COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2323-CR **Cir. Ct. No. 2011CT23**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAREN LYNNE SNOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Reversed and cause remanded.*

¶1 KLOPPENBURG, J.[1] Karen Lynne Snow appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration and an order denying her motion for a new trial. Snow argues that she was denied

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

equal protection under the United States and Wisconsin Constitutions when the prosecutor used a peremptory strike to remove the only Native American prospective juror and referenced that prospective juror's "Ho-Chunk culture" when explaining the strike. I conclude that the circuit court clearly erred when it ruled that the prosecutor's peremptory strike of the prospective juror did not violate Snow's right under the Equal Protection Clause and therefore reverse the conviction and remand the case for a new trial.

BACKGROUND

¶2 The State charged Snow with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration, both as third offenses. The case proceeded to a jury trial held on September 22, 2011. Upon commencement of voir dire, the court introduced the attorneys and asked them each to introduce their witnesses. The prosecutor provided the names of two police officers. Defense counsel introduced Snow and stated that he intended to call Duwayne Link and Jeff Link as witnesses.

¶3 The court asked whether anyone on the prospective juror panel had a "close, casual or nodding acquaintance with any of the people who were just introduced." Several jurors raised their hands, including the prospective juror relevant to this appeal, Jody Whiteeagle. Whiteeagle's only discussion during voir dire proceeded as follows:

> PROSPECTIVE JUROR: I know Duwayne Link and Jeff Link. They're like my dad's friends kind of.
>
> THE COURT: So Mr. -- the two Mr. Links are friends of your father?
>
> PROSPECTIVE JUROR: Yeah.

> THE COURT: And do you also engage in any socializing with either of them?
>
> PROSPECTIVE JUROR: Not really.
>
> THE COURT: Would the fact that you know those gentlemen tend to make you uncomfortable in drawing any conclusions about whether their testimony was true or false?
>
> PROSPECTIVE JUROR: No.
>
> THE COURT: And can you listen to the evidence here and the instructions of the Court and determine this case solely on the facts that you hear from the witnesses in this case?
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: And you wouldn't tend to give their testimony any greater or lesser weight than any other witness?
>
> PROSPECTIVE JUROR: No.

¶4 After concluding voir dire, the parties exercised their peremptory strikes. At the parties' request, the circuit court heard in chambers, on the record, defense counsel's challenge to the prosecutor's use of one of the State's three strikes against Whiteeagle. Defense counsel noted that Snow was Native American and that Whiteeagle was the only Native American prospective juror on the panel. The prosecutor immediately offered the following explanation for the strike:

> Your Honor, my race neutral explanation is that Ms. Whiteeagle alone on the panel indicated to the Court on the record that she knows both of the defense witnesses, Duwayne and Jeff Link. She indicated they are friends of her father. I am aware that family ties, especially in the Ho-Chunk traditional culture, are extremely strong, and I do not accept her explanation she doesn't socialize with them and can be fair. I can't take the risk that she's going to place more credit on their testimony because of her at least acquaintance with them and the fact that they are friends of her father.

¶5 Defense counsel reiterated his objection, arguing that Whiteeagle indicated that she could be fair and impartial, and that because she was the only Native American prospective juror, the prosecutor's strike violated ***Batson***.[2] The circuit court ruled that the prosecutor's strike was permissible, explaining that it did not believe that the prosecutor was striking Whiteeagle because she was Native American, but rather "because he knows there is a friendship that exists between her father and two of the potential witnesses." The court reasoned "because her father is a friend of both of the named potential witnesses that that is enough to permit the District Attorney to strike that juror."

¶6 The trial proceeded and the jury returned a guilty verdict on both charges.[3] Snow moved for a new trial, arguing that the prosecutor's peremptory strike of Whiteeagle violated ***Batson***. At the motion hearing, the prosecutor maintained that he properly used the peremptory strike, but joined defense counsel in requesting a new trial, noting that "the appearance of impartial administration of justice outweighs any risks [of] retrial."

¶7 The court denied the motion for a new trial, stating: "I believe that [the prosecutor] struck this juror because this juror's father was a friend of two

[2] *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986) (holding that a prosecutor's use of a peremptory challenge may not be used to exclude jurors based solely on their race). I will elaborate on the ***Batson*** rule in the discussion section of this opinion.

