2019 IL App (1st) 123561-U

THIRD DIVISION
March 6, 2019

No. 1-12-3561

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.	)	09 CR 22009
	)	
SPENCER MARTIN,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County finding defendant failed to make a *prima facie* showing of a *Batson* violation is reversed and the cause remanded for further *Batson* proceedings; the facts and circumstances surrounding the State's use of all of its peremptory strikes against an otherwise heterogeneous group of African-American members of the venire was sufficient to make a *prima facie* showing of a *Batson* violation, thereby shifting the burden to the State to provide race neutral explanations for its strikes.

¶ 2 Following a jury trial, the circuit court of Cook County convicted defendant, Spencer Martin, of the first-degree murder of Earl Willis. The jury also found that defendant personally discharged the firearm that proximately caused Willis' death. Accordingly, following posttrial

motions, the trial court sentenced defendant to a 60-year term of imprisonment for the first-degree murder charge and natural life imprisonment for the firearm enhancement.

¶ 3 Defendant appealed his conviction claiming that the trial court erred when it denied him the opportunity to hold a *Batson* hearing on the grounds defendant's motion for a *Batson* hearing was untimely, after the State used four peremptory challenges to exclude African-American venirepersons from the jury. Defendant also alleged the trial court erred when it admitted into evidence a bullet from a prior crime defendant was implicated in because the State failed to establish a sufficient chain of custody for the bullet. We remanded this matter to the trial court for it to conduct a *Batson* hearing. On remand, following the hearing ordered by this court, the trial court found defendant failed to make a *prima facie* showing of a *Batson* violation. For the following reasons, we reverse the trial court's finding defendant failed to make a *prima facie* showing of a *Batson* violation and remand for a hearing on the second and third *Batson* requirements.

¶ 4 BACKGROUND

¶ 5 Because this case has been before us before, and in light of our holding, we will provide only a brief summation of those facts necessary to an understanding of our disposition.

¶ 6 Jury Selection

¶ 7 During jury selection the trial court initially questioned 24 potential jurors. The State then used four peremptory challenges to strike four African-Americans. Defendant is African-American. Following these strikes, defense counsel asked the prosecutor if he (defense counsel) needed to make a motion based on the strikes, but then indicated that he would not make a motion yet. Following jury selection, but before the jury was sworn in, defendant's attorney informed the court he wanted to make a *Batson* motion. The court denied that request as

untimely. In defendant's appeal from his conviction he argued the trial court erred when it denied his request for a *Batson* hearing. We agreed, finding defendant's motion for a *Batson* hearing was timely, and remanded this matter to the trial court to conduct a *Batson* hearing. We further ordered that,

> "[a]t that hearing, when determining whether defendant has made a *prima facie* case, the trial court will have to weigh several considerations which include, but are not limited to: '(1) the racial identity between the defendant and the excluded venireperson; (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.' [Citation.]" *People v. Martin*, 2014 IL App (1st) 123561-U, ¶ 46.

We directed the trial court to "make the requisite findings of fact and conclusions of law based on the *Batson* hearing and file them with the clerk of this court within 60 days of its decision, accompanied by the record of the proceedings on remand." *Id.* ¶ 49. Additionally, we noted that in remanding this cause, we were expressing "absolutely no opinion on the merits of defendant's *Batson* violation claims." *Id.*

¶ 8 On remand, defendant's attorney argued that applying each of the factors listed above to the facts of this case raises an inference of racial discrimination. The parties discussed the number of African-Americans in the venire, the number who were initially questioned by the

trial court, and the number that served on the jury. There was some dispute as to whether one juror was African-American or Hispanic. Defendant's attorney argued, in part, that the State "made some remarks on some of the [African-American] jurors that were not true." Defendant's attorney was referring to a member of the venire stricken by the State because she "couldn't tell us what her son did for a living." Defendant's attorney noted that person said her son had only recently started that job, she knew where it was located, but could not remember its name. Defendant's attorney then pointed out that the State accepted a Hispanic juror who did not know what college his daughter attended and a white juror who did not know if he owned or rented his home. Defendant's attorney further argued that the State commented that another African-American stricken from the venire failed to disclose an arrest even though that person had "revealed a far more serious incident," and the State did not strike a white member of the venire "who had failed [to] disclose a violation of child support payments."

