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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1251**

State of Minnesota,
Respondent,

vs.

Albert Joe Ryans, Sr.,
Appellant.

**Filed July 9, 2012
Affirmed
Chutich, Judge
Concurring, Randall, Judge**

Olmsted County District Court
File No. 55-CR-10-542

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora K. Gaitas, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Chutich, Judge; and
Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Albert Joe Ryans, Sr. challenges his convictions of domestic assault by strangulation, terroristic threats and misdemeanor domestic assault. He contends that the district court erred by allowing the state to use a peremptory challenge to remove the only African-American juror in the venire. Ryans further asserts that the district court abused its discretion when it did not dismiss a juror who discovered during trial that he knew a witness for the state. Because the district court's rulings were appropriate, we affirm.

FACTS

On Monday, January 25, 2010, R.C. was visiting the Rochester Metro Treatment Center when staff members noticed that she was very upset. While talking with a counselor, R.C. explained that she and Ryans had argued the day before, and that he had choked her. The counselor called the Rochester Police Department and an officer came to the treatment center to investigate the assault. R.C. told the police officer that Ryans, her boyfriend of about a year, pushed her onto the bed and strangled her for about two minutes. R.C. also reported that Ryans said to her, "I better leave before I kill you. I will kill you if you disrespect me."

Based on R.C.'s statement, the officer arrested Ryans for domestic assault. The officer also interviewed a witness, L.D., who lived with R.C. She corroborated R.C.'s version of the attack. On January 26, 2010, Ryans was charged with one count of domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2, (2008); one

count of terroristic threats under Minn. Stat. § 609.713, subd. 1 (2008); and two counts of misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1(1)(2) (2008).

During voir dire, the court asked members of the venire if they knew anyone involved in the criminal justice system. Prospective juror H.-J. indicated that her brother was recently convicted of having sex with a minor. He had been on probation for one or two years, but at the time of trial, he was in jail for violating his probation. The court observed that someone from the prosecutor's office probably prosecuted H.-J.'s brother.

H.-J. stated that she would not blame the prosecutor's office for her brother's incarceration and that she understood that Ryans's situation had nothing to do with her brother. She further stated that she had more of a problem with her brother's probation officer than with the prosecutor. H.-J. said that her brother thought that he got a bad deal, but that his feelings also related primarily to his probation officer, rather than the prosecutor, judge, or defense attorney at his trial.

The state peremptorily challenged prospective juror H.-J. and Ryans objected to the challenge arguing that it was racially based. H.-J. was the only African-American on the venire, and Ryans is also African-American. Without ruling on whether Ryans had made a prima facie showing of racial discrimination, the court asked the state for its reasoning for striking the prospective juror.

The state replied that it was "concerned about backlash towards me as a member of the same office that successfully at jury trial prosecute[d] and convicted her brother." Ryans's attorney then argued that no grounds existed to remove H.-J. because she

affirmed “that she had no qualms and no animosity toward the prosecutor’s office.” The state reiterated that its reasons for striking H.-J. were

The fact that [H.-J.’s brother is] back in jail; and the fact he can’t find himself in jail without somebody from my office coming up there and arguing that case; and the fact that but for the prosecution by my office, he isn’t in jail in the first place. And the fact that I’m now prosecuting.

The district court asked Ryans’s attorney if he had “[a]nything else,” and Ryans’s attorney said no. The court then determined that Ryans had not made a prima facie showing of discrimination. The court stated, “I’ll make a finding that there is no overt discrimination and that [Ryans] has failed to prove a prima facie case to even go to the second or third factors under the *Batson v. Kentucky*.” Even though the court noted that the second and third steps of the *Batson* analysis were unnecessary, it went on to say, “I will make the additional finding that the State has presented a race neutral basis upon which to strike the juror, So I’ll make a finding you failed to meet your burden, [Ryans’s attorney].”

During trial, one of the jurors realized that he knew L.D., the woman who corroborated R.C.’s version of the assault, and a witness for the state. L.D. was at R.C.’s apartment on January 24, 2010, and she testified that she saw Ryans choking or strangling R.C. L.D. was also present at R.C.’s apartment when Ryans was arrested, and, following the arrest, she gave a statement to the officer about the assault.

