STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1483

State of Minnesota,
Respondent,

vs.

Ahmed M. Musa,
Appellant.

Filed July 28, 2009
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CR-07-108635

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 S. 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.

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

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

Appellant Ahmed Mohamed Musa challenges his criminal sexual conduct convictions, claiming that the district court erred in denying two of his peremptory juror strikes. Because the district court's analysis under *Batson* was not clearly erroneous, we affirm.

Appellant was convicted by a jury of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(e)(i) (2006), and second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(e)(i) (2006), for sexual assault on a female acquaintance. During voir dire, defense counsel used its first four peremptory challenges to strike four female jurors. The prosecutor raised a *Batson* objection to these strikes, alleging gender discrimination. The district court conducted a hearing out of the presence of the jury on the objection, permitted two of the peremptory strikes, but decided to disallow the other two peremptory strikes, concluding they were motivated by solely gender, and reseated jurors K.T. and M.Z. Appellant now seeks a new trial on the grounds that the district court erred by granting the state's *Batson* challenge to defense counsel's peremptory strike of these two female jurors.

D E C I S I O N

The use of peremptory challenges to exclude potential jurors solely on the basis of gender violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). "Whether there is racial [or gender] discrimination in the exercise of a peremptory

challenge is a factual determination to be made by the district court and is entitled to great deference on review." *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002). The decision will not be reversed unless it is clearly erroneous. *Id*.

Minnesota applies the *Batson* three-step analysis: (1) the party opposing the challenge must make a prima facie showing of gender discrimination—an inference that the juror's exclusion was based on gender; (2) the burden then shifts to the party wishing to strike the juror to provide a gender-neutral explanation; and (3) if a gender-neutral reason is offered, the district court must decide if the reason is pretextual or if the objecting party has proven purposeful discrimination. *State v. Blanche*, 696 N.W.2d 351, 364-65 (Minn. 2005) (citing *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770-71 (1995)); *see also* Minn. R. Crim. P. 26.02, subd. 6a(3). "The ultimate burden of persuasion regarding [gender] motivation rests with, and never shifts from, the opponent of the strike." *State v. Bailey*, 732 N.W.2d 612, 618 (Minn. 2007) (quotation omitted).

The Minnesota Supreme Court has recognized that gender-neutral explanations do not need to be "persuasive, or even plausible." *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003) (quotation omitted). Rather, the explanation will be deemed gender-neutral "[u]nless a discriminatory intent is inherent in the [party's] explanation." *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771 (quotation omitted).

Step One - Prima Facie Showing of Gender Discrimination

The prosecutor argued that defense counsel's use of his first four peremptory challenges to strike four women in the jury panel in a case where the victim of the sexual

assault was a woman, was prima facie evidence of gender discrimination. In raising its objection, the prosecutor stated:

> [Defense counsel] has struck four women of a very limited pool of women that would actually be sitting on this jury. I do not believe *for all four women* there is any reason to strike them except for the fact that they are women.
>
> Specifically, I refer to [M.Z., Defense counsel] did not question her. She did not give any answers that would indicate any reason that she would not be fair to both sides in this matter. She has no assault in her background, nothing of that type. Some of the other people that [defense counsel] chose I believe he may be able to come up with a non-gender reason for striking but specifically for M.Z., after seeing the additional two strikes of two more women, I believe he's only striking her because she's a woman and under *Batson* I believe that that's inappropriate and that she should be placed back on the panel.

(Emphasis added.) The district court responded by stating that "so far the defendant has exercised four of his five pre-empts and all four of them appear to be women, so that would make out a prima facie showing under the *Batson* analysis."

Appellant argues that this finding was clearly erroneous because he contends four strikes of women alone cannot establish a prima facie case of gender discrimination. He argues that by the time he exercised his challenges, four men and two women had already been seated so he had not struck "all" the women for the panel. However, when all the strikes are against women, the circumstances raise an inference of discrimination because the victim and the jurors challenged are all women. *See Angus v. State*, 695 N.W.2d 109, 116-117 (Minn. 2005) (finding under circumstances of the case that since the defendant and victim were both white, challenge of an African American juror alone was not sufficient to establish a prima facie case for racial discrimination); *State v. Stewart*, 514

N.W.2d 559, 563 (Minn.1994) (holding whether the circumstances of the case raise an inference of discrimination depends in part on the races of the defendant and the victim). Thus, we conclude that the district court did not commit clear error in finding a prima facie case of gender discrimination.

