

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2004AP2754-CR

Cir. Ct. No. 2002CF5426

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY B. BURNETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Ricky B. Burnette appeals the judgment convicting him of first-degree sexual assault with the use of a dangerous weapon, false imprisonment, and armed burglary, contrary to WIS. STAT. § 940.225(1)(b),

940.30, and 943.10(2)(a) (2003-04).¹ He also appeals from the order denying his postconviction motion. Burnette contends that the trial court erred in failing to dismiss the jury panel following voir dire because the State committed a *Batson v. Kentucky*, 476 U.S. 79 (1986), violation when it systemically eliminated all the potential African-American jurors from serving on the jury.² Further, Burnette submits that the trial court erroneously exercised its discretion in denying his postconviction motion seeking to vacate the convictions and a new trial, because newly-discovered evidence he presented discredited the prosecutor's reasons for the strikes of the African-American jurors by the prosecutor, and consequently, the trial court's findings that the strikes were for race-neutral reasons. Because the trial court properly applied the *Batson* test in determining that the prosecutor's strikes were for race-neutral reasons, and because the newly-discovered evidence did not undermine the trial court's determinations regarding the prosecutor's motives in striking three prospective African-American jurors, we affirm.³

I. BACKGROUND.

¶2 K.L.G. reported to the police that upon returning to her apartment on September 20, 2002, and getting ready for bed, Burnette, whom she knew previously, jumped out from the bathroom and pushed her to the ground. Burnette

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Burnette urges us to apply a de novo standard of review to the *Batson v. Kentucky*, 476 U.S. 79 (1986), issue he raises. As will be discussed later, we disagree.

³ While we are satisfied that what the prosecutor did was not prohibited, we question whether it was wise to strike all the people of color from the jury. First, it gives the appearance of unfairness, and secondly, almost assuredly it will lead to time-consuming challenges to the jury selected.

was wearing orange rubber gloves and had a rope and a knife. After a struggle that ended only when Burnette pulled the knife out of his pocket and told K.L.G. that he would use it if she did not stop struggling, he sexually assaulted her. Sometime later, Burnette fell asleep and K.L.G. managed to escape. After Burnette was arrested, police searched his car and found, among other things, copies of K.L.G.'s car and apartment keys, her business cards, a baseball bat, chemical-resistant orange rubber gloves, a knife, duct tape, a drop cloth, and two gallons of muriatic acid, as well as items that could be used to disguise one's appearance.

¶3 After Burnette waived his preliminary hearing and after several pretrial motions were heard, a jury trial commenced on March 31, 2003. During the jury selection process, there were originally seven individuals of African-American descent among the potential jurors. The trial court dismissed four potential African-American jurors for cause. Three of these potential jurors indicated that they had religious objections to sitting on a jury and judging someone. The fourth juror explained that he had been "railroaded" and sent to prison, and, as a result, he did not believe he could be fair. Following the questioning of the jury panel, the prosecutor used three of his five peremptory strikes to remove the three remaining prospective African-American jurors from the panel, leaving an all-white panel.

¶4 Burnette's attorney objected to the jury array on the basis that Burnette, who is African-American, was to be tried by an all-white jury, and the trial court held a hearing. The trial court noted that the jury now consisted of only white jurors, and that the State had peremptorily struck four non-white potential jurors, three of whom were African-American, and one of whom the trial court believed was of Asian or Pacific Islander descent. Inasmuch as the remaining

potential African-American jurors were removed by the State, the trial court, in an apparent reference to the *Batson* test, found that Burnette had made “a prima facie case that the defense needs to make before the burden shifts to the State.” The trial court then held a hearing to explore the prosecutor’s reasons for striking the prospective African-American jurors. At the hearing, the prosecutor related to the court that prior to the voir dire he had the list of potential jurors checked to find out whether any of the people listed on it had a criminal record. The prosecutor discovered from CCAP (Consolidated Court Automation Programs) records that several of the potential jurors had criminal records, and, as a consequence, he struck one white male and two African-American males. The prosecutor explained that he struck the final prospective African-American juror because she had stated that she had a personal connection with one of the defense witnesses. At the conclusion of the hearing, the trial court determined that the State struck the jurors for race-neutral reasons and denied the defense motion to dismiss the jury.

