COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP351 **Cir. Ct. No. 2016TP168**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO R.D.W., JR., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

R.D.W., SR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] R.D.W., Sr. appeals the October 11, 2017 order terminating his parental rights to his child, R.D.W., Jr., contending on appeal that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the trial court erred in denying his ***Batson***[2] challenge at the grounds jury trial. He argues that in ruling on his ***Batson*** motion, the trial court erred in the analysis by skipping entirely the third prong of the ***Batson*** purposeful discrimination test and failing to consider the persuasiveness and plausibility of the State's proffered race-neutral explanation for striking an African-American, Juror 2. *See* ***Batson v. Kentucky***, 476 U.S. 79, 97-98 (1986).

¶2 The State and Guardian ad Litem (GAL)[3] respond that R.D.W., Sr. failed to meet his burden under the third prong of ***Batson*** of showing that they intended purposeful racial discrimination when they struck Juror 2. *See* ***State v. Lamon***, 2003 WI 78, ¶32, 262 Wis. 2d 747, 664 N.W.2d 607 (citing ***Batson***, 476 U.S. at 98).

¶3 For the following reasons we agree with the State and GAL and affirm.

BACKGROUND

The CHIPS petition and TPR petition

¶4 R.D.W., Jr. was removed from his father's care as a result of physical abuse by his father. He was subsequently placed in a foster home on April 23, 2015. R.D.W., Sr. was also convicted of possession of cocaine and possession of narcotics drugs discovered at the time of his arrest on the child abuse

[2] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[3] The State and GAL shared four peremptory strikes at trial because they were aligned in interest. For ease of reading, and although they filed separate appellate briefs, we refer to them in this opinion as the State when referring to their strike of Juror 2.

charge. He remained in custody from the time of R.D.W., Jr.'s removal through the grounds trial.

¶5 A CHIPS[4] petition was filed regarding R.D.W., Jr. after he was removed from his father's care and a CHIPS Dispositional Order was entered on June 29, 2015. On May 25, 2016, a termination of parental rights (TPR) petition was filed by the State alleging abandonment and failure to assume parental responsibility grounds against R.D.W., Sr.[5] A jury trial on the grounds phase commenced on August 14, 2017, in front of the Honorable Christopher R. Foley and jury selection was completed that day. At the end of jury selection, trial defense counsel made a ***Batson*** motion, which the court adjourned to the following morning.

Jury Selection

¶6 The jury panel consisted of thirty-five individuals, only twenty-five of whom were part of the actual selection after questioning was completed. Of the twenty-five, three were African-American: Jurors 2, 3, and 21. R.D.W., Sr. is African-American. The State and GAL were aligned in making their peremptory challenges, and they struck all three of the African-American jurors.

¶7 At the start of the ***Batson*** hearing, the court noted that the law in Wisconsin and otherwise is that while R.D.W., Sr. does not have a right to *include* jurors of his race in the panel, "he is entitled … to be tried by a panel that … does

[4] "CHIPS" is an acronym used for Child In Need of Protection or Services cases filed pursuant to WIS. STAT. §§ 48.21 and 48.13.

[5] R.D.W., Jr.'s mother died during the pendency of this case and is not a party to this appeal.

not *exclude* people of his race based on purposeful discrimination." (Emphasis added.) The court at the outset found that a *prima facie* case of purposeful discrimination had been established because of the removal of the only members of R.D.W., Sr.'s race from the panel. As to Jurors 3 and 21, the court stated that it did not believe the defense would be able to rebut the race-neutral explanation he anticipated the State and GAL would offer as to those two individuals. As to Juror 21, the court stated that it had come close to striking that individual for cause during selection. As to Juror 3, the court noted that individual had expressed views of corporal punishment that were of concern to the State and caused a reaction from the other jurors. With that, the court turned to trial defense counsel, the movant, for his argument.

¶8 Trial counsel began by asserting that he did not believe the prosecutor was racially biased. After the court noted that the prosecutor had just filed a photocopy of her membership card with the NAACP, trial counsel stated, "in no way would I infer or say that [the prosecutor] is racially biased. I'm sure she's not, based upon my considerable experience with her. But that's really not the issue here."

