THIRD DIVISION
September 25, 2019

No. 1-16-0515

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. 13 CR 6049
	)	
JOEL SEPULVEDA,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County; the trial court appropriately found defendant failed to establish a first step *prima facie* case of purposeful discrimination under *Batson* and did not abuse its discretion in sentencing defendant to 14 years in the Illinois Department of Corrections. Pursuant to Illinois Supreme Court Rule 472, we remand this matter back to the circuit court for the sole purpose of allowing defendant to file a motion to address alleged errors regarding fines, fees, and costs assessed against him.

¶ 2 Defendant was charged with armed habitual criminal (AHC) and his case was tried before a jury. During jury selection, defendant raised a *Batson* objection after the State used six of its peremptory challenges to strike two African-American venirepersons and four Hispanic venirepersons where defendant is Hispanic. After giving defense counsel an opportunity to state

a *prima facie* case of purposeful discrimination the trial court found defendant had failed to establish a *prima facie* case. Following defendant's trial, the jury returned a verdict finding defendant guilty of AHC. The trial court sentenced defendant to 14 years in the Illinois Department of Corrections. Defendant appealed arguing (1) his case should be remanded for a *Batson* hearing because a *prima facie* case for race discrimination during jury selection was established; (2) his 14-year sentence is excessive; and (3) he is entitled to a reduction in the fines, fees, and costs assessed against him. For the following reasons, we affirm and, pursuant to Illinois Supreme Court Rule 472, remand this matter back to the circuit court for the sole purpose of allowing defendant to file a motion to address alleged errors regarding fines, fees, and costs assessed against him.

¶ 3 BACKGROUND

¶ 4 Defendant, Joel Sepulveda, was charged by indictment with various weapon related charges and two counts of AHC alleging generally that defendant, who had previously been convicted of felony offenses, knowingly or intentionally possessed two firearms, specifically a Hi-point .45 caliber firearm and a .40 caliber Kel-tec firearm. Prior to trial the State elected to proceed only on the two counts of AHC and an order of *nolle prosequi* was entered on the remaining charges. Following a jury trial defendant was found guilty of AHC and sentenced to 14 years in the Illinois Department of Corrections. Defendant appeals his conviction and sentence arguing (1) the case should be remanded for a *Batson* hearing where defendant stated a *prima facie* case for race discrimination during jury selection; (2) defendant's 14-year sentence is excessive; and (3) defendant is entitled to a reduction in the fines, fees, and costs assessed against him. The relevant history in this matter follows.

¶ 5 Jury Selection

¶ 6 The jury in this case was selected after the trial court, State, and defendant questioned two panels of jurors chosen from a 40 member venire - the first panel consisting of 28 venirepersons and the second 12. From the first panel, the trial court excused seven venirepersons for cause (Wendy Jackson, Henry Mlynarski, Brandon Knight, Donald Ballinger, Jamie Gonzalez, Brittany Lewis, and Daniel Rico).

¶ 7 Thereafter, defendant exercised all seven of its peremptory strikes against seven individuals: Sharon Gillfillan, Maxine Goldenberg, Joseph Sweezy, Deane Speelman, Vito Buonsante, Cheri Hypes, and Robert Thomas. The State exercised six of its peremptory strikes against Stephanie Mendoza, Natalie Mancil, Stephanie Glinsey, Arnulfo Lopez, Tania Gonzalez, and Nicole Perez. No other peremptory strikes were used by the State. With respect to the peremptory strikes by the State, the following information was obtained from the juror information cards and questioning of the individuals:

- Stephanie Mendoza was a 20-year old woman studying science in her sophomore year of college. She was living on the northwest side of Chicago with her family. She had never been the victim of a crime, did not have friends or family in law enforcement, and had never been in a courtroom before. Her boyfriend had been murdered in a shooting ten months earlier.
- Natalie Mancil was a 36-year old woman working as a support specialist for an energy company. Her husband worked in IT. She had moved from the southeast side of Chicago to the southwest suburbs. She disclosed that she was friends with a Chicago police officer and that her cousin had been held at gunpoint during an armed robbery. She had served on a jury before and had attended court on another occasion as "moral support" for her brother. In response to the State's inquiry, Ms. Mancil stated that the court matter she

attended on behalf of her brother was for a gun related charge. This was the only question asked to any of the venireperons by the State.

- Stephanie Glinsey was a 27-year old woman who for the past 15 years lived in the southern suburbs of Chicago with her family. She was working as a FMLA specialist administering FMLA leave plans to employees. She had never been the victim of a crime but had previously appeared in court for a speeding violation. Her uncle had been killed in a shooting that occurred in 2012 for which no one had been prosecuted. She had a neighbor who was a police officer.
- Arnulfo Lopez was a 32-year old man working as a machine operator who for the past four years lived in the northwest suburbs of Chicago with his spouse, a medical assistant. He was previously in court for a divorce matter. He had been convicted of DUI eight years ago. Six years ago, he was the victim of an armed robbery in which a firearm was used for which no one had been prosecuted. He had family and friends who were police and corrections officers including a family member who was a Cook County police officer that was killed while off duty.
- Tania Gonzalez was a 22-year old woman who for the past 15 years had been living in a townhouse in the northwest suburbs of Chicago with her family. For the past two years she had been employed as a cashier at Panera Bread. Prior to that employment she had been enrolled in school. She had been in a court room previously for an assault case. She does not have any family or friends in law enforcement. She had never been the victim of a crime. She

also stated that her cousin and best friend had been charged with gun possession, mob action, and assault.

