APPENDICES

People v. Daniel Mason 21SC773

People v. Daniel Mason 19CA2168

COLORADO COURT OF APPEALS

DATE FILED: September 9, 2021
CASE NUMBER: 2019CA2168

Court of Appeals No. 19CA2168
Weld County District Court No. 16CR2268
Honorable Julie C. Hoskins, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Daniel Mason,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by CHIEF JUDGE BERNARD
Davidson* and Taubman*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 9, 2021

Philip J. Weiser, Attorney General, Rebecca A. Adams, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Eric Sims Jr., Flatirons Litigation, LLC, Boulder, Colorado, for DefendantAppellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Defendant, Daniel Mason, appeals his conviction. We affirm.

I. Background

¶ 2 Defendant was charged with nine counts of possessing child pornography. A jury found him guilty of one count, but it was unable to reach a verdict on the other eight. During jury selection, defendant raised a Batson challenge, named for Batson v. Kentucky, 476 U.S. 79 (1986), that the trial court denied. He contends that was error. We disagree.

II. General Legal Principles and Standard of Review

¶ 3 The Equal Protection Clause of the Fourteenth Amendment prohibits parties from using peremptory strikes to remove prospective jurors solely on account of their race. Id. at 89; People

v. Valdez, 966 P.2d 587, 589 (Colo. 1998). As is relevant to the analysis in this case, a court resolving a Batson challenge asks three questions to decide whether a party's use of a peremptory strike violated this prohibition:

- Did the objecting party make a prima facie showing that the party exercising the peremptory strike did so on the basis of race?
- If so, then did the party exercising the strike articulate a race-neutral reason for removing the prospective juror?
- If so, considering both sides' arguments, has the objecting party shown, by a preponderance of the evidence, that the party exercising the strike engaged in purposeful discrimination?

People v. Beauvais, 2017 CO 34, ¶ 21.

¶ 4 We review the trial court's answers to the first two questions de novo. People v. Rodriguez, 2015 CO 55, ¶ 13. We review the court's answer to the third question for clear error. Id.

III. Analysis

¶ 5 Defendant asserts that the prosecution violated the Batson prohibition when it used a peremptory strike to remove a Hispanic prospective juror, whom we shall call "Mr. R." Mr. R wrote on his juror questionnaire that he had previously been involved in criminal cases. Accordingly, the court and counsel for both sides questioned him in chambers, outside of the other jurors' presence. During this questioning, Mr. R explained that he had twice been a defendant in criminal cases and that he had pled guilty both times. Neither party challenged him for cause.

¶ 6 Later, the prosecution exercised a peremptory strike to excuse Mr. R. Defense counsel objected, arguing that the strike violated Batson because the prosecution had used an earlier peremptory strike to remove another prospective juror who was Hispanic.

¶ 7 Unprompted, the prosecutor stated two reasons why she had struck Mr. R: he had a "criminal history," which the prosecutor found to be "concerning"; and, when the court and the attorneys had questioned him in chambers, "he was not giving very articulate answers. He was kind of giving one-word answers, which in my mind indicated a level of intelligence that isn't going to be able to appreciate or grasp the technical evidence that this jury is going to hear."

¶ 8 Without asking defense counsel to respond to the prosecutor's proffered reasons for excusing Mr. R, the court found that "the record made by" the prosecutor was both "supported by the evidence" and "sufficient." It therefore denied defense counsel's Batson challenge. (We note that defendant does not assert on appeal that he should have been given an opportunity to rebut the prosecution's reasons.

Rather, he simply states, without more, that the court "did not allow" him to provide a rebuttal. We will not address this contention because it is undeveloped. Whiting-Turner

Contracting Co. v. Guarantee Co. of N. Am. USA, 2019 COA 44, ¶ 47.)

¶ 9 We conclude, for the following reasons, that the record supports the court's decision to deny defense counsel's Batson challenge.

¶ 10 As the Attorney General concedes, we do not need to address the first Batson question in this case because the prosecution offered its reasons for challenging Mr. R, and the court's ruling addressed those reasons. See Valdez, 966 P.2d at 592. We must, nonetheless, address the second and third questions.