¶9 The prosecutor argued next, saying that she had not realized until jury selection was over that all of the African-Americans had been struck. She agreed with the court's comments about the unsuitability of Jurors 3 and 21. But as to Juror 2, she explained that Juror 2 was young, single, and childless, and that given the allegations of child abuse in this case, that was a concern for her. She explained her thinking in making the strike of Juror 2, vis-á-vis other single, childless jurors. She stated that she had identified both Juror 2 and Juror 4 as potential strikes in her mind, but that even though she was single and childless, Juror 4 had professional experience with children as a teacher, and Juror 2 had

none. Similarly, she chose to strike Juror 2—as opposed to Juror 6 who also was single and childless—because Juror 6 was a retired school secretary and "probably has spent a significant part of her career working with children."

¶10 The prosecutor next explained that Juror 2's lack of personal experience with children was not mitigated by her employment. She worked as a CNA, which in the prosecutor's experience, meant working with adults or the elderly. Additionally, Juror 2 was extremely quiet and never "volunteered anything." The prosecutor stated that she was "concerned that she would not be an involved juror or have the fund of information that is brought in as a person is older, has more occupational experience, has more life experience."

¶11 The GAL argued next and stated that she too had not noticed that they had struck the only African-Americans on the panel. Her concern with Juror 2 was the same as the prosecutor—she had no children and she did not speak up. The GAL observed that unlike the rest of the panel, Juror 2 did not react at all when Juror 21 made the comment about corporal punishment in a joking manner. It appeared to the GAL that Juror 2 was not interested enough in the process to stay on the jury.

¶12 Trial counsel argued next and agreed with the court's assessment of the strikes of Jurors 3 and 21 as not racially based, but stated, "I don't believe that the State has shown that there were legitimate grounds for striking [Juror 2]." He pointed out that the order of strikes was that Juror 2 was the State's second strike and he argued that this was significant in showing purposeful discrimination.

¶13 The prosecutor's response to the order-of-strikes argument was that order was meaningless to the issue of bias. She explained that because each side gets four peremptory strikes, she sometimes waits to make a particular strike to see

if the other side is going to make it, thereby saving her the strike. Regarding the fact that she and the GAL struck Juror 2 with their second strike, she said they consulted each other and agreed that her youth and lack of children made her a definite strike, so they might as well go ahead and strike her when they did. Finally, she advised the court that if her intentions were the focus, she offered to show the court her tattoo of Coretta Scott King's words on her arm.

¶14 Ultimately, the court denied the ***Batson*** motion, concluding that R.D.W., Sr. had failed to meet his burden of establishing, "to the level of certainty it needs to be established," that the strike was purposeful racial discrimination. *See* ***Batson***, 476 U.S. at 98.

¶15 The jury found that grounds existed for the termination of R.D.W., Sr.'s parental rights. A dispositional hearing was held on October 5, 2017, and a written order was entered by the court on October 6, 2017, terminating R.D.W., Sr.'s parental rights to his son. This appeal follows.

STANDARD OF REVIEW AND GENERAL LEGAL PRINCIPLES

¶16 All individuals who exercise their right to a jury trial are entitled to have a jury selected without racial bias. *See* ***State v. King***, 215 Wis. 2d 295, 300, 572 N.W.2d 530 (Ct. App. 1997) (citing ***Batson***, 476 U.S. at 86). However, the parties are entitled to strike prospective jurors for any reason, so long as the reason does not deprive the other party of their rights to Equal Protection under the Fourteenth Amendment of the U.S. Constitution. ***Batson***, 476 U.S. at 89. "Proof of *racially discriminatory intent or purpose* is required to show a violation of the Equal Protection Clause." ***Lamon***, 262 Wis. 2d 747, ¶34 (emphasis added). Simply showing a racially discriminatory or disparate *impact* is not enough. *See* ***id.***

¶17 We apply a clearly erroneous standard to a trial court's ruling on a ***Batson*** challenge because the issue of whether discriminatory intent occurred is a question of fact for the trial judge to decide. *See* ***Lamon***, 262 Wis. 2d 747, ¶41. Great deference should be given to the trial court's determination as the trial court is the best judge of the State's race-neutral explanations. ***Id.*** at ¶42.