- Nicole Perez was a 30-year old woman living with her husband in a northwest suburb of Chicago. She was working as a loan processor for a mortgage company and her husband was in the healthcare business. She had previously been in court for a traffic ticket. Neither she nor any of her family or friends had ever been the victim of a crime. She had a friend who was a criminal attorney and her best friend's father was a Cook County sheriff.

¶ 8 After the State exercised six peremptory strikes against the aforementioned venire members, defendant's counsel, raised a *Batson* challenge upon which the following exchange occurred:

"Defense counsel: Judge, I feel compelled to ask for a reason for the exclusion made by the State of Illinois.

THE COURT: On who?

Defense counsel: *** all 7, Judge.

THE COURT: All 7?

Defense counsel: 5 Hispanic, 2 Black. Just for the record, Mr. Sepulveda is a male Hispanic.

Assistant State's Attorney: I think we used 6, not 7.

Defense counsel: I think it's 4 [Hispanic] and 2 [Black].

THE COURT: Is there anything else you want to say --

Defense counsel: No, Judge.

THE COURT: On behalf of your request?

Defense counsel: No, Judge.

THE COURT: Okay. Let's see. All right. Then, you haven't established a *prima facie* case, I don't think. So, Motion is Denied.

Defense counsel: Judge, I did state that all the ones they struck -- had stricken, were minorities, 4 Hispanic, 2 Black.

THE COURT: *** you can't lump the Hispanics in with the Blacks.

Defense counsel: Is that true, when you have a Hispanic defendant?

THE COURT: *** the best showing is, that there are 5 Hispanics and Ginsey, she is a Black woman. Mancil is a Black woman. Excused for being Hispanic? That's the best you can show?

Defense counsel: I just want to make the record clear."[1]

¶ 9 Thereafter Marco Martinez, Cheri Hensley, Tiffany Dyes-Powers, Andrea Dicicco, Heidi Spoor, Paul Estrich, Donald Sirmarco, and Alicia Moore were accepted as jurors from the first panel.

¶ 10 After questioning the second panel of 12 the trial court dismissed four individuals for cause (Matthew Hopkins, Ricki Herling, Michael Gute, and Joseph Bolbot). Neither party exercised any peremptory strikes against the remaining eight jurors on the second panel (George Gonzalez, Kathleen Miklautsch, Michelle Keefe, Linda Walley, Barbara Liska, Cynthia Mueller, Elliot Gebber, and Hadia Hijazi). Gonzalez, Miklautsch, Keefe, and Walley were accepted as jurors with Liska and Mueller as alternates. Aside from the six who were stricken as a result of the State's peremptory challenges, the race of the venirepersons to include the jury members is not contained in the record.

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[1] The trial court misspoke when it said "five Hispanics and Ginsey she is a Black woman" as the State used peremptory strikes against four Hispanic individuals not five.

¶ 11 Trial

¶ 12 At trial, Chicago police officers Konrath, Mahmoud Haleem, and Chicago police sergeant Brian Spreyne testified for the State.

¶ 13 Officer Konrath testified that on the night of February 26, 2013 he was in Chicago's Marquette Park driving patrol in a marked Chicago Police Department squad car with his partner Officer Dixon in the passenger seat. The squad car was equipped with mars lights, a siren, and a dashcam video that recorded when the vehicle's mars lights were activated. At 10:20 p.m. Konrath saw a vehicle driving without headlights or taillights. It was dark and snowy that evening so Konrath unsuccessfully attempted to curb the vehicle by driving his squad car behind it and activating his mars lights thereby activating the squad car's dashcam video. The video captured the subsequent chase through a gas station down various streets to include the wrong way on a one-way street before eventually pulling into an alley whereupon the vehicle stopped.

¶ 14 When the vehicle came to a stop in the alley, the driver stayed with the car and the passenger, who Konrath identified as defendant, jumped out of the passenger side of the vehicle wearing a black puffy jacket and blue jeans and began running down the alley. Konrath testified that when defendant exited the vehicle it looked like he was holding something on his right side, but Konrath could not tell what it was. Dixon exited the squad car to follow defendant but slipped on some ice so Konrath instructed Dixon to stay with the driver of the vehicle and began pursuing defendant down the alley. While chasing defendant, Konrath relayed over the radio to other officers defendant's description and direction. Thereafter, Konrath observed officer Haleem run into the alley between defendant and Konrath whereupon defendant turned south down a gangway of an apartment complex at which point Konrath lost sight of defendant.