¶ 9 The trial court issued written findings pursuant to this court's order. The trial court's order finds that all of the members of the venire the State used peremptory challenges against were African-American. The trial court found that the State used four of its seven peremptory challenges, and that fourteen members of the venire were stricken for cause, of which "[t]here were white, Hispanic and African-American [potential] jurors in the fourteen excused by both sides." The written order indicates the trial court did not find a disproportionate use of peremptory challenges against African-Americans because "the State only used four of seven peremptory [c]hallenges" and "used challenges for cause against white, Hispanic and African-American jurors." The court wrote:

> "The State did not use three of their challenges and could have if they were acting to exclude jurors based on race. This is not conclusive, but is a factor to be

> considered. This controversy arises all in the questioning and challenging of the first ten jurors. The State excluded four black jurors and they kept one. That one is Ricardo Matta whose race is in dispute.
>
> In the next thirty potential jurors questioned the State did not use any peremptory challenges. The parties agree that approximately twelve African-American jurors were questioned. That means eight African-American jurors were questioned after the first ten jurors were questioned. Of those eight, none were peremptorily challenged."

The court found that it questioned 40 members of the venire and the parties agreed there were 12 African-Americans in that group. The court found there were three or four African-Americans on the jury depending on the race of the disputed juror. The court made no findings as to that juror's race. The trial court found the arguments concerning the allegedly inconsistent statements about African-American members of the venire and non-African-American members of the venire "to be without merit." The court found the white member of the venire who allegedly did not know if he owned or rented "knew he owned his home for three years and rented for fifty-two years." The court concluded that the striking of the African-American who did not disclose an arrest "was not at all the same" as the white juror "who had a non-support that was not criminal and there was no indication he was arrested or charged." The court further noted as follows:

> "During the selection of the first alternate the defense used their challenge to strike their second female Asian juror. The next juror was African American ***. The State initially thought she might have to be excused for cause because of an order of protection, but said 'I would love to keep her as a juror,' [citation]. The

defense wanted her, I allowed her to stay and she was the first Alternate."

The trial court did find that the "excluded venire persons are part of a heterogeneous group [s]haring race as their only common characteristic," and that the defendant, victim, and many of the witnesses were all African-American."

¶ 10 The trial court's findings state that after conducting a comparative juror analysis as well as observing the demeanor and actions of the prosecutors, there is nothing to suggest an attempt to exclude jurors based on race or that the State was exercising peremptory challenges based on race. The court again noted of the African-American woman who became an alternate that the State said they "would love to have" her as a juror. The court found there was "a fair representation of African-Americans on the jury compared to the venire," and the State's "questions and comments compared to the other jurors were not discriminatory." The court held defendant failed to make a *prima facie* case of a *Batson* violation.

¶ 11 Trial Evidence

¶ 12 The victim's severely decomposed body was discovered on May 12, 2006, inside of his white conversion van, which was found parked on the south side of Chicago on the 7200 block of South Indiana Avenue. The State's theory at trial was that defendant killed Willis on February 4, 2006, just hours after a gas station shooting defendant had been implicated in. On May 12, 2006, Officer Peter Ujda and his partner responded to a call of a "man slumped over a wheel" in a van at 7200 South Indiana Avenue. When Officer Ujda opened the side door of the white conversion van that was the subject of the call, he saw a body inside. Detective Tim Murphy then arrived at the scene, spoke with Officer Ujda, and observed a body lying between the two captain's chairs of the van. Detective Murphy later learned that Willis had been missing since February 3, 2006, and that police were looking for him in connection with the gas station

shooting. Detective Murphy also learned that defendant had been taken into custody in connection with the gas station shooting on or about February 22, 2006.

¶ 13 Following trial the jury found defendant guilty of first-degree murder and further found defendant personally discharged a firearm that proximately caused the death of Willis. Following a sentencing hearing, the trial court judge sentenced defendant to a 60-year term of imprisonment for the first-degree murder charge and a natural life term for the firearm enhancement.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 As we stated in defendant's initial appeal:

> " 'In *Batson,* the United States Supreme Court held that, in a criminal case, the fourteenth amendment's equal protection clause prohibits a prosecutor from using a peremptory challenge to exclude a prospective juror solely on the basis of his or her race. [Citation.] Under *Batson,* the equal protection clause is violated when the facts show that the State excluded an African-American venireperson on the assumption that he or she will be biased in favor of defendant simply because of their shared race.' *People v. Davis,* 345 Ill. App. 3d 901, 907 (2004). There is a three-step process that the court must engage in when reviewing a *Batson* motion. First, the party objecting to the exercise of a peremptory challenge is 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.' See *Batson v. Kentucky,* 476 U.S. 79, 93-94 (1986). 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. *Batson*, 476 U.S. at 97-98. Finally, the trial court considers the reasons provided for the peremptory strike and determines whether those reasons are pretextual or whether the objector has established purposeful discrimination. *Batson*, 476 U.S. at 98." *Martin*, 2014 IL App (1st) 123561-U, ¶ 45.

