STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0203

State of Minnesota,
Respondent,

vs.

Mukhtar Abdi Sugal,
Appellant.

Filed January 14, 2013
Affirmed
Hooten, Judge

Anoka County District Court
File No. 02-CR-09-5646

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

Anthony C. Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

Eric L. Newmark, Robert W. Vaccaro, Gaskins Bennett Birrell Schupp, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant challenges his convictions of theft-by-swindle and residential mortgage fraud, arguing that the district court improperly applied the *Batson* procedure after sua

sponte requiring the state to provide a race-neutral explanation for its decision to exercise a peremptory strike of a juror. Claiming that the peremptory challenge was motivated by racial discrimination, appellant argues that the district court erroneously concluded that the state provided a race-neutral explanation for the peremptory strike. We affirm.

FACTS

Appellant Mukhtar Abdi Sugal was charged with one count of theft-by-swindle in violation of Minn. Stat. § 609.52, subd. 2(4) (2008), and one count of residential mortgage fraud in violation of Minn. Stat. § 609.822, subds. 2(1) and (3) (2008). Appellant pleaded not guilty, and the jury selection process began on November 8, 2011.

During voir dire, the district court initiated questioning of 22 prospective jurors with general questions about the presumption of innocence, burden of proof, possible connections with the county attorney's office and potential witnesses, scheduling issues, and personal experiences with the judicial system. The prospective juror at issue on appeal, S. W-J., did not respond to any of these preliminary inquiries. In response to the district court's direct questions to her, S.W-J. stated that she lived in Fridley, had been married for six years, worked as an IT security analyst, and was a graduate student.

The prosecutor, in his voir dire of the jury panel, asked if anyone did not own their own home and if any had purchased one or more homes and worked with real-estate agents. Based upon the jury's responses, the prosecutor noted that "pretty much everybody" who had bought a home did so with a mortgage. In response to his question asking who had been to a closing and had read all the documents, S.W-J. stated that she

did not remember if she "read each word on every" document but scanned each one to make sure she "just didn't sign it without doing so."

The prosecutor also questioned the jurors regarding their attitude toward banks and the Occupy Wall Street protests. With respect to S.W-J., the prosecutor noted that he saw her "shaking [her] head" in response to the inquiry about the Occupy Wall Street protests, but the record does not reveal if this was a positive or a negative reaction. When directly questioned about her views, S.W-J. explained that she did not know much about the protests other than what she heard on the news. The prosecutor followed up with a number of other panel members who apparently responded to the question, and they all explained that they did not know much about the movement or had not formed an opinion.

No prospective jurors were challenged or excused for cause, and the attorneys exercised their peremptory challenges. S.W-J. was not selected as a member of the jury. Thereafter, outside the presence of the jury, the district court judge, sua sponte, requested that the prosecutor explain his decision to strike S.W-J., an African-American woman.

In response, the prosecutor maintained that he intended to select jurors who were fair, "who had experience in the financial sector," and who had "as little as possible the negative view . . . toward banks." He noted that he struck a juror who had a scheduling conflict and a negative view towards banks and that he had planned on striking three others, but those had been struck by appellant's attorney. He then explained that he "defaulted to [his] general theory of jury selection," focusing on his assertion that S.W-J. did not provide direct responses or opinions. He also noted that he wanted jurors with

"as much home buying experience as possible" and that S.W-J. "only purchased one home."

The district court then allowed appellant's attorney an opportunity to respond to the state's explanation of why it struck S.W-J. The response, in full, reads as follows:

> Well, your honor, I guess I don't remember her being indirect in regard to any questions, so if the prosecutor want[s] to elucidate that a little bit more, that would be fine with me.
>
> Other than that, I don't have much to say. I think the Court's basically expressed a preference for having people of diverse backgrounds and multi[-]racial [juries] and such, and that would provide that, or keeping her, ordering her back on would provide that.

Based upon this response, the district court allowed the peremptory challenge to stand, reasoning that in the "absence of a specific objection challenge," the state articulated a race-neutral reason for exercising a peremptory strike of S.W-J. The record does not establish whether there were any other members of a minority group on the panel of prospective jurors. Trial commenced, and appellant was found guilty on both counts on November 14, 2011. Appellant challenges his convictions, claiming that the district court erred in upholding the state's peremptory strike against a person of color from the jury.

D E C I S I O N

"Peremptory challenges are designed to be used to excuse prospective jurors who can be fair but are otherwise unsatisfactory to the challenging party." *State v. Reiners*, 664 N.W.2d 826, 833 (Minn. 2003). "Peremptory challenges allow a party to strike a

prospective juror that the party believes will be less fair than some others and, by this process, to select as final jurors the persons they believe will be most fair." *Id.*

"The use of peremptory challenges to exclude potential jurors is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *State v. Pendleton*, 725 N.W.2d 717, 723 (Minn. 2007) (citing *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986)).