¶18 There are three steps in ***Batson***'s "purposeful discrimination" test: (1) the defendant must establish a *prima facie* case of purposeful discrimination; (2) the prosecutor must then articulate a race neutral explanation; and (3) the trial court must then "determine if the defendant has established purposeful discrimination." ***Id.***, 476 U.S. at 98. The clearly erroneous standard applies to each step in the ***Batson*** analysis. *See* ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992).

DISCUSSION

¶19 R.D.W., Sr. argues that the trial court's denial of his ***Batson*** motion was clearly erroneous because the court "essentially skipped the third prong of ***Batson***" in evaluation of the strike of Juror 2. He acknowledges that the court properly determined the first prong—that he had established a *prima facie* case. But as to the second and third prongs, he argues that the State's proffered race-neutral explanation should not have been accepted by the court and was merely a pretext for racial discrimination, relying on ***Lamon***, 262 Wis. 2d 747, ¶32. He argues that ***Lamon*** makes it clear that the trial court must evaluate the State's explanation for "persuasiveness and plausibility." *See* ***id.*** Here the trial court stated that the "persuasiveness and plausibility" of the State's proffered race-neutral explanation were not the issue. Therefore, he argues, the trial court failed to do the proper third prong analysis and its conclusion is clearly erroneous.

¶20 But we agree with the State and GAL, and we conclude that R.D.W., Sr.'s argument fails because it is his burden to establish that the State's intent was purposeful racial discrimination and he fails to do that. And regardless of the trial court's words to the effect that it did not believe "persuasiveness and plausibility" to be an issue, the trial court did properly weigh the State's intent and credibility and concluded that R.D.W., Sr. had failed to meet his burden of establishing discriminatory intent. ***Id.***, ¶41. We discuss more fully below.

*The **Batson** Analysis: Step One*

¶21 R.D.W., Sr. concedes that the trial court properly determined step one of the ***Batson*** analysis: that the defendant showed a *prima facie* case because all three African-American jurors were struck by the State. *See **Batson***, 476 U.S. at 98 (footnote omitted). Therefore, we begin with step two of the ***Batson*** analysis. *See **Lamon***, 262 Wis. 2d 747, ¶29.

*The **Batson** Analysis: Step Two*

¶22 Because only the strike of Juror 2 is challenged, at step two we examine whether the court erred when it found that the State presented a race-neutral explanation for the strike of Juror 2. *See **Lamon***, 262 Wis. 2d 747, ¶29. The State's explanation for the strike must be "clear, reasonably specific, and related to the case at hand[,]" but it need not rise to the level of a strike for cause. ***Id.*** "At the second ***Batson*** step, a 'neutral explanation' means an explanation based on something other than the race of the juror." ***Lamon***, 262 Wis. 2d 747, ¶30 (citation omitted).

¶23 The proper framework for the analysis of step two is set forth by ***Purkett v. Elem***, 514 U.S. 765, 767-68 (1995). In ***Purkett***, the U.S. Supreme

Court overturned a decision of the Court of Appeals for the Eighth Circuit that found the "'prosecution's explanation for striking juror 22 … was pretextual[.]'" ***Id.*** at 767 (citation omitted). The court in ***Purkett*** noted that the appeals court's analysis conflated the second and third steps: "The second step of this process does not demand an explanation that is persuasive, or even plausible." ***Id.*** at 767-68.[6] As the Court explained, "[i]t is not until the *third* step that the *persuasiveness* of the justification becomes relevant[.]" ***Id.*** at 768 (citation omitted) (second emphasis added).

¶24 Here the State and GAL gave explanations that were "clear, reasonably specific, and related to the case at hand." ***Lamon***, 262 Wis. 2d 747, ¶29. Each said that Juror 2 was struck because of her lack of experience with children, in both her personal and professional life. Given that the grounds trial issue involved the physical abuse of a child, this explanation was pertinent to the issue and neutral because it was based on something other than the race of the juror. *See* ***id.***, ¶30. As ***Purkett*** clearly holds, plausibility and persuasiveness are not the issue in step two. ***Id.***, 514 U.S. at 767-68. Accordingly, the trial court properly concluded at step two of the ***Batson*** analysis that the State had met its burden of proffering a race-neutral explanation.

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[6] We note even implausible, fantastic, silly, or superstitious explanations may be a proper basis for the trial court's finding because "[w]hat [***Batson***] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *See* ***Purkett***, 514 U.S. 765, 769 (1995) (holding that a prosecutor who based a strike on a prospective juror's "long, unkempt hair, a mustache, and a beard" had articulated a nondiscriminatory reason for the strike such that the ***Batson*** inquiry should proceed to step three).