¶ 17 To make a *prima facie* showing that a peremptory challenge was exercised on the basis of race, "the defendant must prove three factors: (1) he or she is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of [the] defendant's race from the venire; and (3) sufficient facts and circumstances existed to raise an inference that the prosecution used the peremptory challenges to exclude veniremembers on the basis of race. [Citations.]" *People v. Coulter*, 345 Ill. App. 3d 81, 87 (2003) (citing *People v. Coulter*, 321 Ill. App. 3d 644, 654-55 (2001) (*Coulter II*) (citing *Batson*, 476 U.S. at 96)).

> "The focus of this case is *Batson*'s first step, requiring us to examine whether [the defendant] put forth enough evidence to establish a *prima facie* case of racial discrimination. The *** defendant may establish a *prima facie* case by offering a wide variety of evidence that raises a mere inference of a discriminatory purpose. *Johnson v. California*, 545 U.S. 162, 169 (2005); see also *United States v. Stephens*, 421 F.3d 503, 512 (7th Cir. 2005) ('[T]he burden at the *prima facie* stage is low....')." *Bennett v. Gaetz*, 592 F.3d 786, 791 (7th Cir. 2010).

In *Johnson*, the United States Supreme Court considered whether *Batson* permitted "California to require at step one that 'the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.' [Citation.]"

Johnson, 545 U.S. at 168. The Supreme Court held California's standard for measuring the sufficiency of a *prima facie* case was "at odds with the *prima facie* inquiry mandated by *Batson*." *Id.* at 173. The Court stated it

> "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. Instead, 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." *Id.* at 170.

The Court cautioned that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citation.] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. [Citations.]" *Id.* at 172. Thus, the "threshold for making out a *prima facie* claim under *Batson* is not high." *People v. Davis*, 231 Ill. 2d 349, 360 (2008) (citing *Miller-el v. Dretke*, 545 U.S. 231, 230 (2005) (*Miller-El* II)).

¶ 18 To make the determination the trial court must consider the totality of the relevant facts and all relevant circumstances surrounding the peremptory strike "to see if they give rise to a discriminatory purpose." *Davis*, 231 Ill. 2d at 360. "[T]he mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination. [Citations.]" *Id.* at 361. The number of African-Americans stricken only takes on meaning when coupled with other information such as the racial composition of the venire, the race of others struck, and the *voir dire* answers of those who were struck compared to the answers of

those who were not struck. *Id.* (citing *People v. Rivera*, 221 Ill. 2d 481, 512 (2006)). Other factors relevant in evaluating whether a *prima facie* cases exists include racial identity between the party exercising the peremptory challenge and the excluded venirepersons, a pattern of strikes against African-Americans on the venire, a disproportionate use of peremptory challenges against African-Americans, whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic, and the race of the defendant, victim, and witnesses. *Id.* at 362. "[W]hen 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.]" (Internal quotation marks omitted.) *People v. Austin*, 2017 IL App (1st) 142737, ¶ 39. "A ruling on the sufficiency of a *prima facie* case of purposeful discrimination is a finding of fact that will not be reversed unless it is against the manifest weight of the evidence." *Rivera*, 221 Ill. 2d at 502.

¶ 19 Applying the foregoing to the facts and circumstances of this case, we find the trial court's judgment that defendant failed to make a *prima facie* case of racial discrimination in the State's use of its peremptory challenges is against the manifest weight of the evidence. The trial court found there is a racial identity between defendant and the excluded venirepersons. However, the State also notes that the victims and most of the witnesses were also African-American. "The fact that the defendant, victim, and star prosecution witness were all the same race, black, is a factor in the State's favor because it suggests that the prosecutor's challenges were not motivated by discrimination." *People v. Figgs*, 274 Ill. App. 3d 735, 745 (1995). See also *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."). We find this factor raises no inference toward *or against* racial discrimination. See *People v. Alvarado*, 365 Ill. App. 3d 216, 224 (2006); *Henderson v. Walls*, 296 F.3d 541, 551 (7th Cir. 2002), cert. granted, judgment vacated, 537 U.S. 1230 (2003) ("*Batson* has been interpreted to require race neutrality in exercising peremptory challenges, regardless of the race of the defendant, victim, or witness." (citing *Powers v. Ohio*, 499 U.S. 400 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992))).