¶ 15 Officer Haleem testified that he was monitoring the police radio on February 26, 2013 with his partner, Officer Flores, and went to the alley where here observed Konrath chasing

defendant. He saw defendant, who he identified in court, in the alley running toward him, they made eye contact and defendant fled south down a gangway. Haleem was 10 to 15 feet behind him. Haleem testified he saw defendant clutching the right side of his coat and then take two objects from the right side of his coat and toss them on the roof of a nearby garage. One of those objects appeared to be a weapon. Haleem continued chasing defendant after he tossed the objects down the gangway until he saw Sergeant Spreyne tackle defendant in the gangway and place defendant in custody. Thereafter, Haleem went back to the garage and used a garbage can to climb onto the roof which was covered in snow. Haleem testified that he did not see any footprints there, but found two firearms – a .40 caliber Kel-tec firearm and a .45 caliber Hi-point firearm. The Kel-tec was operable, but unloaded and the Hi-point was loaded with eight live rounds. He recovered the firearms and took them to the police station where they were inventoried. Haleem identified the State's exhibits 5 and 6 as the two firearms.

¶ 16 Haleem also testified that at the police station, defendant waived his *Miranda* rights and informed him that the driver of the vehicle told defendant to take the weapons and run while he detained the officers at the scene.

¶ 17 Sergeant Spreyne testified that he was monitoring the radio on February 26, 2013 and responded to an assignment at W. 64th Street. He got out of his vehicle and went to the first gangway at 3208 W. 64th Street. There he saw defendant throw two items onto the roof of a garage. Thereafter, Spreyne backed out of the gangway as defendant ran in his direction and waited for defendant to emerge from the gangway. When defendant reached the end of the gangway, Spreyne performed an emergency takedown of defendant and placed him in custody.

¶ 18 The parties stipulated that defendant had been convicted of two qualifying felony offenses for the charge of AHC.

¶ 19 Two neighbors, Rodrigo Osornio and Eva Rojas, and defendant's sister-in-law, Crystal Vera, testified on behalf of defendant. Osornio testified that on February 26, 2013 it was snowing and he was outside cleaning his garage. He saw defendant run through the alley being chased by a police officer who was two to three feet behind defendant. He did not see anything in defendant's hands or that defendant was grasping at his side. Osornio then went to the front of his house and watched as defendant was arrested.

¶ 20 Rojas testified that on February 26, 2013 she was at her home standing on her back porch with a friend who was smoking a cigarette when she saw defendant being chased by a police officer through the gangway of her apartment complex. She did not see anything in defendant's hands and did not see him throw anything on the garage.

¶ 21 Vera testified that she is married to defendant's brother and on February 26, 2013 she was at her sister-in-law's house located at 3210 W. 64th Place. She saw police lights and went to the window where she saw defendant run out of the gangway with an officer behind him. She also acknowledged that she could not see the garage from the front of her sister-in-law's apartment complex.

¶ 22 After the close of evidence, the jury found defendant guilty on both counts of AHC and the trial court entered judgment on the first count merging the second count in with the first.

¶ 23 Post-Trial Proceedings

¶ 24 Defendant filed a motion for a new trial on November 4, 2015 raising, among other errors, the trial court's response to defendant's *Batson* challenge arguing only that:

> "During jury selection Defendant requested the Court require the State to produce race-neutral reasons for their exclusion of minorities on the jury panel, as Defendant alleges the State's use of preemptory challenges was racially discriminatory. The Court improperly denied Defendant's request for the State to

produce race-impartial explanations for the State's elimination of minorities on the jury panel."

¶ 25 At the hearing on defendant's motion for new trial, defense counsel rested on the argument set forth in the motion for new trial and the trial court denied the motion indicating that there was no reason to state anything more with respect to defendant's *Batson* challenge.

¶ 26 Sentencing

¶ 27 A presentence investigation report was filed with the court which noted defendant's juvenile criminal history involving one conviction for intoxification in 1997 and his adult criminal history involving a conviction for drinking alcohol on the public way in 2009, attempt first degree murder in 2002, and the two felony drug convictions in 2001 which served as the predicate for his AHC charge. Defense counsel also tendered to the trial court a number of letters and photographs in support of defendant from various individuals which the court acknowledged having reviewed. At sentencing, defendant's mother and girlfriend testified in support of defendant.

¶ 28 Defendant's mother testified that she had been sick over the last year and defendant had taken her to her dialysis treatments three times a week in addition to doctor appointments. She stated that defendant cooked and cleaned for her and her husband. He assisted her 75-year old husband to walk up and down the stairs. Defendant also took care of his sister's two children helping them with school work and giving them advice about how to avoid gangs. Defendant went to church and has helped raise money for the church. Defendant also had a girlfriend and helped to raise her young son. She asked that the trial court impose a lenient sentence on defendant.

¶ 29 Defendant's girlfriend testified that she and defendant had been together since 2010. She stated that defendant helps care for her six-year old son when she goes to school or work. She asked the court to impose the minimum sentence on defendant.

¶ 30 Defendant also addressed the court discussing his decision to leave the gang in which he had been involved and to mentor youth in his community about avoiding gangs. He discussed his responsibility for his girlfriend's son and his attempt to turn his life around. Defendant addressed the trial court in allocution, acknowledging the seriousness of his crime and asking the court to consider the impact of a lengthy sentence on his friends and family.

