric Notes, which contained notations of plaintiff's specific complaints, were introduced for an improper purpose: to mislead the jury into believing that the "absence of notes from October and November 2008 was the result of [plaintiff's] failure to present the symptoms of Shyra's imperforated anus to [defendant]." The trial court overruled plaintiff's objection, ruling that the Pediatric Notes were demonstrative of defendant's custom and practice and that the content of the Pediatric Notes served to inform the jury's potential calculation of damages. The Pediatric Notes were duly admitted into evidence along with defendant's related testimony.

¶ 9 On October 17, 2016, the jury entered a general verdict in favor of defendant and answered a special interrogatory defendant's favor. The trial court entered judgment accordingly.

On November 15, 2016, plaintiff renewed her arguments in a motion for a new trial, which was denied. Plaintiff appeals and requests a new trial.

¶ 10

ARGUMENT

¶ 11 The issues on appeal are: (1) whether the trial court's ruling, that plaintiff failed to carry her burden of establishing that defendant's peremptory challenge of three prospective black jurors served a discriminatory purpose, was clearly erroneous; and (2) whether the trial court's evidentiary ruling that the Pediatric Notes were relevant was an abuse of discretion.

¶ 12 Because a trial court's finding on the issue of discrimination rests largely on credibility determinations, we will not set aside the trial court's decision here unless it was clearly erroneous. *People v. Rivera*, 221 Ill. 2d 481, 502 (2006). Plaintiff argues that we should review the trial court's decision for an abuse of discretion and cites *People v. Boston*, 383 Ill. App. 3d 352, 355 (2008) in support of her position. Plaintiff's reliance on *Boston* is misplaced because the case explored a trial court's discretion to conduct *voir dire*, generally, and does not mention *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

¶ 13 The "Equal Protection Clause forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. The holding in *Batson* applies to private litigants' use of peremptory challenges to exclude jurors on account of their race in civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

¶ 14 A trial court's evaluation of a *Batson* violation requires a three-step process. *Mack*, 371 Ill. App. 3d at 44. First, a party must make a *prima facie* showing that the nonmoving party exercised its peremptory challenge on the basis of race. *Id.* If such a showing is made, the burden then shifts to the nonmoving party to articulate a race-neutral reason for excusing the

venireperson. *Id.* Third, the trial court must determine whether the moving party has carried his burden of establishing purposeful discrimination, which includes an evaluation of the reasons provided by the nonmoving party as well as claims by the moving party that the proffered reasons are pretextual. *Id.*

¶ 15 In order to establish a *prima facie* case of purposeful discrimination in the exercise of its peremptory challenges, the moving party must present facts and any other relevant circumstances which raise an inference that the other party challenged the prospective jurors on account of their race. *People v. Williams*, 173 Ill. 2d 48, 71 (1996). Relevant circumstances are considered in light of the totality of the relevant facts surrounding the peremptory strike to see if they give rise to a discriminatory purpose. *People v. Davis*, 233 Ill. 2d 244, 256 (2009). In determining whether a *prima facie* case of discriminatory jury selection has been established, the following relevant circumstances should be considered: (1) racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African–American venirepersons; (3) a disproportionate use of peremptory challenges against African–American venirepersons; (4) the level of African–American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African–American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *Id.*

¶ 16 Plaintiff claims that defendant's peremptory challenges of Gardner, Pogue and Sloan were discriminatory in purpose. Defendant counters that plaintiff failed to make a *prima facie* showing that defendant's challenges were discriminatory and that argument in rebuttal was therefore not required. Defendant argues, alternatively, that the trial court's ruling to accept

defendant's race-neutral explanations for challenging the prospective black jurors was not clearly erroneous. We address the parties' arguments in turn.

¶ 17 At the outset, we note that the issue of whether plaintiff made a *prima facie* showing of discrimination is a moot point because the trial court found that valid, race-neutral reasons supported defendant's use of his peremptory challenges to exclude Gardner, Pogue and Sloan. *See Mack v. Anderson*, 371 Ill. App. 3d 36, 45 (2006) (holding that the question of whether the plaintiffs have established a *prima facie* case of discrimination becomes a moot point once the trial court rules on the ultimate question and finds valid, race-neutral reasons supporting the peremptory challenges). Accordingly, we reach the merits of whether the trial court's ruling that plaintiff did not carry her burden of establishing purposeful discrimination on the part of defendant was clearly erroneous.