[3] The court granted the State's motion to dismiss the operating-while-intoxicated charge and entered a judgment of conviction only for operating a motor vehicle with a prohibited alcohol concentration.

defense witnesses. I do not believe that there was any purposeful discrimination in his [peremptory] challenge." Snow now appeals.[4]

DISCUSSION

¶8 Peremptory challenges are part of the fabric of our jury system and allow parties to strike potential jurors "without a reason stated, without inquiry, and without being subject to the court's control." ***State v. Lamon***, 2003 WI 78, ¶23, 262 Wis. 2d 747, 664 N.W.2d 607. However, peremptory challenges are subject to the commands of the Equal Protection Clause. ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986). Purposeful racial discrimination in selection of the jury violates a defendant's right to equal protection because it denies the protection that a trial by jury is intended to secure. ***State v. King***, 215 Wis. 2d 295, 300, 572 N.W.2d 530 (Ct. App. 1997) (citing ***Batson***, 476 U.S. at 86). A defendant of whatever race is entitled to a jury selected without discrimination. ***Lamon***, 262 Wis. 2d 747, ¶28 n.5 (citing ***Powers v. Ohio***, 499 U.S. 400 (1991)). A prospective juror's right to equal protection is also violated when the juror is denied participation in jury service on account of race. ***Batson***, 476 U.S. at 87. Moreover, jury selection procedures that purposefully exclude persons based on race undermine public confidence in the fairness of our justice system. ***Id.***

¶9 Wisconsin courts have adopted the ***Batson*** principles and analysis. ***Lamon***, 262 Wis. 2d 747, ¶22. In ***Batson***, the United States Supreme Court

[4] On appeal, the State, as the plaintiff-respondent, moved for summary reversal. As explained in an order dated February 8, 2013, this court accepted the motion as the respondent's brief, and the appeal was submitted for consideration based upon Snow's brief and the State's motion.

outlined a three-step process for determining whether a prosecutor's peremptory strikes violated the Equal Protection Clause:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citing ***Batson***, 476 U.S. at 96-98) (internal citations omitted). On appeal, the clearly erroneous standard of review applies at each step of the ***Batson*** analysis.[5] ***Lamon***, 262 Wis. 2d 747, ¶45.

¶10 The first ***Batson*** step requires that the defendant make a prima facie showing of purposeful discrimination. In order to establish a prima facie case of purposeful discrimination, a defendant alleging racial discrimination must show that the prosecutor relied on race in exercising the peremptory strike. ***King***, 215 Wis. 2d at 300-01. This court has previously held that a defendant established a prima facie case when the defendant demonstrated that the prosecutor used his peremptory challenges to remove every male from the jury panel in a case involving an alleged violation of a harassment injunction. ***State v. Jagodinsky***, 209 Wis. 2d 577, 579, 583, 563 N.W.2d 188 (Ct. App. 1997).[6] The ***Jagodinsky***

[5] While an exception to this deferential standard of review may exist in circumstances where the circuit court does not have an opportunity to evaluate the juror's credibility, neither party argues that this exception applies here. *See* ***State v. Lamon***, 2003 WI 78, ¶¶46-57, 262 Wis. 2d 747, 664 N.W.2d 607.

[6] The ***Batson*** analysis applies to claims of gender, as well as racial, discrimination in jury selection. ***State v. King***, 215 Wis. 2d 295, 300, 572 N.W.2d 530 (Ct. App. 1997); ***State v. Jagodinsky***, 209 Wis. 2d 577, 579-80, 563 N.W.2d 188 (Ct. App. 1997).

court noted: "Even if this were not enough, the trial court heard the prosecutor admit that he used gender. Hence, the court faced plain evidence of gender discrimination." ***Id.*** at 583. Similarly, in ***King***, this court once again considered a prosecutor's acknowledgement of taking gender into account as plain evidence of discrimination in analyzing whether the defendant made a prima facie showing. 215 Wis. 2d at 304-05.

¶11 Based on the legal principles set forth in ***Jagodinsky*** and ***King***, I affirm the circuit court's conclusion that Snow established a prima facie case of purposeful discrimination. Here, defense counsel established that Snow was Native American, that Whiteeagle was also Native American, and that the prosecutor used a peremptory strike to remove Whiteeagle, the only Native American potential juror, from the panel. Moreover, the circuit court heard the prosecutor acknowledge that he took race into account when he stated: "I am aware that family ties, especially in the Ho-Chunk traditional culture, are extremely strong, and I do not accept [Whiteeagle's] explanation [that] she doesn't socialize with them and can be fair."[7]

¶12 The ***Batson*** analysis next shifts the burden to the prosecutor to provide a neutral explanation for the peremptory strike. ***Lamon***, 262 Wis. 2d 747, ¶29. A neutral explanation means "an explanation based on something other than

[7] Alternatively, once a prosecutor offers a neutral explanation for a peremptory challenge, the preliminary issue of whether the defendant made a prima facie showing becomes moot. ***King***, 215 Wis. 2d at 303 (citing ***Hernandez***, 500 U.S. at 359). In ***King***, this court explained that the trial court did not need to rule on whether a prima facie case had been met because the prosecutor immediately offered to provide neutral reasons, rather than arguing that the defendant failed to establish a prima facie case. 215 Wis. 2d at 303. Similarly, the prosecutor in this case offered an explanation for the strike without arguing that the defendant failed to establish a prima facie case. Therefore, "we arrive at the second step" in the ***Batson*** analysis. ***King***, 215 Wis. 2d at 305.

the race of the juror." ***Id.***, ¶30. The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand. ***Id.***, ¶29. Unless discriminatory intent is inherent in the prosecutor's explanation, "'the reason offered will be deemed race neutral.'" ***Id.***, ¶30 (quoting ***Hernandez***, 500 U.S. at 360).