> A peremptory challenge against a prospective juror on account of her race denies equal protection both to the prospective juror, because it denies her the right to participate in jury service, and to the defendant, because it violates his right to be tried by a jury made up of members selected by nondiscriminatory criteria.

Id. (citing *Reiners*, 664 N.W.2d at 831). The three-step framework for determining whether a peremptory challenge is motivated by racial discrimination is summarized as follows:

> [O]nce 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 discrimination.

Id. at 723–24 (quoting *State v. Blanche*, 696 N.W.2d 351, 364–65 (Minn. 2005) (quotation omitted)). "The importance of clarity at each step of the analysis is that the opponent has the burden of proving a prima facie case, the proponent has the burden of production of a race-neutral explanation, and the opponent has the ultimate burden of proving pretext and discriminatory intent." *Reiners*, 664 N.W.2d at 832.

1. First-Prong *Batson* Analysis

The parties agree that the first prong was either satisfied or rendered moot by the fact that the district court raised sua sponte the issue of the state's peremptory strike of S. W-J. Relative to this issue, the state cites *State v. James*, 520 N.W.2d 399, 402 (Minn. 1994), which concluded that the first *Batson* prong was moot because the prosecutor provided two reasons for exercising a peremptory strike and the trial court ruled against the defendant's *Batson* challenge. "'Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991)); *see also State v. Stewart*, 514 N.W.2d 559, 563 (Minn. 1994) ("[B]ecause the trial court proceeded to the second step in the process, we need not address whether appellant established a prima facie case of the discriminatory use of the peremptory strike.").

2. Second-Prong *Batson* Analysis

"In step two, 'the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.'" *Pendleton*, 725 N.W.2d at 726 (quoting *Blanche*, 696 N.W.2d at 364). This explanation does not have to be persuasive or plausible, and it will be "deemed race-neutral unless a discriminatory intent is inherent in the prosecutor's explanation." *Id.* (quotation and alteration omitted). The state's explanation satisfied this burden in that the prosecutor explained his opinion that S. W-J. failed to provide direct answers and opinions and did not have enough home-buying

experience because she had only purchased one home, seemingly valid considerations during voir dire in a prosecution for residential mortgage fraud. There is no discriminatory intent inherent in these explanations.

3. Third-Prong *Batson* Analysis

a) Sufficiency of District Court's Analysis

Appellant contends that the district court did not engage in any analysis of the third prong of the *Batson* analysis, i.e., whether, notwithstanding the proffered race-neutral reason for the prosecutor's peremptory challenge, such reason was merely pretext and discriminatory intent was present. By failing to consider this third prong, appellant argues, the district court abdicated its duty to ensure that the jury-selection process was free from racial discrimination, thereby necessitating a new trial.

Appellant's contention, however, is not supported by *Pendleton*. In that case, the supreme court concluded that the district court engaged in all three prongs when it "collaps[ed] the *Batson* analysis into one step" by permitting the defendant to state the "reasons for the objection," permitting "the state to offer race-neutral reasons for the challenge," and permitting the defendant "to rebut those reasons before ruling on the merits of the objection." *Pendleton*, 725 N.W.2d at 727. Under this rationale, the district court's conclusion that the strike was race neutral also represented a finding on the third *Batson* prong. Thus, the lack of more explicit findings by the district court relative to the third prong is not dispositive of whether the prosecutor had discriminatory intent in striking the juror. *See State v. Taylor*, 650 N.W.2d 190, 203 (Minn. 2002) ("While additional explanation of the court's finding would have been helpful, it is reasonable to

conclude that the prosecutor was not motivated by racial discrimination."); *see also Reiners*, 664 N.W.2d at 832–34 (holding that the district court's application of *Batson* was clearly erroneous but then reviewing the record for a determination as to the validity of the objection); *State v. Rivers*, 787 N.W.2d 206, 211 (Minn. App. 2010) (stating that, although it failed to specifically address step three, the district court "found that a number of race-neutral reasons supported the strike and, by denying the challenge, implicitly found that [the defendant] did not prove purposeful discrimination"), *review denied* (Minn. Oct. 19, 2010). As set forth in *Pendleton*, even "where the district court erred in applying *Batson*, we will examine the record without deferring to the district court's analysis." 725 N.W.2d at 726.

b) Merits of Appellant's Claim of Purposeful Discrimination

"In step three of the *Batson* analysis, we must decide whether the opponent of the challenge has proved purposeful discrimination." *Id.* at 726. The district court considers all the evidence and "determines whether the defendant carried his burden of proving that the peremptory strike was motivated by racial discrimination and that the proffered reasons were merely a pretext for the discriminatory motive." *Taylor*, 650 N.W.2d at 202. "Appellate courts give considerable deference to the district court's finding on the issue of the prosecutor's intent because the court's finding typically turns largely on credibility." *Id.*