*The **Batson** Analysis: Step Three*

¶25 The ***Batson*** court's simple statement of the step three analysis is that, after the prosecutor's neutral explanation, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." ***Id.***, 476 U.S. at 98 (footnote omitted). Determining "purposeful discrimination" clearly requires a determination of the prosecutor's intent. The Court acknowledged this in ***Hernandez v. New York***, 500 U.S. 352 (1991), where the Court stated that a ***Batson*** challenge requires the defense to show proof of a racially discriminatory intent or purpose, rather than a discriminatory result or impact. *See* ***Hernandez***, 500 U.S. at 359-60 (citation omitted).

¶26 It is also well established that the trial court's finding of intent is a credibility determination and as such is a finding of fact which is entitled to great deference in ***Batson*** reviews. *See* ***Hernandez***, 500 U.S. at 365. As the ***Hernandez*** court explained, the reason that great deference is accorded to the trial court's intent finding is because it is a credibility evaluation that the court is in the best position to make:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. (quotations and citations omitted).

¶27 The trial court here properly analyzed the issue as a question of the intent of the State and GAL in making the strike of Juror 2. The court stated:

"[B]ecause [the prosecutor's] intent and [GAL's] intent is, in fact, the core issue. Unless their decision to strike [Juror 2] was for the purpose of invidious discrimination was based upon an assumption that because [R.D.W., Sr.'s] racial identity is the same as [Juror 2's], then their challenge fails." Subsequently the court determined their explanations were credible and made the required fact finding that R.D.W., Sr. had not made a sufficient showing of purposeful discriminatory intent. It is this fact-finding that we are to give great deference to.

¶28 R.D.W., Sr. attempts to meet his burden with one argument—that the trial court erred in its legal analysis by stating that persuasiveness and plausibility were not the issue. It is true that the trial court here did incorrectly say that "persuasiveness and plausibility" were not the issue. It appears that the court momentarily confused the language on step two from ***Purkett***, the case he cited, with the language of step three of the analysis. *See* ***Id.***, 514 U.S. at 767. But it is very clear ultimately that when conducting the analysis, the court properly weighed the credibility of the State and GAL in their explanation, and evidence of Juror 2's statements, and concluded that R.D.W., Sr. had not proved any discriminatory intent.

¶29 Additionally, the evidence in the record supports the trial court's finding that R.D.W., Sr. had failed to show discriminatory intent. The State and GAL denied any discriminatory intent and even R.D.W., Sr.'s own trial counsel stated on the record that he did not believe the prosecutor was racially biased. R.D.W., Sr. points to no evidence to rebut their denials. The record shows that the trial issue was physical abuse of a child. Thus, the fact that it is undisputed that Juror 2 was young, single, and childless shows the State's concerns about her lack of experience with children to be a rational, not pretextual, concern. The State's consideration of the fact that Juror 2 worked as a CNA, an occupation usually

associated with working with adults, again demonstrated support for the State's reasonable concern about her lack of experience with children. The prosecutor's membership in the NAACP and her Coretta Scott King tattoo are further evidence of her lack of racial bias, supporting her denial of purposeful discrimination. None of these facts were disputed by R.D.W., Sr., and all support the trial court's finding of non-discriminatory intent.

¶30 In sum, the only argument R.D.W., Sr. makes on appeal in support of meeting his burden is the trial court's misstatement as to the applicability of "persuasiveness and plausibility," and he interprets that as confusion about the standard. However, the record shows that the trial court correctly applied the standard: it weighed the credibility of the State and GAL's explanation and the evidence from the jury selection and arguments. It concluded that R.D.W., Sr. had failed to show purposeful discriminatory intent. None of the cases require the trial court to utter magic words, such as *persuasive*, *plausible*, or *pretext*. The issue is whether the trial court believes the prosecutor's explanation and whether R.D.W., Sr. met his burden of showing that the trial court failed to weigh and determine intent. Here, the court believed the State and GAL and found no showing of racially discriminatory intent and that is a factual finding that we give great deference to.

¶31 Accordingly, we affirm the decision of the trial court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.