COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2001-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD V. STIGLITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County: DANE F. MOREY, Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.[1] Richard Stiglitz appeals his judgment of conviction for operating a motor vehicle while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a). Stiglitz argues that he was denied equal protection when the State used all its peremptory challenges to remove men from the jury panel. We conclude that the State failed to meet its burden of providing a sufficient explanation why each of its strikes was based on factors other than gender. We therefore reverse Stiglitz's conviction and remand for a new trial.

BACKGROUND

¶2 Stiglitz was charged with operating a motor vehicle while intoxicated, second offense. During the jury selection, the State exercised its peremptory challenges to remove four men, resulting in a jury of two men and ten women. Stiglitz objected. The trial court asked the State if it was striking jurors on the basis of gender. The State replied, "I left Mr. Sperger and Mr. Larson. I don't know, Judge. I just kind of had a feeling or - -." At that point, the trial court interjected and ruled that "there has been absolutely zero demonstration of any intentional bias. I don't see how it could possibly prejudice a defendant in any way. It's denied."

¶3 The trial continued and the jury eventually found Stiglitz guilty. This appeal followed.

STANDARD OF REVIEW

¶4 Deference is owed to the trial court's conclusions when reviewing ***Batson*** objections and we may not reverse these findings unless they are "clearly erroneous." ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992); *see also* ***Batson v. Kentucky***, 476 U.S. 79 (1986).

DISCUSSION

¶5 On appeal, Stiglitz argues that the trial court misapplied the ***Batson*** test and should have sustained his objection. We agree that the trial court misapplied the ***Batson*** test.

¶6 The intentional use of gender when selecting jurors violates a defendant's right to an impartial jury under the Equal Protection Clause of the Fourteenth Amendment. *See* ***State v. Joe C.***, 186 Wis. 2d 580, 585, 522 N.W.2d 222 (Ct. App. 1994); *see also* ***J.E.B. v. Alabama***, 511 U.S. 127, 127-29 (1994).

¶7 The Supreme Court in ***Batson***, 476 U.S. at 96-97, developed a three-pronged test for racial discrimination in the use of preemptory strikes. The ***Batson*** rule was extended to peremptory challenges of members excluded on the basis of gender. *See* ***J.E.B.***, 511 U.S. at 145. First, ***Batson*** requires that Stiglitz make a prima facie case showing that the State relied on gender when making its peremptory selections. *See* ***Joe C.***, 186 Wis. 2d at 585. Second, once Stiglitz makes a showing, the burden shifts to the State to provide a gender-neutral explanation for its selections. *See* ***id.*** at 585-86. Third, the trial court must then evaluate whether Stiglitz has carried his burden of proving purposeful discrimination. *See* ***id.*** at 586.

¶8 We start with the first prong and ask whether Stiglitz established a prima facie case. The trial court appears to have implicitly ruled whether Stiglitz had made a prima facie showing.[2] The trial court's inquiry into the State's

[2] The trial court did not expressly say that Stiglitz had made a prima facie showing. However, once Stiglitz objected, the court questioned the State whether it was striking jurors on the basis of gender. The trial court was not required to inquire into the purpose of the strikes unless Stiglitz had made a prima facie showing. *See* ***Jagodinsky***, 209 Wis. 2d at 582.

rationale for each of its four juror strikes suggests that it was satisfied that Stiglitz had satisfied the first prong of the ***Batson*** test. *See* ***State v. Jagodinsky***, 209 Wis. 2d 577, 582, 563 N.W.2d 188 (Ct. App. 1997).

¶9 To make a prima facie showing under ***Batson***, a defendant must show that the facts and circumstances raise an inference that the State exercised its peremptory challenges with an intent to discriminate based on gender. *See* ***id.*** at 96; *see also* ***J.E.B.***, 511 U.S. at 145. A trial court presented with a ***Batson*** motion must consider all the circumstances relevant to the prosecutor's intent, including whether the prosecutor eliminated all members of a gender group from the jury panel, and whether the excluded members were suitable candidates for exclusion by the State on gender-neutral grounds. *See* ***State v. Walker***, 154 Wis. 2d. 158, 173-75, 453 N.W.2d 127 (1990).

¶10 In this instance, the uncontroverted facts are that Stiglitz was a man and the State used all four of its challenges to remove men from the jury. On its face this suggests gender discrimination. The trial court determined that Stiglitz met his burden of establishing a prima facie claim of gender discrimination. Based upon the facts in the record, we conclude that the trial court's determination was not clearly erroneous.

¶11 Next, we turn to the second prong: whether the State met its burden of giving a sufficient gender-neutral explanation to support its preemptory strikes. *See* ***Jagodinsky***, 209 Wis. 2d at 583. In ***Batson***, 476 U.S. at 97, the Supreme Court explained that the prosecutor's race-neutral (or gender-neutral) explanation "need not rise to the level justifying exercise of a challenge for cause." But the Supreme Court further noted that the State must give "a 'clear and reasonably

specific' explanation of [its] 'legitimate reasons' for exercising the challenges." ***Id.*** at 98 n.20 (citation omitted).

¶12 ***Batson*** requires the State to offer something more than a bare, general statement that non-prohibited factors prompted its strikes. Rather, the State must specify those factors so that the trial court can then perform its function of finding whether the strikes were motivated by prohibited discrimination. Without specific information, the trial court cannot make findings.

¶13 Applying this standard, we conclude that the State did not furnish a reasonably specific and legitimate explanation for exercising its challenges. In fact, there is nothing in the record indicating that the State relied on gender-neutral factors at all.

¶14 Having concluded that the State did not satisfy its burden under the second prong of the ***Batson*** test, what remains is Stiglitz's unrebutted prima facie claim of purposeful gender discrimination. The only remedy is to reverse the conviction and remand for a new trial.[3] *See* ***State v. Walker***, 154 Wis. 2d 158, 179, 453 N.W.2d 127 (1990).

[3] The State argues that we should remand to allow completion of the ***Batson*** test instead of a new trial. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). However, once Stiglitz established a prima facie showing of purposeful discrimination, the burden shifted to the State to provide a gender-neutral explanation at that time. While the State did not provide a gender-biased explanation, it did not provide a gender-neutral explanation as it was required to do. *See* ***State v. Jagodinsky***, 209 Wis. 2d 577, 583, 563 N.W.2d 188 (Ct. App. 1997). As a result, its burden was not met. It is not entitled to a second chance.

By the Court.—Judgment reversed and cause remanded with directions.

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