After L.D.’s testimony, the juror alerted the court that he knew her. The juror had been friends with L.D.’s deceased fiancé for several years. He did not know L.D. very well, and had not seen her in over a year. The juror had visited the house where L.D. and

her fiancé lived once, and received mass emails from L.D. updating her fiancé's friends about his health. He did not recognize L.D.'s name during voir dire and did not realize that he knew her until she entered the courtroom to testify.

The juror stated that he could restrict his credibility assessment of L.D.'s testimony to his observations of her at trial, and he affirmed that he would not rely on his relationship with her or her deceased fiancé when evaluating her testimony. Ryans asked that the juror be removed for cause, but the court denied the request. The jury found Ryans guilty of all charges, and this appeal followed.

D E C I S I O N

I. Peremptory Challenge

Ryans contends that the district court erred when it allowed the state to use a peremptory challenge to remove the only African-American juror on the venire. The Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely because of their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986).

Under *Batson*, courts use a three-step analysis to determine whether the state's peremptory strike was motivated by racial discrimination. *State v. Matthews*, 779 N.W.2d 543, 554 (Minn. 2010); *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (requiring the three-step process for determining whether a party purposefully discriminated on the basis of race). The three step process for analyzing a *Batson* claim is:

Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court

must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

State v. Reiners, 664 N.W.2d 826, 830 (Minn. 2003) (quoting *Purkett v. Elem.*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770–71 (1995)).

“[T]he existence of racial discrimination in the exercise of a peremptory challenge is a factual determination that is to be made by the district court and should be given great deference on review.” *Reiners*, 664 N.W.2d at 830. “The district court’s determination [on a *Batson* challenge] will not be reversed unless it is clearly erroneous.” *State v. Pendleton*, 725 N.W.2d 717, 724 (Minn. 2007) (quotation omitted). If the district court errs in applying *Batson*, however, this court need not defer to its analysis. *Id.* at 726.

Ryans argues that the district court erred when it found that Ryans did not make a prima facie showing that the state’s peremptory challenge was motivated by racial discrimination. When the court overruled Ryans’s objection, it found that no prima facie showing of discrimination was made. Instead of ending its analysis at step one, the court also made additional findings that the state provided a race-neutral explanation for striking H.-J., and that Ryans did not meet his burden in showing purposeful discrimination, steps two and three of the *Batson* analysis.

In a similar case, the defendant argued that the state was motivated by racial discrimination when it struck a potential juror. *Pendleton*, 725 N.W.2d at 723. In *Pendleton*, the defendant objected to the peremptory strike and gave two reasons why he believed that the strike was racially motivated. *Id.* at 724. Before ruling on the

defendant's objection, the district court allowed the state to respond and explain its reasons for striking the juror. *Id.* The court then overruled the defendant's challenge, concluding that the defendant had not shown a prima facie case of discrimination. *Id.* at 725. It also stated that, even if a prima facie case *had* been made, the state presented a race-neutral reason for striking the potential juror. *Id.*

On review, the Minnesota Supreme Court held that “the district court improperly conducted the *Batson* analysis.” *Id.* at 725. The court stated that, after the defendant gave the reasons for his objection, “the district court should have determined whether a prima facie case of racial discrimination had been shown. Instead, the court allowed the state to respond and [the defendant] to rebut that response. The court’s analysis was not in accordance with our *Batson* precedent or the *Batson* procedure” *Id.* at 725–26 (citation omitted). The court did not reverse the district court’s decision, but instead held that “where the district court erred in applying *Batson*, we will examine the record without deferring to the district court’s analysis.” *Id.* at 726.¹

Similarly, Ryans made an objection to the state’s peremptory strike of H.-J. and stated his reasons for the objection. At that point, the district court should have determined whether a prima facie case of discrimination had been shown. Instead, the court allowed the state to present its reasons for striking the prospective juror, just as the

¹ The reviewing court has independently examined the record without deferring to the district court’s analysis in other *Batson* challenges. See *Reiners*, 664 N.W.2d at 832 (observing that the court should have announced more clearly its findings and analysis of each stage of the *Batson* analysis, but nonetheless reviewing the record to determine the validity of the strike); *State v. Taylor*, 650 N.W.2d 190, 202 (Minn. 2002) (finding that the district court did not apply the proper analysis at the second *Batson* step and substituting the court’s own analysis).

court did in *Pendleton*, and did not follow the *Batson* procedure. We will therefore examine the record without deferring to the district court's analysis.