¶ 18 Defendant exercised his first peremptory challenge to remove Gardner from the venire. Plaintiff objected to the challenge as discriminatory and the trial court turned to defendant to provide a race-neutral basis for the challenge. Defendant responded: "[m]y basis is she has been a plaintiff in a lawsuit. I did not believe that I was, honestly, getting a good vibe from her myself, so it's a personal reason for a strike your Honor." Accepting defendant's explanation as race-neutral, the trial court explained its reasoning at the hearing on plaintiff's motion for a new trial: Gardner "had been a party to a lawsuit which may suggest an orientation towards plaintiff, or a favorable view towards a plaintiff in a case." The trial court continued: "I think my note reflects and I think the brief too that the defendant did not get a good vibe from this juror. Again, I think the observations are just as important sometimes as what people say. Sometimes they say one thing, but you sense something different from the way they are answering your question, so I believe that that was a race neutral explanation."

¶ 19 In considering defendant’s peremptory challenge of Gardner, we note that defendant’s proffered explanation was, in part, subjective. However, defendant offered an objective basis for challenging Gardner that served to tie her specific bias to the case: Gardner was a plaintiff in a civil suit in March of 2016. *See People v. Andrews*, 155 Ill. 2d 286, 293 (1993) (holding that an explanation must demonstrate that the excluded venire members exhibited a specific bias related to the particular cause to be tried, other than that their shared race with the defendant may have biased them in favor of the defendant).

¶ 20 We hold that the trial court’s ruling, that plaintiff did not carry her burden of showing that defendant’s peremptory challenge of Gardner was discriminatory in purpose, was not clearly erroneous. The trial court found that Gardner’s bias, as it related to her status as a recent plaintiff in a lawsuit, was a credible, race-neutral basis for her challenge. *see Mack*, 371 Ill. App. at 47. The trial court also assessed defense counsel’s credibility and demeanor as it related to her observations of Gardner during *voir dire*, finding that defendant’s explanation for challenging Gardner was not race-based. “The best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). “In addition, race-neutral reasons for peremptory challenges often invoke a juror’s demeanor (*e.g.*, nervousness, inattention), making the trial court’s firsthand observations of even greater importance.” *Id.* “[C]redibility and demeanor lie ‘peculiarly within a trial judge’s province,’ and we have stated that in the absence of exceptional circumstances, we would defer to [the trial court].” *Id.* (*quoting Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Defendant’s explanations were duly considered and accepted by the trial court, within its peculiar province, as not having a discriminatory intent and we decline to second guess the trial court’s judgment.

¶ 21 Plaintiff's argument that defendant asked Gardner "twenty (20) questions, 8 questions more than any prospective white juror" does not establish racial pretext or discrimination. On its face, plaintiff's argument may require a comparative juror analysis, "whereby the striking party's questions to prospective jurors and the responses to those questions are evaluated, to see whether otherwise similar prospective jurors were treated differently because of their membership in a particular race." *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 47. However, plaintiff has not drawn our attention to which questions and answers demonstrate the similarity between that Gardner and the "prospective white jurors." Moreover, because plaintiff did not identify the "prospective white jurors" by name and the record does not identify the prospective jurors by race, we have no way of determining which prospective jurors are the proper subjects for comparative analysis. We decline to undertake such an unguided analysis. But, in any event, were the results the comparative juror analysis to militate in plaintiff's favor, the finding would serve as an additional factor for the court to take into consideration in determining the existence of a *prima facie* case. *People v. Shaw*, 2014 IL App (4th) 121157, ¶ 18. At the third stage of the *Batson* process, plaintiff's argument fails to rebut defendant's race-neutral explanation for challenging Gardner as pretextual.

¶ 22 Plaintiff's additional argument is unavailing: that defendant's acceptance of juror LaPuz Androval, who settled a case where she was injured in an accident, reveals the pretext of defendant's race-neutral explanation for challenging Gardner. "[I]n many instances there will be no single criterion that serves as the basis for the decision whether to excuse a particular venireman." *People v. Mitchell*, 152 Ill. 2d 274, 295 (1992) (*quoting People v. Mack*, 128 Ill. 2d 231, 239 (1989)). A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other,



favorable characteristics.” *Id.* Therefore, purposeful discrimination is not automatically established by the mere coincidence that an excluded venireperson shared a characteristic with a juror who was not challenged. *People v. Easley*, 192 Ill. 2d 307, 327 (2000). Because plaintiff’s argument offers no more than a single shared characteristic between Gardner and Androval, she has not carried her burden of establishing purposeful discrimination on the part of defendant.