¶13 In ***State v. Guerra-Reyna***, the prosecutor struck two prospective jurors with Hispanic surnames. 201 Wis. 2d 751, 753, 549 N.W.2d 779 (Ct. App. 1996). The defendant, Guerra-Reyna, was Cuban. ***Id.*** Upon defense counsel's objection, the prosecutor explained[8] that he believed one of the stricken jurors was "'not only Hispanic, but [was] Mexican,'" that animosity existed "'historically between Mexican people and Cuban people'" and that he wanted to protect the defendant from any potential unfair racial bias. ***Id.*** at 753-54. The ***Guerra-Reyna*** court held that the motive of protecting a defendant cannot justify a challenge based solely on the juror's membership in a cognizable class. ***Id.*** at 759. The court further concluded "as a matter of law that excluding a prospective juror from jury service because of race or membership in a cognizable class can never be 'neutral,' regardless of the prosecutor's good faith." ***Id.***

¶14 In ***Jagodinsky***, the prosecutor explained that his peremptory strikes were "'not based upon gender alone .... To say gender isn't an issue would be a lie to the Court, but there are a lot of other things, education, employment. And considerations such as those are also in the back of my mind when I pick a jury.'" 209 Wis. 2d at 581. The court held that a prosecutor needs to "offer something

[8] As for the first ***Batson*** step, the court found that "the prosecutor tacitly conceded that Guerra-Reyna had made a *prima facie* case of discrimination as to the prospective jurors." ***State v. Guerra-Reyna***, 201 Wis. 2d 751, 754, 549 N.W.2d 779 (Ct. App. 1996) (italics in original).

more than a bald, but otherwise credible, statement that other nonprohibited factors were considered. Rather, he or she must demonstrate how there is a nexus between these legitimate factors and the juror who was struck." ***Id.*** at 585. A few months later in ***King***, this court explained that the ***Jagodinsky*** court interpreted previous case law "to preclude striking a juror based on a prohibited characteristic, even if other non-prohibited characteristics were also used." ***King***, 215 Wis. 2d at 308.

¶15 More recently, the Wisconsin Supreme Court provided guidance as to what types of prosecutorial explanations may constitute race-neutral explanations. In ***Lamon***, the defendant was African-American and the prosecutor struck the only African-American juror, Dondre Bell, from the jury. 262 Wis. 2d 747, ¶11. The ***Lamon*** court accepted the prosecutor's following explanations for striking the juror as race-neutral: her office and the federal prosecutor's office had prosecuted a number of Bells who live in Beloit; Bell was a well-known criminal name in Beloit; Bell's address was located in a high crime area in Beloit and the State had police reports evidencing police contacts at that address, yet Bell did not answer the prosecutor's question regarding contact with law enforcement; and Bell did not mention anything about relatives who may have had police contacts, though the prosecutor had a list that confirmed police contact with Bell's family members listed at his address. ***Id.***, ¶¶79-91.

¶16 Based on the foregoing law, I conclude that the circuit court clearly erred in concluding that the prosecutor in this case "proffered a neutral discriminatory explanation." Unlike the prosecutor in ***Lamon***, the prosecutor in this case did not have specific, race-neutral explanations for striking Whiteeagle. To the contrary, the prosecutor explicitly mentioned Whiteeagle's membership in a cognizable class during his explanation, and linked such membership to his

belief that she would not weigh potential witnesses' testimony without bias, stating: "I am aware that family ties, especially in the Ho-Chunk traditional culture, are extremely strong, and I do not accept her explanation she doesn't socialize with them and can be fair."

¶17 This court has interpreted previous case law "to preclude striking a juror based on a prohibited characteristic, even if other non-prohibited characteristics were also used." ***King***, 215 Wis. 2d at 308. Here, the prosecutor linked his doubts as to Whiteeagle's ability to fairly weigh testimony due to his belief that "family ties, especially in the Ho-Chunk traditional culture, are extremely strong," thereby demonstrating that the strike was based on a prohibited characteristic. As a matter of law, excluding a prospective juror from jury service because of race or membership in a cognizable class can never be neutral, regardless of the prosecutor's good faith. *See* ***Guerra-Reyna***, 201 Wis. 2d at 759.

¶18 Because the circuit court clearly erred in concluding that the prosecutor offered a race-neutral explanation for the peremptory strike of prospective juror Whiteeagle, I need not address the third ***Batson*** step. The prosecutor's failure to offer a race-neutral explanation leaves only Snow's "unrebutted prima facie claim" of purposeful discrimination. ***Jagodinsky***, 209 Wis. 2d at 585. The only remedy is to reverse the conviction and remand for a new trial. ***Id.***

CONCLUSION

¶19 For the reasons stated, I conclude that the circuit court clearly erred when it denied Snow's ***Batson*** motion at trial and postconviction motion for a new trial. Therefore, I reverse the judgment of conviction and remand the case for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

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