A. Prima Facie Case of Racial Discrimination

The first step under *Batson* is to determine whether Ryans made a prima facie showing of racial discrimination. *Reiners*, 664 N.W.2d at 83. Under *Batson*, a party objecting to a peremptory strike must make a prima facie case of racial discrimination. *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009). “[A] defendant must establish a prima facie case of racial discrimination by showing (1) that one or more members of a racial group have been peremptorily excluded from the jury; and (2) that circumstances of the case raise an inference that the exclusion was based on race.” *State v. White*, 684 N.W.2d 500, 505 (Minn. 2004). “Whether the circumstance of the case raise an inference of discrimination depends in part on the races of the defendant and the victim.” *Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005); *see also State v. Stewart*, 514 N.W.2d 559, 563 (Minn. 1994).

The inference of discrimination can be drawn by proof of disproportionate impact upon the racial group, *e.g.*, the prosecutor totally excluded all blacks from the venire, or upon an examination of all the surrounding circumstances, *e.g.*, an examination of the prosecutor's questions in voir dire or stated reasons in exercising peremptory challenges or established past patterns of racial discrimination in jury selection.

State v. Moore, 438 N.W.2d 101, 107 (Minn. 1989). “[T]he use of a peremptory challenge to remove a member of a racial minority does not necessarily establish a prima facie case of discrimination.” *Reiners*, 664 N.W.2d at 831.

Ryans argues that “racial overtones” are present because Ryans is African-American and the victim is white. In addition, because the only African-American on the venire was struck by the state, he contends that proof of a disproportionate exclusion of African-American jurors has been shown.

In previous cases, the Minnesota Supreme Court has applied a relatively low threshold when testing whether a prima facie case of discrimination existed. *See Pendleton*, 725 N.W.2d at 726 (finding a prima facie showing of discrimination when a juror had a negative encounter with police during an apparently racially-motivated traffic stop); *Taylor*, 650 N.W.2d at 201 (upholding a finding of prima facie discrimination when the district court cited the potential juror’s race and the fact that the juror was the first minority to be questioned). Because the only African-American on the venire was struck in a case where Ryans is African-American and the victim is white, the defense raised an inference that the exclusion was based on race, satisfying the first step of the *Batson* test.

B. Race-Neutral Explanation

The second step under *Batson*, once the objecting party set forth a prima facie case of racial discrimination, shifts the burden to the party who used the peremptory strike to offer a race-neutral explanation for removing the juror. “At this [second] step of the inquiry, the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.” *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771 (alteration in original) (quotation omitted). The reason does not need to be “persuasive, or even

plausible.” *Reiners*, 664 N.W.2d at 832 (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771) (quotation marks omitted).

The state explained that its reason for striking H.-J. was that she would blame the state for her brother’s incarceration. It reasoned that H.-J.’s brother would not have been tried and convicted without the prosecutor’s office. As the prosecutor explained:

She has a brother, an African-American, presumably, since she is, recently convicted following jury trial by a member of my office for a criminal sexual conduct case, now finds himself back in jail. While she did indicate that her primary beef, if you will, or issue is with the probation agent, nothing happens in terms of probation violations without prosecutors from our office arguing for sanctions sought by the probation agent that result in the jail. And, therefore, the State is concerned about backlash towards me as a member of the same office that successfully at jury trial prosecutes and convicted her brother.

No discriminatory intent is inherent in the state’s reason for striking H.-J.; by providing a race-neutral explanation, the state has met its burden under the second step of *Batson*.

C. Purposeful Discrimination

Batson’s third step requires that the court determine whether the opponent to the peremptory challenge has shown purposeful discrimination. The court must “test the validity of the explanation—that is, to determine whether the proffered race-neutral reason was the actual basis for the peremptory strike or whether it was offered to mask a discriminatory intent or purpose.” *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992). Ryans has the burden to prove that the strike was motivated by racial discrimination. *See Taylor*, 650 N.W.2d at 202. “Where the proponent’s explanation of a peremptory

challenge is race-neutral, and there is no evidence from which to infer an intent to discriminate, the *Batson* objection must be overruled.” *Reiners*, 664 N.W.2d at 834.