¶ 31 At the conclusion of evidence, the State emphasized defendant's criminal history to include two convictions for manufacture/deliver of narcotics stemming from charges occurring in 1999 as well as a 2002 conviction for attempt first degree murder. The State noted that defendant had previously been convicted of a Class X offense and an extended term applied to defendant's conviction making the sentencing range for his offense 6 to 60 years. The State argued defendant had violence in his background despite a normal childhood, that he had not learned from his prior convictions, and deserved more than the minimum sentence.

¶ 32 Defense counsel acknowledged that defendant had been going down the wrong path with his drug and attempt murder convictions which were 15 years ago, but tried to change his life. Counsel argued defendant was not in a gang anymore and spoke to his nieces and nephews about gang association. He had a girlfriend and was taking care of her son. Counsel stated that the courtroom was filled with people supporting defendant. Counsel stated that, with respect to this incident, defendant had not discharged or brandished the guns. Defendant took the guns to hide when the police tried to stop the vehicle he was in because the driver wanted to get rid of them. Defense counsel stated that six years at 85 percent is significant and defendant accepted responsibility for his actions.

¶ 33 In ruling, the trial court acknowledged aggravating factors to include defendant's criminal history set forth in the presentence investigation report stating "In aggravation, the defendant has a criminal record consisting of the offenses listed in the presentence investigation." The trial court also considered the kind of weapon at issue in this case which the court stated was not used for hunting but to shoot people. The trial court also acknowledged mitigating factors to include defendant's extensive family support; the difficulty a lengthy sentence would have on his parents and family; the fact that defendant's last criminal activity was not recent; that he has been a positive role model for nieces, nephews, and stepchildren; that defendant did not fire the weapons and instead "disposed of them." The trial court concluded:

> "I would like to tell you that I did not find this to be an easy case to sentence, Mr. Sepulveda. When we were done with the evidence and the jury found you guilty, I would have been fully prepared to give you about 25 years. Wouldn't have batted an eyelash at it based upon your record and based upon [your] *** being out there at night with those weapons. Wouldn't have thought twice about it, but I don't think now that's really a good idea.
>
> I have to confess I am somewhat moved by your mitigation that you have presented. Now I find myself back in the quandary of what I should really do with you.
>
> Your record is such that anybody looking at it and looking at this, I don't think they would have any problem with a sentence in the 20s or even 30s, but I confess I just do not think that would be appropriate in your case. I can't ignore it either.
>
> So it will be the judgment and sentence of this court, Mr. Sepulveda, that you be sentenced to 14 years in the Illinois Department of Corrections."

¶ 34 Defendant filed a motion to reconsider his sentence which the trial court denied.

¶ 35 Defendant timely filed his appeal. This appeal followed.

¶ 36 ANALYSIS

¶ 37 On appeal defendant argues (1) the case should be remanded for a *Batson* hearing because defendant stated a *prima facie* case for race discrimination during jury selection; (2) defendant's 14-year sentence is excessive; and (3) defendant is entitled to a reduction in the fines, fees, and costs assessed against him.

¶ 38 *Prima Facie* Showing Under *Batson*

¶ 39 We first address defendant's claim that the trial court erred in finding defendant failed to make a first step *prima facie* case of purposeful discrimination under *Batson* required to proceed to the second step which shifts the burden to the State to explain the challenge by articulating a nondiscriminatory explanation for the strike related to the particular case. Here, we conclude the trial court appropriately found defendant failed to establish a *prima facie* case of purposeful discrimination as required by *Batson*.

¶ 40 Standard of Review

¶ 41 The parties dispute the appropriate standard of review to determine whether a *prima facie Batson* claim was established. Citing our supreme court's decision in *People v. Rivera* (*Rivera* II), 227 Ill. 2d 1, 11-12 (2007), defendant argues that the appropriate standard of review is *de novo* while the State argues the standard of review is clearly erroneous citing the court's later decision in *People v. Davis* (*Davis* I), 231 Ill. 2d 349, 362 (2008).

¶ 42 We agree with the State that the appropriate standard of review here is clearly erroneous. Defendant quotes *Rivera* II where the trial court *sua sponte* raised a reverse *Batson* issue. The Illinois Supreme Court held, "when a trial court raises a *Batson* issue *sua sponte*, the court's findings of fact, including any specific observations of record bearing upon demeanor or

credibility, will be accorded the deference the manifest weight standard provides; however, the ultimate legal determination based upon those findings is a legal determination we will make *de novo*." *Rivera* II, 227 Ill. 2d at 11-12.

¶ 43 However, in *People v. Davis* (*Davis* II) (233 Ill. 2d 244 (2009)) our supreme court determined the *de novo* standard in *Rivera* II was not the applicable standard of review when reviewing a first step *Batson* inquiry initiated by a party. At issue in *Davis* II was whether the trial court erred in concluding that defendant failed to establish a *prima facie* case of racial discrimination under step one of the *Batson* inquiry. *Id*. at 262. The court concluded that the clearly erroneous standard of review applied to its review of the trial court's first step *Batson* inquiry. *Id*. at 261. In a footnote, the court further stated:

> "We are mindful that [*Rivera* II] applied a *de novo* standard of review to the ultimate conclusion in a *Batson* case. But it did so where the trial court affirmatively found that a *prima facie* case existed even though no party had even raised a *Batson* objection at any point. The standard of review enunciated in *Rivera* [II] is not applicable here, however, because the trial court did not act to find that a *prima facie* case existed, and defendant on remand specifically raised a formal *Batson* objection and was fully allowed to make all arguments in support of his objection. Thus, the usual "clearly erroneous" standard of review is applicable." *Id*.