¶5 Following the jury’s guilty verdicts on all three counts, Burnette filed a postconviction motion re-raising the *Batson* issue and seeking to vacate his convictions and a new trial. In his motion, Burnette attached information reflecting that people with names similar to those who served on the jury had criminal records. Also attached to the motion was documentation that there were people with names similar to those who were struck from the panel, allegedly because they had criminal records, who had no criminal records. Burnette argued that this evidence undermined the trial court’s findings that the State did not racially discriminate when peremptorily striking the three African-American jurors.

¶6 The trial court, in a written order, denied the motion without conducting a hearing. The trial court concluded that the three jurors who Burnette

claimed had criminal records had middle initials different from those people with criminal records, and that the new information did not eliminate the explanation given by the prosecutor that he believed certain jurors had criminal records and he struck them on that basis.

II. ANALYSIS.

¶7 Burnette first argues that the trial court erred when it determined that the State struck the three potential African-American jurors for race-neutral reasons. Burnette claims that the trial court did not properly apply the third step of the *Batson* analysis. Burnette contends that while the trial court properly concluded that Burnette had made a prima facie showing that the prosecutor's peremptory challenges were done on the basis of race, the trial court "erroneously conflated the second and third step[s] of the Batson test." Burnette submits that the trial court should not have accepted the prosecutor's explanation that two of the three potential African-American jurors were struck due to their criminal records, or that the third potential African-American juror was struck because of her personal connection to one of the defense witnesses. According to Burnette, the trial court neglected to apply step three of the *Batson* test in its analysis. We disagree.

¶8 In 1986, the United States Supreme Court held that: "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89.

¶9 In reaching its decision, the *Batson* court held that the "invidious quality" of government action alleged to be racially discriminatory in violation of

the Equal Protection Clause “must ultimately be traced to a racially discriminatory purpose.” *State v. Lamon*, 2003 WI 78, ¶26, 262 Wis. 2d 747, 664 N.W.2d 607 (quoting *Batson*, 476 U.S. at 93).

¶10 The *Batson* Court outlined a three-step process for determining whether a prosecutor’s peremptory strikes violated the Equal Protection Clause. 476 U.S. at 96-98. The test had been adopted in Wisconsin. See *State v. Davidson*, 166 Wis. 2d 35, 39-40, 479 N.W.2d 181 (Ct. App. 1991). First, the defendant must establish a prima facie case of discriminatory intent by showing that:

- (1) he or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant’s race from the venire; and
- (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race.

Lamon, 262 Wis. 2d 747, ¶28 (citing *Batson*, 476 U.S. at 96) (footnote omitted).

¶11 With regard to this first factor, the *Lamon* court explained *Batson* as follows:

The circuit court must consider all relevant circumstances in determining whether a defendant made the requisite showing. Those circumstances include any pattern of strikes against jurors of the defendant’s race and the prosecutor’s voir dire questions and statements. The *Batson* court expressed “confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.”

Lamon, 262 Wis. 2d 747, ¶28 (quoting *Batson*, 476 U.S. at 97).

¶12 “Under the second step of *Batson*, if the circuit court finds that the defendant has established a prima facie case, ‘the burden shifts to the State to come forward with a neutral explanation for challenging [the dismissed venireperson].’” *Lamon*, 262 Wis. 2d 747, ¶29 (quoting *Batson*, 476 U.S. at 97) (alteration by *Lamon*). A “‘neutral explanation’ means an explanation based on something other than the race of the juror.” *Id.*, ¶30. The prosecutor’s explanation must be “clear, reasonably specific, and related to the case at hand,” however, it “need not rise to the level of justifying exercise of a strike for cause.” *Id.*, ¶29.