Step Two – Gender Neutral Reasons For Strike

The district court next requested that defense counsel articulate a gender-neutral reason for his strikes. Defense counsel stated:

> First of all, let me say this before we go to the individual jurors. When I did my strikes I was not thinking of woman. I struck them basically because of the record that I have, the responses to the questionnaires, the experiences they have with sexual assault before. So that was what was in my mind. I wasn't thinking about . . .

The district court then redirected defense counsel to answer specifically with respect to each juror. Defense counsel first responded with respect to his reasons for the first two challenges (prior sexual assaults) and the district court agreed these were gender-neutral reasons and permitted the first two jurors to be removed on peremptory challenge.

With respect to the third and fourth jurors challenged, the district court seemed to combine steps two and three of the *Batson* analysis—first asking defense counsel to state a gender-neutral basis and then asking the prosecution to respond. Because the district court asked the prosecutor to respond, we assume that the district court found the stated reason was gender-neutral and then continued its analysis as to whether the reason was pretext for discrimination.

Step Three – Reason Pretextual or Proven Purposeful Discrimination

A. Juror K.T.

With respect to the third woman challenged, juror K.T., defense counsel was not certain why he wanted her stricken. At first, he could not find her on the jury chart and then said, "I'm not sure but I think she said she was sexually assaulted. Let me just look, find the record quickly." After the district court reminded defense counsel that juror K.T. had said she had been physically, not sexually, assaulted, defense counsel argued he sought to strike this juror because the two assaults are similar and involved violence, force, abuse, and subjection. When asked to respond, the prosecutor argued a simple assault was not a proper basis for a peremptory strike and that other male jurors who had been subjected to physical assault and sexual assault as children were not stricken, only the female jurors were.

Concerning juror K.T., the district court concluded that "she didn't seem to be very bothered by [the assault] at all, so I don't think that is a—in light of the fact that it's four women the defense has struck I'm going to disallow that peremptory challenge and reseat [K.T.] on the jury." As appellant points out, the district court's comment as to whether juror K.T. could be fair is not relevant to whether there was pretext for discrimination in the reason given. *See Reiners*, 664 N.W.2d at 833 (finding that court incorrectly used the criterion that is applicable to a challenge for cause for the analysis of a peremptory challenge).

However, the district court's reason for disallowing the defendant's peremptory challenge to juror K.T. - "in light of the fact that it's four women the defense has struck"

considered the pattern of the peremptory challenges. We assume the district court's decision was implicitly based on its evaluation of defense counsel's credibility in light of the uncertain manner in which he provided the reason for the strike, and in the context of the state's evidence of gender discrimination, that male jurors similarly situated were not challenged. The record in this case supports this decision.

Respondent argued that the stated reasons for striking juror K.T. were pretextual because defense counsel did not move to strike other potential male jurors who had been assaulted, some sexually. Purposeful discrimination may be shown if the proffered reason for striking a panelist applies just as well to other similarly situated venire members who are not stricken. *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005) (comparing stricken African American venire members who were struck with white venire members who were seated). Of the jurors questioned here, juror K.T., a female, had been physically assaulted several years previously by someone she knew from work who broke into her house; juror D.N., a male, had recently been physically assaulted by a neighbor and sexually molested by a relative as a child; juror S.S., a male, was sexually abused by a relative as a child, and the wife of juror P.J., a male, had been raped before their marriage. Defense counsel challenged juror K.T., the female, on the grounds she had been previously assaulted, but male jurors D.N. and P.J. were seated on the jury. Accordingly, this record supports the conclusion that defense counsel's peremptory strike of K.T. was discriminatory based on gender because similarly situated male jurors were not stricken.

Because the record supports a determination of pretext, we conclude the district court's ruling to deny the peremptory challenge of juror K.T. was not clearly erroneous.