¶ 20 The trial court did not make an express finding but implied it believed there was not a pattern of strikes against African-Americans. We find the manifest weight of the evidence supports finding a pattern of strikes against African-Americans. The trial court found that "African-Americans were well represented on the venire" and noted that the State did not use all of its seven peremptory challenges. The court may consider "the fact the prosecution did not exhaust its *** available peremptories to exclude all African-American prospective jurors." *Gaetz*, 592 F.3d at 791. However, "the complete exclusion of a racial group is not required for a *prima facie* case to be established under *Batson*." *People v. Andrews*, 146 Ill. 2d 413, 434 (1992). "A '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. The *Andrews* court found that the State's use of all of its challenges to exclude African-American venirepersons in that case was "strongly suggestive of racial motivation and thus constitutes a 'pattern' of strikes against black venire members." *Id.* However, the court did not state a pattern is *not* formed when the State uses less than all of its strikes. The *Andrews* court cited our supreme court's earlier decision in *People v.*

Harris, 129 Ill. 2d 123 (1989), for the proposition that the State's use of 15 out of 20 peremptory challenges to exclude African-Americans constitutes a pattern of strikes. *Andrews*, 146 Ill. 2d at 429. The *Harris* court found the record in that case demonstrated a pattern of strikes by the State against the 15 venirepersons "whose only common characteristic was that they were black." *Id.* at 173. In this case, the trial court did make an express finding that "[t]he excluded venire persons [were] part of a heterogeneous group [s]haring race as their only common characteristic." Further, the fact that of the four peremptory challenges the State did use all were used against African-Americans is sufficient to infer a "pattern" of racially motivated use of the challenges. See, *e.g.*, *People v. Edwards*, 301 Ill. App. 3d 966, 973 (1998) ("we might be inclined to find a pattern had the State exercised two peremptory challenges against African–Americans and none or few against whites"). See also *U.S. v. Stephens*, 421 F.3d 503, 514 (7th Cir. 2005) ("Even more compelling, however, is that the prosecutor used no challenges at all against prospective white jurors").

¶ 21 The trial court did not find a disproportionate use of peremptory challenges against African-Americans. The court again relied on the fact "the [S]tate only used four of seven peremptory [c]hallenges" and could have used three more "if they were acting to exclude jurors based on race." The trial court found the State kept one African-American juror but concedes his race is in dispute. Even if the disputed juror was African-American, his inclusion on the jury is not dispositive of the question of whether defendant established a *prima facie* case under *Batson*. Our supreme court has stated that:

> "The inquiry in this case is whether the State discriminated against the *** excluded black venirepersons, not whether the State failed to discriminate against the *** accepted black jurors. *Batson* teaches that the equal protection clause is

> violated when the State excludes a black venireperson on the assumption that he will be biased in favor of the defendant simply because of their shared race. [Citation.] Thus, if the State excludes one black venireperson on that basis, regardless of how many black venirepersons are not excluded, the rule of *Batson* is violated. This court as well has repeatedly recognized that 'the exclusion of even just one minority venireperson on account of race is unconstitutional and would require reversal of the conviction below.' [Citations.]" *Andrews*, 146 Ill. 2d at 433-34.

¶ 22 The trial court also relied on the fact the State did not exercise any peremptory challenges against eight more African-American members of the venire after it struck the first four (and may or may not have kept one more as an alternate). Nonetheless, in opposition to that point defendant cites *People v. Ramirez*, 230 Ill. App. 3d 231 (1992), in which the court held the State's use of "one hundred percent of [its] exercised peremptory challenges *** against black venire members" and none against nonblack members "constitutes the disproportionate use of strikes against black venirepersons." *Ramirez*, 230 Ill. App. 3d at 235-36. The State does not address directly the "disproportionate use of peremptory challenges" factor but does argue that the totality of the relevant facts and circumstances demonstrate that the trial court's finding that defendant failed to make a *prima facie* case is not manifestly erroneous. We remain cognizant that "the courts 'should consider more than simply the number of jurors excluded.' [Citation.]" *People v. Hayes*, 244 Ill. App. 3d 511, 514 (1993). Nonetheless, this court has held that "[w]here the numbers reveal a racial imbalance resulting from the use of a disproportionate number of challenges against blacks, those numbers cannot be ignored and are significantly relevant along with all the other circumstances." *Id.* at 513-14. In *People v. Lann*, 261 Ill. App. 3d 456 (1994),