¶13 “Finally, the third step of *Batson* requires that when the prosecutor offers a race-neutral explanation, the circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established.” *Id.*, ¶32. This third step includes that, once steps one and two have been completed, “the defendant may show that the prosecutor’s explanation for the peremptory challenge is in fact pretext for racial discrimination.” *State v. Walker*, 154 Wis. 2d 158, 176 n.11, 453 N.W.2d 127 (1990). In other words, “[t]he defendant then has the ultimate burden of persuading the court that the prosecutor purposefully discriminated or that the prosecutor’s explanations were a pretext for intentional discrimination.” *Lamon*, 262 Wis. 2d 747, ¶32. Finally, when the prosecutor offers a race-neutral explanation, the court then “has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established.” *Id.* (citing *Batson*, 476 U.S. at 98). After engaging in this analysis, if the trial court is satisfied with the explanation, and the explanation is plausible, the *Batson* challenge is unsuccessful.

¶14 When reviewing a *Batson* violation claim, the standard of review is whether the trial court’s determinations are clearly erroneous. *Lamon*, 262

Wis. 2d 747, ¶43. Although there is an exception to the standard of review of giving deference to the trial court's ruling, it does not come into play here because the trial court observed first-hand the selection process and heard and assessed the prosecutor's explanation. *Cf. Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir. 1995). Thus, contrary to Burnette's request, we will apply a deferential standard of review.

¶15 After reviewing the record, we are satisfied that the trial court properly applied the third step of the *Batson* test. The third step requires that after the prosecutor offers a race-neutral explanation, the "circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established." *Lamon*, 262 Wis. 2d 747, ¶32. Here, the trial court believed the prosecutor's explanations for striking three African-American jurors. The trial court found: "I am satisfied given the reasons that have been stated by [the prosecutor] that the State has exercised its peremptory strikes [on] a race neutral basis." This was a proper exercise of discretion.

¶16 The prosecutor explained that after conducting a search of the names of the potential jurors, he discovered that several of them had criminal records. He advised the court that it was his practice to strike from the venire panel those who have criminal records. Indeed, not only did the prosecutor use two of his five peremptory strikes on two potential African-American male jurors for that reason, but he also struck a white male potential juror on the same basis. The prosecutor also told the court that he struck the final prospective African-American juror because of her connection to one of the named defense witnesses. The trial court had the opportunity to listen to the prosecutor's explanation and to assess his credibility. The trial court was satisfied that striking two African-Americans because they had criminal records was a race-neutral reason. With regard to the

final strike of a potential African-American juror, while the trial court stated that he would not have struck this woman for cause because of the connection, the trial court acknowledged that the prosecutor exercised his remaining peremptory strike for a reason “completely neutral from her race.”

¶17 The trial court applied the three-part *Batson* test properly. It conducted a relevant inquiry as to the reasons for the strikes. Burnette met the first factor – that being that all the remaining prospective African-American jurors were stricken by the prosecutor – which required the prosecutor to give reasons for the strikes. The prosecutor supplied reasons that were race-neutral and believable. At this point it was incumbent on Burnette to show the court that the reasons proffered by the State were “pretext[s] for racial discrimination.” See *Walker*, 154 Wis. 2d at 176 n.11. Burnette failed to do so.

¶18 Burnette points to the fact that the prosecutor never asked the stricken people about their criminal records; however, the State was not required to individually question the potential jurors in order to avoid a claim of racial discrimination. These circumstances concerning whether a juror must be questioned regarding the reason for the later strike were addressed in *Lamon*, 262 Wis. 2d 747. In fact, the circumstances present here are strikingly similar to those found in *Lamon*. There, the prosecutor researched a stricken prospective juror, but failed to question the stricken juror about the results of that research. *Id.*, ¶14. Our supreme court determined that no questions regarding the reason why a juror was struck must be asked if information in the record supports a non-discriminatory intent to strike. *Id.*, ¶89. In *Lamon*, the court opined:

Questioning or failing to question a potential juror presents a problematic tautology. Failing to examine a juror, or conversely singling out a juror, can be equally argued to weigh against a race neutral justification for a

peremptory strike. In *Gengler* the court held that a prosecutor was allowed to rely on information other than individual voir dire to provide a basis for his race neutral explanation. [*Davidson v.*] *Gengler*, 852 F. Supp. [782], 789 [(W.D. Wis. 1994)]. According to *Gengler* individual follow-up questions on voir dire are not required in order to strike a potential juror. In this case the refusal to conduct individualized voir dire of [the potential juror] may be an isolated factor arguably evidencing discriminatory intent. However, this factor alone is not conclusive of discrimination during jury selection. In light of the totality of the circumstances, the numerous race-neutral reasons proffered by the State outweigh any alleged discriminatory intent resulting from the failure to question [the potential juror] further.