¶ 23 Defendant exercised his second peremptory challenge to remove Pogue from the venire following an unsuccessful attempt to challenge her for cause. Plaintiff objected to the challenge as discriminatory and the trial court turned to defendant to provide a race-neutral basis for the challenge. Defendant responded: “Your honor, I just moved to try to get Miss Pogue off for cause. I don’t believe she can be fair.” The trial court accepted defendant’s explanation as race-neutral and excused Pogue, reasoning that, “I do think it was an adequate explanation when somebody says I can’t tell you for sure that I will wait until I hear both sides of the story before making up my mind, so I that, again, was a race neutral explanation.” The following exchange during *voir dire* informs the issue:

“MR. ROMERO [(PLAINTIFF’S ATTORNEY)]: Miss Pogue, do you believe that there is anything wrong with this system of our –

MS. ANDERSON [(DEFENDANT’S ATTORNEY)]: Objection Your Honor.

THE COURT: Overruled.

MR. ROMERO: And so it’s not fair to everybody, is it?

PROSPECTIVE JUROR POGUE: No.

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MS. ANDERSEN: And just in general, in this case, do you agree to listen to the evidence before reaching any decisions?

PROSPECTIVE JUROR POGUE: I agree to listen. I don’t know if I can promise that I won’t come to a decision before I hear everything, but I mean, you are swayed one way or another based on a lot of different queues so- I’m emotionally driven so.

MS. ANDERSEN: And we are all emotionally driven to a certain extent. And we always remember that there's somebody that can throw you a curve ball in the end; right?

PROSPECTIVE JUROR POGUE: This is true. This is very true. And like I said, if I were selected. I would do my best to reserve judgment until the very end."

¶ 24 We hold that the trial court's ruling, that plaintiff failed to carry her burden of establishing purposeful discrimination on the part of defendant with respect to Pogue, was not clearly erroneous. Explanations advanced by the party against whom a *Batson* claim has been made must be clear and reasonably specific, but they need not rise to the level of a challenge for cause. *People v. Lee*, 325 Ill. App. 3d 643 (2001). Defendant's proffered explanation for challenging Pogue was based upon a specific bias, namely, that she would not promise to weigh all of the evidence before making a decision. Additionally, Pogue's being "emotionally driven," could clearly have impacted her ability to fairly weigh the evidence in a case alleging harm done to a newborn girl as a result of a doctor's negligence. A challenging party's "explanation must demonstrate that the excluded venire members exhibited a 'specific bias' related to the particular cause to be tried, other than that their shared race with the defendant may have biased them in favor of the defendant." *Andrews*, 155 Ill. 2d at 293. Despite Pogue's statement that, "I would do my best to reserve judgment until the very end," we cannot say that the trial court's ruling that defendant's basis for challenging Pogue was race-neutral was clearly erroneous in deciding.

¶ 25 Defendant exercised his third peremptory challenge to remove Melvin Sloan from the jury. Plaintiff objected to defendant's challenge as race-based and the trial court turned to defendant for rebuttal. Defendant explained: "my concern is that, honestly, I made him uncomfortable talking about educational issues, which is how we got into the scholarship discussion, and I have concerns about that level of his understanding which is why I am moving

to strike him.”

¶ 26 We hold that the trial court’s ruling, that plaintiff did not carry his burden of demonstrating purposeful discrimination on part of the defendant with respect to Sloan, was not clearly erroneous. The trial court was in the best position to observe the demeanor of Sloan, which defendant described as “uncomfortable,” due to an unprompted discussion about Sloan’s freshman year departure from high school and his resultant inability to take full advantage of a basketball scholarship. A juror’s demeanor may constitute a legitimate and racially neutral reason for excusing him or her. *People v. Young*, 128 Ill. 2d 1, 20 (1989). A trial judge is in the best position to observe the demeanor of potential jurors and then evaluate explanations for peremptory challenges. *Mitchell*, 152 Ill. 2d at 296. The trial court evaluated defendant’s explanation of Sloan’s “level of understanding”: “He [Sloan] may not understand the medical terminology and the more complex issue that are in a medical malpractice versus a slip and fall or an auto case, something of that nature.” A juror may be excluded if they cannot fully comprehend the proceedings. *People v. Caine*, 258 Ill. App. 3d 599, 605 (1994). The trial court’s decision was not clearly erroneous here.