this court stated that the "proportionality analysis compares the number of peremptories used against African-Americans versus the number used against whites." *Lann*, 261 Ill. App. 3d at 463. In that case, "the prosecutor used six peremptory challenges against African-American venirepersons and one against a white venireperson juror." *Id.* The *Lann* court held "[t]here is no question, based on either precedent or common sense, but that the prosecutor's use of six of seven strikes against African-Americans constitutes a 'disproportionate use of peremptory challenges.' [Citations.]" *Id.* Interestingly, the *Lann* court ultimately found that taking all of the facts and circumstances into consideration the trial court's decision in that case that the defendant failed to establish a *prima facie* case of discrimination was not against the manifest weight of the evidence. *Id.* at 464. Regardless, in this case there is similarly no question the use of four out of four peremptory challenges against African-Americans was disproportionate.

¶ 23 The trial court's next finding was that the percentage of African-Americans in the venire as compared to the jury is "close." Specifically the court found that it questioned forty members of the venire, there were 12 African-Americans in the venire, and there were either three or four African-Americans on the jury, depending on the race of the disputed juror. The State argues on appeal that defendant never established the disputed juror was not African-American as the State alleged, and, therefore, because any ambiguities in the record must be construed against defendant, that juror must be considered African-American for purposes of this appeal. Although the trial court's findings state that the court only questioned 40 members of the venire, the State asserts on appeal there were 50 people total in the venire, therefore the venire was 24% African-American. The State counts the disputed juror and one alternate juror who was African-American and claims the jury was approximately 29% African-American and, therefore, the level of African-American representation on the jury was greater than the level of African-

American representation in the venire. Defendant replied the State was attempting to distort the facts and had not argued in the trial court that the venire, for purposes of comparing the relative representation of African-Americans in the venire and on the jury, should include the 10 individuals who were not called and not questioned.

¶ 24 The trial court's written findings confirm its belief the venire, for purposes of comparing the representation of African-Americans in the venire with the representation of African-Americans on the jury, consisted of 40 people. The court's order states: "In the venire, based on both sides' arguments, there were nineteen white, twelve black, six Hispanic and 2 Asian, one was unknown," for a total of 40 members of the venire. Because we are reviewing the trial court's judgment for whether it is against the manifest weight of the evidence, we will adopt its determination the venire consisted of 40 people. Defendant also correctly notes that the trial court made that finding based on the parties' arguments; and the doctrines of invited error, waiver, and judicial estoppel prevent a party from taking one position in the trial court and a different position on appeal. *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 800 (2009). Moreover, we agree with the trial court that 40 is the proper number for purposes of conducting this comparison. See *U.S. ex rel. Henderson v. Page*, 2000 WL 1466204, No. 97 C 1079, *8-9 (N.D. Ill. Sept. 29, 2000) (finding venire consisted of 40 where procedure was to seat panels of venire members, have the trial judge question them, then allow inquiry by the parties; 40 were actually seated and questioned; refusing to consider strikes used in panel that was dismissed; and noting "complex strategic nature of the jury selection process and the exercise of peremptory challenges").

¶ 25 Based on a 40-person venire containing 12 African-Americans, and a jury of 14 persons (including two alternates) containing four African-Americans (accepting that the disputed juror

is African-American) the venire was 30% African-American and the jury was 28% African-American. If the disputed juror was in fact Hispanic as defendant contends, the latter number drops to 21%. The trial court correctly observed these numbers are close, but the level of African-American representation on the jury was less than the level of African-American representation in the venire. Even where there has been a "slight disparity between the level of black representation on the venire *** and that on the jury [(in that case a 9% difference)] our supreme court has found "some support for an inference of discrimination." *People v. Henderson*, 142 Ill. 2d 258, 290 (1990), reversed on other grounds, *U.S. ex rel. Henderson*, 2000 WL 1466204, No. 97 C 1079 (N.D. Ill. Sept. 29, 2000). We note again that at the first step of a *Batson* analysis the question is only whether the evidence raises a mere inference of a discriminatory purpose. Moreover, even absent the ability to compare the level of representation of African-Americans in the venire and in the jury our supreme court has found a *prima facie* case of discrimination where other "strong evidence *** weighs in favor of a *prima facie* case" (*Andrews*, 146 Ill. 2d at 434), including a pattern of strikes against African-Americans, the disproportionate use of strikes against African-Americans, and the heterogeneity of the peremptorily excluded African-American venire members (*Andrews*, 146 Ill. 2d at 429-433).