Lamon, 262 Wis. 2d 747, ¶89. Here, the trial court accepted the prosecutor's explanation that two of the three potential African-American jurors were struck on the basis of independent research on CCAP which revealed the potential jurors had criminal records. Neither juror was ever questioned about his criminal record. The CCAP records were introduced to support the prosecutor's explanation. As to the third potential African-American juror, the prosecutor struck her on the basis that she knew a defense witness. Even though the stricken male jurors were not questioned about their criminal records and the stricken female juror was not asked whether a personal connection to a defense witness rendered her partial, no evidence was submitted suggesting these reasons were untruthful. Thus, under the totality of the circumstances, the trial court properly exercised its discretion in denying Burnette's *Batson* challenge.

¶19 Burnette next argues that the trial court erroneously exercised its discretion in denying his postconviction motion seeking a vacation of his convictions and a new trial. He argues that the trial court mistakenly analyzed what he characterizes as newly-discovered evidence consisting of CCAP records that show that three of the jurors who were not struck by the prosecutor appear to

have criminal records. Burnette submits that this proves that the State's rationale for striking the potential African-American jurors was pretextual. Burnette claims that because the State did not strike white jurors with criminal records, the prosecutor's explanation that he struck two of the potential African-American jurors only because of their criminal records was seriously undermined.

¶20 The trial court, in a written decision, denied Burnette's motion, concluding that no evidentiary hearing was needed.

¶21 A court's denial of a motion seeking a new trial based upon newly-discovered evidence will be reversed only for an erroneous exercise of discretion. *State v. Lederer*, 99 Wis. 2d 430, 437, 299 N.W.2d 457 (Ct. App. 1980).

¶22 In the trial court's decision, the court wrote that Burnette's allegations were unfounded for several reasons. First, the trial court stated that Burnette "overlooks a fact that was made plain at trial: [c]ontrary to Mr. Burnette's theory, the State relied on the CCAP records to strike a juror of apparent *non*-African-American descent, [named juror]." Thus, the trial court surmised that the State clearly must have investigated the backgrounds of all the potential jurors and this fact supports the prosecutor's claim that the reason he struck two of the potential African-American jurors was because people with identical names had criminal records.

¶23 The trial court also was unpersuaded by Burnette's next argument, that the State failed to strike white potential jurors with criminal records. Again, this argument was based on CCAP records Burnette supplied to the court that reflected that three people with names similar to three jurors who actually served on the jury had criminal records. With regard to this argument, the trial court stated that Burnette had overlooked an important detail. The trial court observed

that those people listed as having names similar to those of the three jurors who had criminal records, had different middle initials than the three people who served on the jury. Thus, the court found no substance to Burnette's claim that the prosecutor struck only African-American jurors with records.

¶24 Finally, Burnette makes much of the fact that one of the people with a name similar to a white juror, who had a criminal record, had no middle initial listed in CCAP, thus suggesting that this person could have been the named juror. He also points to documents he filed showing that there are people with the identical names of the stricken African-American jurors who do not have criminal records. These arguments are also unpersuasive because it is clear the prosecutor struck only potential jurors whose names were an identical match to people with criminal records. The issue is not whether a juror with a criminal record may have served on the jury, or whether the prosecutor was wrong in his belief that these particular jurors had criminal records; rather, the issue is whether the prosecutor gave a reasonable explanation for why he struck African-American jurors.⁴

¶25 The trial court's analysis reflects a proper exercise of discretion. The trial court concluded that the information supplied by Burnette after the trial did not "breathe new life into Mr. Burnette's *Batson* challenge." We adopt the trial court's reasoning and agree. Consequently, the judgment of conviction is affirmed.