Ryans argues that the district court did not complete this portion of the *Batson* analysis because it “terminated the inquiry” after finding that the state offered a valid race-neutral reason for striking H.-J. He contends that the case should be remanded for further findings on whether the state’s strike was purposeful discrimination. Alternatively, he contends that the record reflects purposeful discrimination by the state. We conclude that, although not presented in the classic *Batson* format, the court did evaluate all three steps of the analysis.

After the state explained its reason for striking H.-J., Ryans argued that H.-J. had no bias or animosity toward the state, and that the state’s fear that H.-J. would blame the state for her brother’s present incarceration did not provide a sufficient foundation for removing her. The court allowed the prosecutor another chance to reiterate his reason for striking H.-J. and then asked Ryans if there was “anything else” he wanted to say. After Ryans said no, the court determined that Ryans had not made a prima facie case of discrimination. It then made the additional findings that the state had provided a race-neutral explanation for striking H.-J., and that Ryans did not meet his burden.

In *Pendleton*, like here, the defendant argued that because the district court failed to specifically address step three of the *Batson* analysis, his conviction should be reversed. *Pendleton*, 725 N.W.2d at 723. Even though the supreme court found that the district court “collapsed the *Batson* analysis into one step,” it held that the court did engage in the type of analysis required by step three. *Id.* at 726–27. Because the district

court allowed the defendant to “state his reasons for the objections (step one), allow[ed] the state to offer race-neutral reasons for the challenge (step two), and allow[ed] Pendleton to rebut those reasons before ruling on the merits of the objection (step three),” the record was sufficient to determine whether there was a *Batson* violation. *Id.* at 727 and n.5.

Similarly, the district court here gave Ryans two chances to offer proof of purposeful discrimination after the state presented its reasons for striking H.-J. Moreover, most of the voir dire is recorded in the transcript, including the questioning of jurors that took place privately. The record here is sufficient to determine that no purposeful discrimination occurred.

Ryans argues that the record reflects purposeful discrimination because H.-J. could have been impartial. As the Minnesota Supreme Court has noted, the determination that a prospective juror could be fair is “irrelevant to the *Batson* analysis. Peremptory challenges are designed to be used to excuse prospective jurors who can be fair but are otherwise unsatisfactory to the challenging party.” *Reiners*, 664 N.W.2d at 833. Thus, whether H.-J. could be fair is irrelevant. The state’s implicit rejection of H.-J.’s assertions that she would not let her brother’s situation impact Ryans’s case simply does not show purposeful discrimination by the state.

The Minnesota Supreme Court has held that a family member’s involvement with the legal system is a race-neutral reason for striking a juror. *See State v. Martin*, 614 N.W.2d 214, 222 (Minn. 2000) (holding that the reasons stated for striking a juror, because his father had been convicted of felony murder in a similar situation to the case

at hand, the juror was anxious about losing his job, and the juror's brother was in prison, were sufficient non raced-based justifications); *State v. Scott*, 493 N.W.2d 546, 549 (Minn. 1992) (holding that the reasons that the juror was struck, because the juror's family had recently been involved with the county sheriff's office and because she replied that she could "probably" follow the judge's instructions, were racially neutral).

These established precedents show that the state offered a valid racially-neutral reason for striking H.-J. Ryans offered no other proof to show that the state engaged in purposeful discrimination when striking H.-J.² Because Ryans did not carry his burden to prove purposeful discrimination, the district court appropriately denied the *Batson* challenge.