¶ 26 Finally, the trial court found that defendant's analogies about comments made by the State during *voir dire* about African-American members of the venire and non-African-American members of the venire to be without merit. Defendant argued in the trial court and on appeal that the State exercised peremptory challenges against African-American jurors who answered questions similarly to non-African-American jurors the State did not use peremptory challenges on. Two male jurors, one African-American and the other not, failed to disclose certain information. The African-American male failed to disclose one criminal conviction. Defendant

argues that juror did not receive a conviction because he received supervision in the retail theft case, but defendant admits the potential juror failed to disclose the arrest for that offense. The non-African-American male failed to disclose a prior arrest for nonpayment of support for a family member. Defendant argues the two potential jurors "were in the same exact situation—both had failed to disclose an arrest not resulting in conviction. Yet, only one of them was struck form the jury by the State, and it was [the African-American.]" Defendant also argues a female African-American juror could not recall the name of the store where her son was recently employed, and the State exercised a peremptory challenge against her. However, a non-African-American male was not certain of the name of the university where his daughter worked, and the State did not strike him from the jury. In the first-stage *Batson* hearing defendant also noted the State did not strike a non-African-American potential juror who "didn't seem to know for sure if he was a homeowner or a rent[er]," but defendant does not argue that additional fact on appeal. The trial court's written order does not address the two potential jurors who did not know their children's places of employment. Instead, the court remarked how the State informed the court they would "love to keep her as a juror" in reference to the African-American who became an alternate juror.

¶ 27 "Courts have held that an important tool in assessing the existence of a *prima facie* case is 'comparative juror analysis,' which examines 'a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group. [Citation.]" *Davis*, 231 Ill. 2d at 361. The trial court's written judgment only addressed the two members of the venire who failed to disclose prior arrests. The trial court found the jurors who failed to disclose arrests were not similar because the non-African-American "had non-support that was not criminal and there was

no indication he was arrested or charged. He appears to have answered my question correctly." On appeal, defendant disputes the contention the non-African-American panelist did not have an arrest in a criminal matter, only in a civil matter. Defendant argues non-payment of support is a criminal matter, citing section 16/15 of the Non-Support Punishment Act (750 ILCS 16/15 (West 2016)). Section 16/15 states that a "person convicted of a first offense *** is guilty of a Class A misdemeanor" and a second offense is a Class 4 felony. 750 ILCS 16/15(b) (West 2016). At the hearing following this court's remand for a determination of whether defendant made a *prima facie* case, the State, with regard to the non-support arrest, informed the court: "It's not even listed under criminal. It just says non-support of family. I don't have any other information. There is no dispo available." We may rely on trial counsels' statements in assessing whether the trial court's judgment defendant failed to make a *prima facie* case is against the manifest weight of the evidence. See *People v. Peeples*, 155 Ill. 2d 422, 456-57 (1993) ("in the context of a *Batson* hearing [citation], the testimony of trial counsel is relevant evidence of the number of peremptory strikes against black venirepersons"). The trial court's finding that a comparative juror analysis of these two potential jurors does not give rise to a discriminatory purpose is not against the manifest weight of the evidence. Assuming *arguendo* both potential jurors failed to disclose a prior arrest, only one had a conviction for that undisclosed arrest, and that was the juror the State exercised a peremptory challenge against.