¶ 44 As in *Davis* II, at issue here is whether the trial court erred in concluding that defendant failed to establish a *prima facie* case of racial discrimination under step one of the *Batson* inquiry he initiated. Accordingly, we apply the clearly erroneous standard of review as set forth in *Davis* II. *Id., Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 48. Review under this standard is significantly deferential and is only clearly erroneous " 'when although there is evidence to

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

¶ 45 First-Step *Batson* Inquiry

¶ 46 Our supreme court in *People v. Rivera* (*Rivera* I) (221 Ill. 2d 481, 500-01 (2006)) discussed the three-step inquiry to be taken where a litigant raises an objection pursuant to the Supreme Court's decision in *Batson v. Kentucky* (476 U.S. 79 (1986)) stating:

> "In *Batson,* the Supreme Court established a three-step process for evaluating alleged discrimination in jury selection. The Court held that the party objecting to the exercise of a peremptory challenge is first required to establish a *prima facie* case of purposeful discrimination 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] If the objector demonstrates a *prima facie* case, the burden then shifts to the other party to explain his challenge by articulating a nondiscriminatory, 'neutral' explanation related to the particular case to be tried. [Citation.] Finally, the trial court considers the reasons provided for the peremptory strike. As part of that process, the objector may argue that the reasons given are pretextual. The trial court then makes a final determination as to whether the objector has established purposeful discrimination. [Citation.]" *Rivera* I, 221 Ill. 2d at 500-01.

¶ 47 Here, we specifically address whether the court erred in its determination that defendant failed to establish a *prima facie* case of purposeful discrimination - the first step in the process for evaluating whether the State's use of a peremptory challenge resulted in removal of a venireperson on the basis of race. *Id*.

¶ 48 The court in *Davis* I identified seven factors relevant in evaluating whether a *prima facie* case exists to be considered in addition to comparative juror analysis emphasizing that the trial court must "look at the totality of all the relevant facts and circumstances to determine whether they give rise to an inference of discriminatory purpose." *Id*. at 362. The seven factors are as follows:

> "(1) the racial identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against African–Americans on the venire; (3) a disproportionate use of peremptory challenges against African–Americans; (4) the level of African–American representation in the venire compared to the jury; (5) the prosecutor's questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African–American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses." *Id*.

¶ 49 With respect to this first-step inquiry under *Batson* our supreme court in *Davis* I further stated:

> "To determine at the first step whether racial bias motivated a prosecutor's decision to remove a potential juror, a 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. [Citations] *** [T]he threshold for making out a *prima facie* claim under *Batson* is not high: a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. [Citation.]

> The Constitution forbids striking even a single prospective juror for a discriminatory purpose. [Citations.] However, the mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination. [Citations.]" (Internal quotations omitted.) *Davis* I, 231 Ill. 2d at 360-61.

¶ 50 In *Powers v. Ohio* (499 U.S. 400 (1991)) the Supreme Court ruled "that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges" reasoning that "the race of defendant may be relevant to discerning bias in some cases, but does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms." *Id.* at 416. Accordingly, a Hispanic person may raise a *Batson* challenge with respect to venirepersons of a different race or ethnicity – African–American individuals – as well as those sharing his ethnicity – Hispanic individuals. See *id.*

¶ 51 However, our supreme court has held that where the *Batson* challenge relates to venirepersons from different racial or ethnic groups, establishing a *prima facie* case of discrimination with respect to one racial or ethnic group does not automatically serve to establish a *prima facie* case with respect to other groups as well. *People v. Harris*. 164 Ill. 2d 322, 344 (1994). The *Harris* court reasoned:

> "[t]he focus in *Batson* and its progeny has been on the exclusion of the members of a single, identifiable group, not of different groups considered together. Indeed, broadening the *Batson* inquiry to include multiple ethnic groups as part of a single claim of discrimination would seemingly make the establishment of a *prima facie* case more difficult than it is now. For these reasons, we decline here

to expand the *Batson* rule to embrace the simultaneous consideration of different racial or ethnic groups." *Id.* at 343-44.

¶ 52 First, we note that the trial court was correct in its determination that defendant's *Batson* challenge with respect to Hispanic venirepersons cannot be combined with his *Batson* challenge with respect to African–American venirepersons. See *Harris*, 164 Ill. 2d at 343 (a *prima facie* case relating to venirepersons of one racial or ethnic group does not establish a *prima facie* as to other groups). Defendant argues *Harris* "did not decide that the State's peremptory strikes against black and Hispanic venire persons *could not* be used together to demonstrate a *prima facie* case." However, that is exactly what *Harris* found stating "[t]he focus in *Batson* and its progeny has been on the exclusion of the members of a single identifiable group, not of different groups considered together" thus declining to broaden "the *Batson* inquiry to include multiple ethnic groups as part of a single claim of discrimination." *Id.* at 344.