¶ 27 We reject plaintiff’s argument that defendant’s explanation for challenging Sloan was pretextual because “similar concerns were not voiced about potential jurors: Spalla, Vitucci, and Lynch, all whose highest level of education was High School.” Defendant removed Anthony Spalla, a white male, using his fourth peremptory challenge. Patrick Lynch indicated that he graduated from high school and when defendant asked what level of education Lisa Vitucci had received, she answered “high school.” Sloan did not pass the ninth grade. In any event, purposeful discrimination is not automatically established by the mere coincidence that an excluded venireperson shared a characteristic with a juror who was not challenged. *Easley*, 192

Ill. 2d at 327.

¶ 28 We note that two black jurors were accepted to serve on the jury in the first and second venire panels. One black juror was selected as an alternate. In denying plaintiff's motion for a new trial, the trial court commented on the diverse racial composition of the jury, stating that "African Americans," "Caucasians," "Hispanics" and "Asians" served on the jury and decided the case. We find these facts relevant to our consideration of the parties' arguments and holding that the trial court's ruling was not clearly erroneous. *See Andrews*, 146 Ill. 2d at 434 (holding that presence of black venirepersons on the jury is relevant to a determination of racial discrimination but not dispositive).

¶ 29 Finally, plaintiff claims that the trial court's admission of the Pediatric Notes into evidence had a prejudicial effect upon her case that warrants a new trial. We review the trial court's ruling that the Pediatric Notes were relevant for an abuse of discretion. *Juarez v. Commonwealth Medical Associates*, 318 Ill. App. 3d 380, 388 (2000). Admission of evidence is a matter within the discretion of the trial court and evidentiary rulings will not be reversed absent an abuse of discretion. *Israel v. National Canada Corp.*, 276 Ill. App. 3d 454, 463 (1995).

¶ 30 Plaintiff claims that the trial court's determination that the Pediatric Notes were relevant allowed defendant to improperly communicate to the jury that the "absence of notes from October and November 2008 was the result of [plaintiff's] failure to present the symptoms of Shyra's imperforated anus to [defendant]." Plaintiff further challenges the relevance of the Pediatric Notes as bearing no relation to the standard of care at issue in the case.

¶ 31 We hold that the trial court did not abuse its discretion by ruling that the Pediatric Notes were relevant. The trial court advanced two reasons for finding the Pediatric Notes to be relevant at the hearing on defendant's motion for a new trial: (1) they showed "custom and practice as to

how the doctor records notations and history that is given to him by the patient;” and (2) “I think it went to damages really the subsequent records, because if you had complaints afterwards that the baby was coming in and having problems and growth issue or elimination issues, things like that, that would go to damages and then the jury is deciding the total value of the case.”

¶ 32 “Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 86. The Pediatric Notes were relevant to the extent that they were used to demonstrate that defendant makes notations about complaints and diagnoses during examinations. “Evidence of routine or habit is admissible to prove that the conduct of the person was in conformity with habit or routine practice.” *Collins by Collins v. Roseland Community Hospital*, 219 Ill. App. 3d 766, 773 (1991). The content of the Pediatric Notes was relevant to the jury’s calculation of damages if there was a finding of liability. In connection with that finding of liability, the jury was instructed to fix an amount of compensation based upon the “nature, extent and duration” of Shyra’s pain and suffering experienced as a result of defendant’s failure to timely diagnose and treat her condition. The trial court did not abuse its discretion by ruling that the Pediatric Notes were relevant to the jury’s calculation of reasonable and fair compensation for Shyra’s pain and suffering if there was a finding of liability.

¶ 33 Having decided that the trial court’s evidentiary ruling was not erroneous, we need not consider plaintiff’s claim of prejudice and she is not entitled to a new trial.

¶ 34 CONCLUSION

¶ 35 Accordingly, we affirm.

¶ 36 Affirmed

No. 1-17-0401