¶ 11 Starting with the second Batson question, defendant contends that the prosecution did not state race-neutral reasons for striking Mr. R. We disagree. As our supreme court has repeatedly explained, the bar for answering the second question is "not high," and even unpersuasive and implausible explanations will pass muster so long as they are facially race neutral. Id. at 590; Rodriguez, ¶ 11. In this case, we conclude that the record supports the court's determination that both of the prosecution's tendered reasons for striking Mr. R were facially race neutral.

¶ 12 Moving to the third Batson question, defendant asserts that the court should not have denied his challenge because both of the prosecution's reasons for striking Mr. R were merely pretextual. With respect to the first reason, defendant asserts that the prosecutor did not strike another prospective juror, a Caucasian man, whom we shall call "Mr. P," even though he had been a defendant in a prior criminal case. With respect to the second reason, defendant submits that Mr. R's responses during individual questioning plainly demonstrated that he could understand complex concepts.

¶ 13 Before we address these contentions, we reiterate that a court's answer to the third Batson question — essentially, whether it believes the prosecution's race-neutral explanation — is reviewed for clear error, meaning that we will only set aside the court's findings "when they are so clearly erroneous as to find no support in the record." Beauvais, ¶ 22. Additionally, a court "need not make express findings about th[e] evidence and how it contributes to the court's ultimate ruling," id. at ¶ 32, and this is true no matter whether the party striking the prospective juror offers demeanor- or non-demeanor-based reasons, id. at ¶ 36.

¶ 14 Turning to Mr. R's criminal history, defendant contends that we should conclude that the prosecutor's reason was pretextual because she did not also strike Mr. P from the jury. But this contention has little force because Mr. P did not serve on the jury. See Miller-El v. Dretke, 545 U.S. 231, 241 (2005)("If a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [nonminority] who is permitted to serve, that is evidence tending to prove purposeful discrimination at Batson's third step.")(emphasis added). As it happens, Mr. P was not even one of the twenty-five prospective jurors who were initially questioned, so we do not know whether the prosecutor would have used a peremptory strike to remove Mr. P had she been given the opportunity.

¶ 15 As for the prosecutor's other reason for striking Mr. R — that he offered one-word answers to questions and was, therefore, unlikely to be able to appreciate the nuances of technical evidence — we defer to the court, who both spoke with Mr. R in chambers and to whom the prosecution provided its justification. See Beauvais, ¶ 25 ("The trial judge is . . . in the best position to evaluate a potential juror's demeanor — and that of the striking party — when parties predicate peremptory strikes on the potential juror's demeanor.").

¶ 16 It would have been better practice for the court to have made express credibility findings in this case. See id. at ¶ 33 n.6. Nevertheless, we conclude that (1) the court's decision was supported by at least some evidence in the record, see id. at ¶ 22; and (2) the court was not required to "make express findings about th[e] evidence and how it contribute[d] to the court's ultimate ruling," see id. at ¶ 32, even though the prosecutor's reason was based on Mr. R's demeanor, see id. at ¶ 36.

¶ 17 Last, defendant filed a motion for a new trial. In ruling on it, the court said that, even if the prosecutor had removed two Hispanic prospective jurors — recall that the prosecutor had used a peremptory strike to remove a Hispanic juror before Mr. R. — defendant had not alleged that he was Hispanic. Although factually true, this statement suggested a misunderstanding of the pertinent law. See Powers v. Ohio, 499 U.S. 400, 415 (1991)("To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.").

¶ 18 But, contrary to defendant's contention, we conclude that this apparent misunderstanding of the law did not drive the court's decision to deny the motion for a new trial. Instead, in the very next sentence, the court decided that, "[i]n any event, [it could not] find [a] constitutional challenge based upon [the prosecutor's] exercise of peremptory challenges." (Emphasis added.)

¶ 19 And the court's findings and conclusions when ruling on the Batson challenge during the trial were not tainted by the misunderstanding. We know this is so because, when the prosecutor mistakenly suggested that only a defendant of the same race as a stricken juror could raise a Batson challenge, the court got the law right, responding, "that's not correct." ¶ 20 The judgment is affirmed.

JUDGE DAVIDSON and JUDGE TAUBMAN concur.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	**DATE FILED: March 7, 2022** **CASE NUMBER: 2021SC773**
Certiorari to the Court of Appeals, 2019CA2168 District Court, Weld County, 2016CR2268	
Petitioner: Daniel Mason, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2021SC773
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 7, 2022.