A "demonstration of pretext implies a two-part analysis: (1) a demonstration that the proffered race-neutral reason is not the real reason for the strike and (2) a demonstration that the real reason was the race of the veniremember." *Angus v. State*,

695 N.W.2d 109, 117 (Minn. 2005). The failure of a race-neutral reason merely satisfies the first prong, but does not establish "that the real reason was based on race." *Id.*

> The [defendant's] successful attack on a [prosecutor's] race-neutral reason does not satisfy the [defendant's] burden to prove racial discrimination because it only begs the question as to the real reason for the strike. If the mere rejection of a [prosecutor's] race-neutral reason were deemed sufficient to support a *Batson* challenge, the effect would be to shift the burden to the [prosecutor] to prove that race was *not* the reason.

Id. (emphasis in original).

In the instant case, it is significant that appellant's trial attorney failed to argue that the reasons advanced by the prosecutor for the peremptory challenge were merely a pretext for a discriminatory motive. When a defendant fails to timely argue to the district court that a prosecutor's explanation for a strike was a pretext, no relief can be granted "unless the record on appeal clearly establishes as a matter of law that the prosecutor's neutral explanation was pretextual and that the striking of the juror was racially motivated." *State v. Scott*, 493 N.W.2d 546, 549 (Minn. 1992). The current matter is analogous to *Scott*, which observed:

> If defendant believed that the prosecutor's explanation, which on its face was racially neutral, was a pretext, defendant should have presented the argument in a timely manner to the trial court. Then the prosecutor could have responded to the allegation and the trial court could have made a factual determination, based on all of the relevant evidence, whether or not the striking was racially motivated.

Id.

Here, appellant's trial attorney failed to argue that the prosecutor's race-neutral explanation for the strike was a pretext for a discriminatory motive, but merely invited the prosecutor to expand on his assertion that S.W-J. had not provided direct answers or opinions. This failure to argue pretext is all the more significant because this was the only instance when appellant's trial attorney addressed the *Batson* issue subsequent to the district court's initial request for an explanation from the prosecutor. *See Stewart*, 514 N.W.2d at 563–64 (concluding that, in the absence of objection by the defense counsel to prosecutor's explanation, "it was reasonable for the trial court to construe defense counsel's failure to follow up on his *Batson* objection as an agreement that the expressed reasons were racially neutral").

The limited and ambiguous record does not support appellant's claims that the prosecutor's race-neutral explanation of his peremptory challenge was merely a pretext or that in striking the juror he was engaged in purposeful discrimination. Appellant has failed to show that the prosecutor's questioning of S.W-J. was dissimilar to the questioning of the other prospective jurors.[1] *See State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (noting that the "threat of pretext" is lowered when "the prosecutor did not alter his usual pattern of questioning for a prospective minority juror").

On appeal, appellant, for the first time, contests the prosecutor's race-neutral explanation that he was attempting to pick only jurors who had more experience buying

[1] Appellant argues that the prosecutor could have asked more specific questions of S.W-J. and by failing to do, demonstrated his discriminatory intent. However, the record does not indicate how many jurors raised their hand in response to the prosecutor's general questions and whether follow-up questions were addressed to each and every juror who raised his or her hand.

homes with mortgages and S.W-J. had only purchased one home, noting that two of the jurors who were selected for the jury had indicated that they rented their homes. "One way to show purposeful discrimination is to show that a prosecutor's proffered reason for striking a prospective minority juror applies equally to a similar non-minority who is permitted to serve." *Bailey*, 732 N.W.2d at 618.

However, the record is not clear as to the precise number of prospective jurors who provided affirmative answers to the prosecutor's inquiry about experience purchasing a home, which could have included these two renters if they had owned homes previously. Appellant fails to identify any evidence of purposeful discrimination beyond this general allegation that two jurors were renters. *See Angus*, 695 N.W.2d at 118 (noting that a lack of "any circumstance that would supply the required inference that the real reason was racial discrimination" precludes a successful *Batson* challenge).

The only objection to the preemptory challenge advanced by appellant's trial attorney was that there was a preference for diversity on the jury. But this comment does not identify or ascribe a discriminatory motive. *See Angus*, 695 N.W.2d at 117 ("[T]he general desire to achieve a diverse jury cannot be the basis to sustain a *Batson* objection where the circumstances of the case do not support an inference that the party exercising the strike has a discriminatory motive."). Based upon the record on appeal, we conclude that appellant has failed to satisfy his burden of proving that the prosecutor's race-neutral explanation was pretextual and that the peremptory strike was racially motivated.

Affirmed.