⁴ The Dissent focuses on the records submitted by Burnette. This focus, however, blurs what is at issue in this case; namely, whether the prosecutor provided a reasonable explanation for the strikes. Neither Burnette nor the Dissent has given a reason why we should doubt the prosecutor's explanation that he did what he customarily does – namely, strike potential jurors who, to the best of his knowledge, had criminal records.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 2004AP2754 (CR)

¶26 KESSLER, J. (*dissenting*). The Majority affirms the trial court's determination that there was no violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). I agree with that part of the Majority opinion that concludes the trial court correctly applied the initial parts of the test outlined in *Batson*. However, unlike the Majority, I conclude that the new evidence Burnette presented post-judgment raised sufficient question as to whether some of the State's facially neutral reasons originally offered as an explanation for striking all African-American venirepersons entitle him to a hearing. Consequently, I conclude that Burnette is entitled to remand for an evidentiary hearing on his postconviction motion, which will give him the opportunity to establish that the reasons offered by the State were pretextual.

¶27 *Batson* established the rule that the "Equal Protection Clause guarantees the defendant that the State will not exclude members of [the defendant's] race from the jury venire on account of race." *Id.* at 86. The Supreme Court stated: "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87. These principles have evolved into a multi-pronged analysis by which a trial court is to determine whether the prosecution's use of peremptory strikes for people of color, or other cognizable groups, violates the Equal Protection Clause. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400 (1991).

¶28 As the Wisconsin Supreme Court explained in *State v. Lamon*, 2003 WI 78, 262 Wis. 2d 747, 664 N.W.2d 607, a person making a *Batson* challenge

must first show that: “(1) he or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant’s race from the venire, and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race.” *Lamon*, 262 Wis. 2d 747, ¶28 (footnote omitted). The trial court correctly concluded that Burnette had met this burden, given that Burnette is African-American and the State struck the three remaining African-American venirepersons. The burden shifted to the State to justify exclusion of the remaining African-Americans for race-neutral reasons that were clear, reasonably specific and related to the circumstances of the case. *See id.*, ¶¶29-30.

¶29 The State explained two of its strikes of African-Americans on the basis of CCAP⁵ records, and one strike based on a nine-year-old contact the potential juror had with one of Burnette’s witnesses. The trial court found these explanations to be facially neutral, and credible, and accepted them.

¶30 As the court in *Lamon* explained, once the trial court has found the proffered reason to be facially neutral, the defendant has the right to attempt to show that the reason is in fact pretextual. *Id.*, ¶32. That did not happen before the trial. However, post-trial Burnette attempted to make that showing based on information not in his possession at the time the jury was selected.

¶31 After the trial, in a post-judgment motion, Burnette submitted several CCAP records showing that three people, who apparently bore the same names as three Caucasians seated on the jury, appeared to have criminal records

⁵ Consolidated Court Automation Programs, known as CCAP, is a computer-based system that attempts to accurately report proceedings in the circuit courts of the state.

similar to those of the African-Americans struck by the State. It is obvious from Burnette's motion that, at the time he submitted it, he did not have information that provided either the middle initial or the date of birth of the persons on the jury. Burnette also presented a computer-generated search of public records that identified approximately ninety people with substantially the same name as one of the struck African-Americans. Again, at that time, Burnette did not know the middle initial of the relevant person. Thus, he argued that neither the State's reliance on CCAP records to establish identity of the person on the jury venire, nor the State's conclusion that the African-American was in fact the person with the criminal record disclosed by CCAP, were reasonable.

¶32 In its decision denying the motion, the trial court had documents that identified the middle initials of the venirepersons, and used that information as the principle rationale for denying the motion without a hearing. At a minimum, Burnette should have been given the opportunity to respond to information in the trial court's possession to which he was not privy.

¶33 As the court explains in *Lamon*, a discriminatory purpose implies that the State's decision was "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.*, ¶34. This requires a credibility determination by the trial court, which in turn implies a fair opportunity to present evidence and challenge the hypothesis of the expressed reason. Because the trial court did not take that step after Burnette presented evidence from which pretext could be reasonably inferred, I would remand to give Burnette the opportunity to sustain his burden of persuasion at a hearing.