II. Juror Dismissal

Ryans next contends that the district court abused its discretion by declining to dismiss a juror who realized during the trial that he had a personal relationship with L.D., a witness for the state. The decision to remove or not remove a juror is reviewed for an abuse of discretion. *State v. Manley*, 664 N.W.2d 275, 284–85. "In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from the failure to dismiss, and that appropriate

² Ryans claimed that the record reflects purposeful discrimination because the prosecutor "strenuously opposed a motion to strike Juror B.," a juror who noted that she may have difficulty being impartial because Ryans is African-American and "sort of" resembled a man who had harassed her. The record shows, however, that the prosecutor merely stated that he did not believe "that the defense is anywhere near the threshold necessary for removal for cause." Nothing in this exchange shows that the state engaged in purposeful discrimination.

objection was made by appellant.” *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983). “When reviewing the trial court’s decision to replace the juror or not, this court must consider the nature and source of the prejudicial material, the number of jurors exposed to it, the weight of the evidence, and the likelihood that curative measures taken were effective.” *State v. Richards*, 552 N.W.2d 197, 210 (Minn. 1996). “Because the decision whether the affected juror may continue to sit involves determinations of credibility and demeanor, which are best left to the trial court, [an appellate] court affords the trial court’s decision significant deference.” *Id.*

Ryans argues that the juror could not be impartial and was more inclined to believe L.D. because of his previous relationship with her deceased fiancé. Ryans also asserts that because L.D. was an important witness, Ryans would have acted to remove the juror if the relationship were discovered during voir dire.

In a similar case, a juror informed the court that he knew a key prosecution witness, the detective who had arrested the defendant. *City of St. Paul v. Hilger*, 300 Minn. 522, 523, 220 N.W.2d 350, 351 (1974). The juror had seen the detective at a bar a number of times, but stated that the acquaintance would not prevent him from being fair and impartial. *Id.* at 523, 220 N.W.2d at 351–52. The court found that the district court did not err by refusing to remove the juror. *Id.* at 523, 220 N.W.2d at 352.

The relationship of the juror to L.D. is more extensive than the connection of the juror and witness in *Hilger*, but it is comparable. The juror knew L.D., but only as the fiancée of his deceased friend, and he did not have a strong independent friendship with her. He told the court that he had not seen L.D. in over a year, possibly closer to two

years, and that he would be able to restrict his credibility determination to his observations of L.D. at trial. The district court noted that the witness was sincere and it did not find any basis to remove him. Given the district court's opportunity to observe the juror's demeanor first-hand, and the considerable deference which we afford its credibility determinations, we conclude that the district court acted within its discretion in allowing the juror to remain on the panel.

Affirmed.

RANDALL, Judge (concurring)

I concur in the result reached by the majority. Where this court found that the first step of the *Batson* test was satisfied, I disagree. The trial court was right in ruling that no prima facie showing of discrimination was made. Even the low threshold established in *State v. Pendleton* was not met here. 725 N.W.2d 717 (Minn. 2007). From start to finish, the voir dire challenges by the prosecutor and Ryans’s attorney were rational, well-reasoned, and easily within the realm of an attorney’s obligation to represent his client, yet not show purposeful and intentional racial discrimination. None was shown by either attorney.

Race-Neutral Explanation

As the majority noted, the Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). Some history of the United States Supreme Court in voir dire and use of peremptory strikes is needed. This issue is too important to handle in an off-hand, perfunctory, or “routinely academic” manner. *Batson* was controversial from the start. *Batson* was a 7-2 decision, with four concurrences, where the concurrences and dissents correctly set out that the majority was tampering with the centuries-old tradition stretching back to common law courts of England and Roman times allowing defendants to have some say in who their final judges would be. *Id.* at 118–19, 106 S. Ct. at 1734–35 (Burger, C.J., dissenting).

Batson put constraints on the state’s use of peremptory challenges in criminal cases, and prosecutors hollered, so predictably, *Batson* was followed by *Georgia v.*

McCullum, which extended the holding in *Batson* to criminal defense attorneys and their clients.¹ 505 U.S. 42, 112 S. Ct. 2348 (1992). This was likely a violation of the Sixth Amendment to the United States Constitution granting defendants the right to have an attorney and, concomitantly, to have an attorney to assist them in jury selection and to have an attorney decide use of peremptory challenges, *not the trial judge*. I emphasized