¶ 53 Defendant argues that we should disregard our supreme court's decision in *Harris* in light of the Seventh Circuit's grant of *habeas corpus* in *Harris v. Hardy*, 680 F. 3d 942 (2012). We first note that in *Hardy* the Seventh Circuit focused entirely on the peremptory strikes on African–American venirepersons and included no discussion of the supreme court's refusal to consider members of different ethnic or racial groups together. *Id.* Moreover, "[w]hile Federal court decisions may be persuasive authority, the State appellate court is bound by the decision of the State supreme court in the absence of contrary authority by the United States Supreme Court." *Village of Deerfield v. Greenberg*, 193 Ill. App. 3d 215, 222 (1990); see also *People v. Qualls*, 233 Ill. App. 3d 394, 397 (1992) (declining to depart from the Illinois supreme court's holding where the defendant in that case was subsequently granted *habeas corpus* by a federal court other than the United States Supreme Court).

¶ 54 We find that defendant was required, but failed to make a *prima facie* case as to Hispanic venire persons and a separate *prima facie* case with respect to African-American venire persons. *Harris*, 164 Ill. 2d at 344.

¶ 55 Furthermore, "the mere number of African-American venirepersons peremptorily challenged, without more will not establish a *prima facie* case of discrimination." *Rivera* I, 221 Ill. 2d at 512; see also *People v. Heard*, 187 Ill. 2d 36, 55 (1999) (holding that where defendant's argument rests solely on the basis that the prosecution used peremptory challenges to exclude five African–American venirepersons, without more, will not establish a *prima facie* case of discrimination).

¶ 56 Unless the trial court acts *sua sponte*, "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 constructed against that party." *Rivera* I, 221 Ill. 2d at 512; see also *People v. Allen*, 401 Ill. App. 3d 840, 847 ("To satisfy *Batson's* first stage of making a *prima facie* showing, the moving party must produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred.").

¶ 57 In this case, when defense counsel raised the *Batson* challenge at trial, he argued only that all six of the State's peremptory challenges were used on minorities - specifically four Hispanic and two African–American venirepersons - and that defendant was a Hispanic male. The trial court then asked defense counsel if there was anything else he wanted to say on behalf of his *Batson* challenge to which defense counsel replied there was not. The trial court then stated that defense counsel had failed to make a *prima facie* case. Defense counsel again reiterated the same argument already advanced to which the trial court responded that "you can't lump the Hispanics in with the blacks." The trial court, for a second time, asked whether defense counsel's argument was the best he could show. Defense counsel responded that "he just wants

to make the record clear." Thereafter, jury selection continued and no additional *Batson* challenges were raised.

¶ 58 Following defendant's guilty verdict a motion for new trial was filed. In that motion, defendant states only that he alleged the State's use of peremptory challenges was racially discriminatory and that the trial court improperly denied defendant's request to proceed to step two of the *Batson* inquiry. Defendant's motion stated no basis for the *Batson* challenge. At hearing on this issue, defense counsel rested on the motion which the trial court denied stating there was no reason to state anything more than that.

¶ 59 While we acknowledge the threshold for making a *prima facie* case under *Batson* is not high, a defendant still must satisfy "the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred." *Davis* I, 231 Ill. 2d at 360. This is accomplished by establishing the relevant seven factors set forth in *Davis* I as well as any relevant comparative juror analysis which the trial court will consider in determining if an inference that discrimination occurred can be drawn. *Davis* I, 231 Ill. 2d at 362.

¶ 60 This, however, was not done. Defendant has not provided a sufficient record establishing the racial makeup of various relevant players to include the entire venire or even the first two panels or the selected jurors. See *Davis* I, 231 Ill. 3d at 365 (declining to presume facts such as the race of a venireperson based on facts not disclosed in the record and citing various other cases similarly declining to consider arguments relevant to the seven factors set forth in *Davis* I where the party asserting a *Batson* challenge failed to preserve an adequate record on appeal).

¶ 61 Instead, defendant's *Batson* argument to the trial court rested solely on the basis that the State used peremptory challenges to exclude four Hispanic venirepersons and two African–American venirepersons where defendant was, himself, Hispanic. However, this argument is

insufficient to establish a *prima facie* case. See *Rivera* I, 221 Ill. 2d at 512 (holding that the mere number of an ethnic group or race peremptorily challenged, "without more will not establish a *prima facie* case of discrimination."); see also *Heard*, 187 Ill. 2d at 55 (finding defendant failed to establish a *prima facie* case of discrimination where his argument rested solely on the basis that the prosecution used peremptory challenges to exclude five African–American venirepersons where the defendant was also African–American).

¶ 62 Defendant argues that many courts have considered *Batson* claims based on challenges against more than one minority group citing *Davis v. Ayala*, 135 S. Ct. 2187 (2015), a United States Supreme Court case; and three federal appeals cases: *Sanchez v. Roden*, 753 F. 3d 279, 292 (2014); *Green v. Travis*, 414 F. 3d 288, 297 (2005); and *Salazar v. State*, 818 S.W. 2d 405, 409 (1991). We reiterate here our position that a party is permitted to raise a *Batson* objection against more than one minority; however, as required by *Harris*, separate *prima facie* cases must be made for each cognizable group. See *Powers* 499 U.S. at 416; see also *Harris*, 164 Ill. 2d at 343.