¶ 28 However, we reach a different conclusion with regard to the second comparative juror analysis defendant offered. The African-American woman who did not know her son's exact place of employment stated her son, who lived with her, "is a store assistant." When asked "What store does he work for?" she responded "21st. and Pulaski. I can't remember the name." She stated he "just started there recently." When asked what he had done previously, she

responded "I think he was in McDonald's management" for about three years. When the State exercised a peremptory challenge against her the prosecutor stated "This is a woman who couldn't tell us what her son did for a living." Her non-African-American counterpart stated his oldest daughter works in the Bank of America downtown, "and the other one, she works in the North University." He was asked "Which university?" and responded "North University." The trial court stated "I am not sure which one, north?" and the potential juror responded "North. Northern. I don't know." On appeal the State argues the statement "Northern. I don't know." is ambiguous and "cannot fairly be construed as one indicating that he did not know where his daughter worked." Regardless whether this juror did or did not know where his daughter worked, we believe the important fact for purposes of the comparative juror analysis is that the non-African-American juror expressed the same level of uncertainty with regard to his child's place of employment as did the African-American potential juror the State struck with a peremptory challenge. The African-American woman said her son was a store assistant, gave a location (21st and Pulaski), but did not know the name of the store. She knew the nature and location of her son's work. The non-African-American juror just said that his daughter worked at "North University" and also expressed uncertainty about the precise name of his daughter's employer.

¶ 29 Our supreme court has instructed that comparative juror analysis is one factor in the totality of the circumstances "that the court should take into consideration in considering the existence of a *prima facie* case." *Id.* at 362. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241. The African-American panelist's answer about her child's employment—the inability to state his

employer's precise name—is strikingly similar to the non-African-American's answer. Thus, we find their disparate treatment is evidence at least tending to prove purposeful discrimination. Although defendant brought the apparent disparate treatment of the two parents discussed above to the trial court's attention, the court failed to take it into consideration in its written judgment. A trial court's finding is against the manifest weigh of the evidence if, *inter alia*, it is not based on the evidence presented. *People v. Qurash*, 2017 IL App (1st) 143412, ¶ 20. We find the trial court's finding regarding the comparative juror analysis of these two members of the venire is against the manifest weight of the evidence.

¶ 30 Based on a total review of the facts and circumstances, we find that the manifest weight of the evidence establishes defendant demonstrated purposeful discrimination against African-Americans at the *prima facie* stage. Defendant and the excluded venirepersons were the same race. There was a pattern of strikes against African-Americans where the State used all four of its peremptory strikes against African-Americans, regardless of whether any African-Americans served on the jury or whether the State did not use all of its strikes. The State's use of peremptory challenges against African-Americans was disproportionate where it did not use any peremptory challenges against non-African-Americans. The level of African-American representation in the venire was greater than on the jury. Although the level of representation in the venire and on the jury was close, this factor is not dispositive, nor is any other factor alone dispositive. *People v. Coulter*, 321 Ill. App. 3d 644, 656-57 (2001), vacated on other grounds by *Coulter v. Illinois*, 123 S. Ct. 1384 (2003). The trial court's finding that the prosecutor's questions and statements during *voir dire* and while exercising peremptory challenges do not give rise to an inference of purposeful discrimination is against the manifest weight of the evidence based on a comparative juror analysis. Finally, there is no dispute the excluded

African-American venirepersons were a heterogeneous group sharing race as their only common characteristic. "The heterogeneity of the peremptorily excluded black venire members is also a circumstance that is highly relevant for *Batson* purposes." *Andrews*, 146 Ill. 2d at 431.

¶ 31 Based on the foregoing we reverse the trial court's judgment finding defendant failed to make a *prima facie* showing of a *Batson* violation and remand for additional proceedings under *Batson*. See *Rivera*, 221 Ill. 2d at 501. In remanding this cause, we express absolutely no opinion on the merits of defendant's *Batson* violation claims.

> "During the second step of the *Batson* hearing, the focus shifts to the prosecutor, who must articulate a race-neutral reason for striking the juror. [Citation.] Once the prosecutor establishes a race-neutral reason for striking the juror, the defendant may rebut the proffered reason as pretextual. [Citation.]
>
> Finally, during the third step of the *Batson* hearing, 'the trial court must determine whether the defendant has shown purposeful discrimination in light of the parties' submissions.' [Citation.] During this step, the 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.' [Citation.]" *People v. Shaw*, 2014 IL App (4th) 121157, ¶¶ 19-20.

¶ 32 We withhold disposition of the remaining issues on appeal and direct the trial court to file its findings of fact and conclusions of law with the clerk of this court within 60 days of its decision, accompanied by the record of the proceedings on remand. We retain jurisdiction to review the trial court's ruling after remand and to address the remaining issues in defendant's appeal. The parties may submit supplemental briefs to this court addressing any issues that arise

from the continued *Batson* hearing on remand.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed, and the cause remanded for further proceedings not inconsistent with this order.

¶ 35 Reversed and remanded with instructions.