B. Juror M.Z.

Defense counsel failed to give a coherent reason for his challenge of juror M.Z.

> [o]ther than the fact that I exercised my peremptory strike I was not thinking, seriously, I was not thinking – I didn't strike her because she's a woman. I struck her simply because I think she may be more sympathetic to the prosecution than to the defendant. Basically that was my thought process when I struck her.
>
> She has a relationship with the police, she grew up in that community, and I'm just making all these assumptions. I mean, the thing could go the other way completely, but people normally in my judgment and based on my experience who grew up in that type of community mostly go for the State than for the defendant because they grew up in that environment. So that was the reason I struck her.
>
> I didn't strike her because of her gender, I didn't strike her because she's a woman. Even if she was a man I probably would have struck her as well.

When asked to respond, the prosecutor argued that defense counsel did not even question juror M.Z., that there is no indication that she is going to favor the state over the defense, and that she was simply struck because she is a younger woman. On appeal, respondent further argues that juror M.Z.'s only connection to police was a stepfather. But the record does not indicate how much time she spent with the stepfather, or whether she "grew up" with him as defense counsel assumed.

Although acknowledging that defense counsel expressed some reason why one would normally strike this juror, the district court found,

> [it] is concerning here because we have the pattern of four women. And then if I allow that strike to be exercised with

> regard to [M.Z.], we will not have another woman until we get down to juror number 25 . . . So it kind of puts you in a Catch-22 [defense counsel]. You may have some feelings which normally legitimately people base their pre-empts on, but the fact that you did all four women and there is no real gender neutral reason except for just basically what counsel relies on which is their own feeling in making these things, it doesn't appear to be gender neutral so I'm going to have to overrule that one and reseat her as well.

The district court concluded that the pattern of strikes, like those in *Batson*, indicated gender discrimination.

Appellant argues that the district court's ruling is erroneous because familial relationship with a police officer has been held to be a neutral reason for a peremptory challenge. *Reiners*, 664 N.W2d at 832 (recognizing having a police officer in the family can be a gender-neutral reason to exercise a challenge). But appellant did not question M.Z. to determine how close her relationship with her stepfather was or how it would affect her decision, suggesting this reason was pretextual. We also note that, in determining whether a facially valid reason is a pretextual explanation offered to mask a discriminatory intent, a district court may consider whether "the basis for the challenge given by the [striking party] is one that will result in the disproportionate exclusion of members of a certain race or gender." *State v. Greenleaf*, 591 N.W.2d 488, 500 (Minn. 1999). Here, the district court calculated the disproportionate effect that permitting the last two challenges would have on the gender makeup of the jury.

We are mindful that a district court is in the best position to evaluate defense counsel's credibility and demeanor and its determination should be given great deference. *State v. Martin*, 614 N.W.2d 214, 222 (Minn. 2000); s*ee also State v. Pendleton*, 725

N.W.2d 717, 724 (Minn. 2007) (holding that great deference must be given to district court on *Batson* challenge and "recognizing that the record may not reflect all of the relevant circumstances that the court may consider"); *State v. Everett*, 472 N.W.2d 864, 868 (Minn. 1991) (stating that district court may determine genuineness of striking party's response).

In summary, there is a sufficient basis on the record for the district court's ruling that there was discriminatory intent in defense counsel's decision to strike four women and that the reasons provided for two of the strikes were pretextual because (1) there was an apparent pattern of striking women (four out of four) from a criminal sexual conduct trial, where the victim was a woman; (2) the stated reason for striking juror K.T. applied equally to certain male members of the jury panel who were not stricken; (3) the assumptions stated by defense counsel for striking M.Z. were not fully substantiated in the record because defense counsel failed to ask any further questions of juror M.Z., and there was no evidence as to the extent of M.Z.'s contact with the law enforcement community; and (4) defense counsel's credibility when providing reasons to strike these two jurors seemed more tentative. Accordingly, we conclude that the district court did not clearly err in granting appellant's *Batson* challenge to defense counsel's use of two peremptory strikes against jurors K.T. and M.Z.

Affirmed.