¶ 63 Furthermore, we do not agree that *Ayala* permits a party asserting a *Batson* challenge to consider different racially identifiable groups together. *Ayala*, 135 S. Ct. at 2187. In *Ayala* the trial court found the defendant failed to establish a *prima facie* case of racial discrimination after two peremptory challenges were used to strike two African–American venirepersons. *Id*. at 2194. Thereafter, the trial court again found the defendant failed to establish a *prima facie* case of racial discrimination after two peremptory challenges were used to strike two Hispanic venirepersons. *Id.* A third objection was raised after peremptory challenges were used to strike a third Hispanic, a third African–American, and an individual whose race was disputed. *Id.* In contrast to the case before us, in support of his *prima facie* case in *Ayala* the defendant "contended that the challenged jurors were 'not significantly different from the white jurors that

the prosecution ha[d] chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence' *** [and] argued that their answers showed that they could impose the death penalty" and thus, a *prima facie* case was made for the three (potentially four) stricken Hispanic venirepersons with a separate *prima facie* case being made for the three stricken African–American venirepersons. *Id.*

¶ 64 As to *Sanchez*, *Green*, and *Salazar* cited by defendant, these cases are all federal appellate cases which are not binding on this court and thus we will not depart from the clear language of our supreme court's decision in *Harris*. See *Village of Deerfield*, 193 Ill. App. at 215, *Qualls*, 233 Ill. App. at 394; see also *Harris*, 164 Ill. 2d at 344.

¶ 65 In his opening brief, defendant also attempts to argue certain of the seven factors set forth in *Davis* I for the first time on appeal; however, these arguments are waived. "The doctrine of waiver precludes consideration on appeal for issues not raised in the trial court" and "[f]orfeiture or procedural default prevents litigants from asserting on appeal objections different from the one advanced in the trial court." *People v. Moravec*, 2015 IL App (1st) 133869, ¶ 23. "The waiver principle encourages the parties to raise issues before the trial court, allowing the court to correct its own errors and consequently disallowing the parties to obtain a reversal through inaction." *Id.*

¶ 66 Waiver aside, we note that defendant's arguments are deficient for reasons to include defendant's improper consideration of members of different ethnic or racial groups together rather than as separate distinct groups (*Harris*, 164 Ill. 2d at 344) and because defendant failed to preserve an adequate record for our review.

¶ 67 Accordingly, we find that the trial court appropriately found defendant failed to establish a *prima facie* case and this ruling was not clearly erroneous.

¶ 68 14-Year Sentence

¶ 69 Turning to defendant's second argument, we disagree that defendant's 14-year sentence constitutes an abuse of discretion by the trial court. Defendant contends his sentence is excessive because (1) the trial court impermissibly considered the two prior felony drug convictions which, as elements of AHC, were already considered in making him eligible for Class X sentencing; (2) defendant's conduct did not cause any harm and thus the sentence was disproportionate to the offense; and (3) the sentence did not appropriately reflect his potential for rehabilitation and other mitigating factors to include defendant's family support, defendant's work history, and accountability for his actions.

¶ 70 The trial court is afforded broad discretion when imposing a sentence and a sentencing decision will not be disturbed on review absent an abuse of discretion. *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 26; *People v. Colon*, 2018 IL App (1st) 160120, ¶ 72. "The trial court is granted such deference because it is generally in a better position than the reviewing court to determine the appropriate sentence, as it has the opportunity to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment habits, and age." *Etherton*, 2017 IL App (5th) 140427, ¶ 26. In Illinois, sentences are presumed to be proper and, when within the prescribed range, will not be found excessive "unless the sentence greatly varies from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *Id.* "In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence and punishment, as well as the defendant's rehabilitative prospects" and the trial court is in the best position to fashion a sentence balancing these goals. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14. "A sentencing court is not required to award a defendant's rehabilitative potential 'greater weight

than the seriousness of the offense.' " *Id*., quoting *People v. Alexander*, 239 Ill. 2d 205, 214 (2010).

¶ 71 Defendant was convicted of AHC. AHC is a Class X felony subject to a sentencing range between 6 and 30 years. 720 ILCS 5/24-1.7 (2012); 730 ILCS 5/5-4.5-25 (West 2012). It is uncontested that defendant's two felony drug convictions were the predicate offenses resulting in defendant being charged with AHC as opposed to unlawful use of a weapon. However, the parties initially dispute whether defendant's two prior felony drug convictions were a double enhancement or a single enhancement; but, defendant ultimately concludes that "[r]egardless of whether Sepulveda was subjected to a single or double enhancement, the State concedes that his two prior drug offenses *** the predicate offenses for his [AHC] conviction [and] his prior attempt murder conviction *** [which] made him eligible for extended term sentencing, though he was not sentenced in that range *** [were] already adequately considered in his sentencing range" and thus could not be considered as an aggravating factor at sentencing.