¹ Tellingly, Associate Justice Clarence Thomas, the only African-American on the Court said, in strident language, “black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.” *McCullum*, 505 U.S. at 60, 112 S. Ct. at 2360 (Thomas, J., concurring). I highlighted Justice Thomas’s position in *State v. Weatherspoon*. “What Justice Thomas tried to tell us (albeit with more brevity), I have tried to support[.] . . . If Justice Thomas and myself are the only ones who hear the bell, it still tolls. *The truth is not negotiable.*” 514 N.W.2d 266, 300 (Minn. App. 1994) (Randall, J., concurring), *review denied* (Minn. June 15, 1994). In her dissent in *McCullum*, Justice O’Connor noted that the Court grappled with the effect of extending the holding in *Batson* to defendants under the guise of “state action”:

What really seems to bother the Court is the prospect that leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection we espoused in *Batson*, 476 U.S., at 85–88, 106 S. Ct., at 1716–1718. The concept that the government alone must honor constitutional dictates, however, is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct.

McCullum, 505 U.S. at 68, 112 S. Ct. at 2363–64 (O’Connor, J., dissenting). Justice Scalia also emphasized what he saw as the absurdity of such a proposition in his dissent:

A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. Justice O’Connor demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court’s justifications.

Id. at 70, 112 S. Ct. at 2364–65 (Scalia, J., dissenting).

this problem in *Weatherspoon* by quoting Justice Scalia’s dissent in *McCullum* in which he stated, “[W]e use the Constitution to destroy the ages-old right of criminal defendants to exercise preemptory challenges as they wish, to secure a jury that they consider fair.” *Weatherspoon*, 514 N.W.2d at 274(Randall, J., concurring).

Be that as it may, *Batson* and *McCullum* are law. The inherent flaws in *Batson*’s reasoning and its extension to *McCullum* led to an avalanche of appeals in state and federal courts. That led the Supreme Court to “reverse itself” without having to admit it (a serious error) in *Purkett v. Elem*, which followed *McCullum* by only three years. 514 U.S. 765, 115 S. Ct. 1769 (1995). In *Purkett*, the prosecutor explained that he struck an African-American juror because he had long, unkempt hair, a mustache, and a beard. *Id.* at 766, 115 S. Ct. at 1770.² The Court, in a 7-2 decision, found that these reasons were race-neutral and constituted a nondiscriminatory reason for striking the juror because the

² A note about the argument Ryans made regarding the “racial hue” cast on this trial. Ryans’s attorney objected to prospective juror B. because he did not believe she could be impartial. As the majority notes, prospective juror B. had been harassed by an African-American man and stated that she may have difficulty being impartial because Ryans is African-American and “[s]ort of” resembled the man who harassed her. The motion to remove prospective juror B. for cause was a prudent choice made by Ryans’s attorney that took into consideration all components of the prospective juror’s background, which could impact her decision in deliberating the case, including race, gender, and previous experiences. Ryans’s attorney should have won this argument and his motion to strike prospective juror B. for cause should have been granted. If Ryans’s attorney was not allowed to exercise a preemptory challenge of prospective juror B., he was likely to end up with a juror that had a probable latent irritation, if not an honest hostility, toward Ryans. The district court even said to Ryans’s attorney, “I’m going to deny the motion to remove for cause. You can use one of your preemptories, if you and your client wish.” My comment on this issue does not affect my vote concurring with the majority on the overall result.

wearing of beards and growing long hair is not peculiar to a specific race. *Id.* at 769, 115 S. Ct. at 1771. The seminal holding in *Purkett* is:

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *The second step of this process does not demand an explanation that is persuasive, or even plausible.* At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Id. at 767–68, 115 S. Ct. at 1770–71 (citations and quotation omitted and emphasis added). I am going to repeat that. Once a *Batson* challenge is raised and the threshold met, the race-neutral reason offered by the other side not only does not have to be persuasive, it does not even have to be plausible! That wipes out *Batson*. If you do not have to come up with a plausible reason, you do not have to come up with anything! “Not plausible” means everything goes. It would have been better in *Purkett* just to admit that *Batson* was a mistake, like prohibition. *See* U.S. Const. amend. XVIII; U.S. Const. amend. XXI, § 1 (stating “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”). Hopefully, down the road, the Supreme Court will own up to its mistake in *Purkett* and formally overrule *Batson* and *McCollum*.