¶ 72 Here defendant's two prior felony drug convictions were appropriately treated as predicate offenses for his AHC conviction and defendant was sentenced within the applicable sentencing range of this Class X felony. See 720 ILCS 5/24-1.7 (2012); 730 ILCS 5/5-4.5-25 (West 2012). There were no enhancements though the State in its brief notes that defendant's conviction of attempt murder made him eligible for enhanced sentencing and defendant appears to concede this point.[2] See *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 15 (holding that no

[2] As the State points out, even if defendant's sentencing range had been extended by his prior conviction for attempt murder, this enhancement would not preclude the trial court from considering it as an aggravating factor at sentencing. See *People v. Thomas*, 171 Ill. 3d 207, 229 (holding the sentencing court's use of prior convictions to impose an

enhancement exists where a defendant is charged with AHC and the two predicate offenses are used only once as an element of the AHC offense thus imposing no harsher sentence or an elevation in the severity of the offense).

¶ 73 Accordingly, the question at issue is whether the trial court improperly considered defendant's two prior felony drug convictions – the predicate offense for his AHC conviction and thus an element of the offense – as an aggravating factor in sentencing defendant. We answer this question in the negative.

¶ 74 A court cannot consider a factor that is an element of the offense as an aggravating factor at sentencing. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 13. However, because public policy dictates that a sentence be varied in accordance with the circumstances of the offense, this rule is not meant to be rigidly applied. *Id*. Moreover,

> "A trial court is not required to refrain from any mention of sentencing factors that constitute elements of the offense. [Citation.] Sentencing hearings do not occur in a vacuum and the duty to impose a fair sentence entails an explanation of the court's reasoning in the context of the offenses of which a defendant has been convicted. A fair sentence is not just the product of mechanically tallying factors in aggravation and mitigation and calculating the result. Indeed, a sentencing hearing is likely the only opportunity a court has to communicate its views regarding the defendant's conduct and thus we do not agree that a trial judge's commentary on the nature and circumstances of a defendant's crimes necessarily

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extended term sentence "does not preclude the court from considering those same prior convictions as an aggravating factor").

> results in improperly using elements of the offense as factors in aggravation." *Id*. at ¶ 15.

¶ 75 The trial court's only references to defendant's criminal history is its statement that "[i]n aggravation, the defendant has a criminal record consisting of the offenses listed in the presentence investigation" and "[y]our record is such that anybody looking at it and looking at this, I don't think they would have any problem with a sentence in the 20s or even the 30s, but I confess I just do not think that would be appropriate in your case. I can't ignore it either."

¶ 76 The trial court makes no mention of specifically considering defendant's felony drug convictions as aggravating factors. Moreover, defendant's criminal record includes convictions beyond his two felony drug convictions to include a conviction for attempt murder. Accordingly, we do not find that the trial court improperly considered an element of the offense of AHC as an aggravating factor in sentencing defendant. We further note the trial court was not precluded from considering defendant's attempt murder conviction.

¶ 77 Nor do we find that the trial court's 14-year sentence to be an abuse of discretion. The sentence was within the 6 to 30 year applicable sentencing range and in fact fell below the midrange point. While defendant argues his sentence was disproportionate because he did not cause any harm, we disagree. With respect to a similar situation in *People v. Bryant* this court stated,

> "[d]efendant disregards the fact that he was convicted of being an armed habitual criminal based on his commission and conviction of two prior qualifying felonies of aggravated discharge of a firearm and unlawful use of a weapon by a felon. Therefore, defendant's conduct in the instant case did not form the sole basis of his conviction for being an armed habitual criminal; rather, his conviction was

> based on his possession of a firearm in this case together with his two prior qualifying offenses." *Bryant*, 2016 IL App (1st) 140421, ¶ 18.

¶ 78 Moreover, the trial court noted that defendant was out at night with the kind of weapons that are "used for one thing and one thing only, to shoot people." The trial court was clear that it considered defendant's mitigating factors and, in fact, was moved to reduce the 25-year sentence he had been prepared to impose to 14 years. Accordingly, defendant's 14-year sentence was not an abuse of discretion.

¶ 79 Assessment of Fines, Fees, and Costs

¶ 80 With respect to defendant's claim that the fines and fees order improperly imposed some costs and erroneously designated some fines as fees, both the State and defendant agree that pursuant to Supreme Court Rule 472(e) this court lacks authority to adjudicate the claim raised for the first time on appeal and the matter must be remanded to the circuit court to allow the party to file a motion pursuant to this rule. Ill. S. Ct. R. 472(e) (eff. May 17, 2019). We agree.

¶ 81 Rule 472 delineates the steps a defendant must follow to correct certain sentencing errors. *Id*. Subsection (e) of Rule 472 specifically addresses criminal cases, such as this, pending on appeal as of March 1, 2019 in which defendant raises for the first time sentencing errors covered under Rule 472 and states as follows:

> "(e) In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 82 Accordingly, we remand to the circuit court for the sole purpose of allowing defendant to file a motion pursuant to Rule 472. *Id.*

¶ 83 CONCLUSION

¶ 84 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed with the exception that we remand to the circuit court for the sole purpose of allowing defendant to file a motion pursuant to Rule 472 to address his alleged errors regarding fines, fees, and costs assessed against him.

¶ 85 Affirmed and remanded.