105 Mass.App.Ct. 265
Appeals Court of Massachusetts,
Middlesex.

COMMONWEALTH
v.
Roberto LOPEZ-ORTIZ.

No. 23-P-295
|
Argued March 28, 2024
|
Decided February 12, 2025

Synopsis

Background: Defendant was convicted in the Superior Court Department, Middlesex County, Kathe M. Tuttman, J., of felony-murder in the second degree. Defendant appealed.

Holdings: The Appeals Court, Englander, J., held that:

trial court acted within its discretion in finding that prosecutor's proffered explanation for peremptory challenge of prospective juror was adequate;

trial court acted within its discretion in finding that prosecutor's proffered explanation for peremptory challenge was genuine;

prosecutor's proffered explanation for peremptory challenge of prospective juror, who was Hispanic-American, was race-neutral, and

prosecutor included specific examples of how prospective juror responded to particular questions in proffered explanation for peremptory challenge.

Affirmed.

D'Angelo, J., filed concurring opinion.

Rubin, J., filed dissenting opinion.

See also 105 Mass.App.Ct. 265.

****1071** Constitutional Law, Jury. Jury and Jurors. Practice, Criminal, Jury and jurors, Challenge to jurors.

Indictments found and returned in the Superior Court Department on April 3, 2014.

The cases were tried before Kathe M. Tuttman, J.,

Attorneys and Law Firms

David J. Nathanson, Boston, (Mark W. Shea also present) for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Lori J. Shyavitz, Leah R. McCoy, & Oren Sellstrom, Boston, for Lawyers for Civil Rights & others, amici curiae, submitted a brief.

Present: Rubin, Englander, & D'Angelo, JJ.

Opinion

ENGLANDER, J.

***265** In 2017, the defendant was convicted of felony-murder in the second degree, with the predicate felony being unarmed assault with intent to rob. The murder occurred after the defendant and several accomplices attempted to rob the victim at the victim's apartment in Lowell. On appeal the defendant raises several issues, all but one of which we dispose of this day in an unpublished memorandum and order pursuant to our Rule 23.0.

This opinion addresses the final issue the defendant raises, as to which the panel is not unanimous. The defendant argues that the ***266** prosecutor improperly utilized a peremptory challenge to strike a prospective juror (designated juror no. 3) because of the juror's Hispanic ethnicity, and that the judge erred in allowing that strike over the defendant's objection. The prosecutor provided a lengthy explanation for the strike during jury selection, and the defendant contends that the reasons given were "not race neutral," citing in particular that the prosecutor, in explaining the strike, referenced statements by the juror regarding the apparent lack of Hispanic people in the jury venire. The dissenting judge in this court also claims that the prosecutor's reasons were not race neutral, citing the prosecutor's references to both the jury pool comments, as well as the juror's objection to a question on the juror questionnaire.[1] We perceive no error in the ****1072** judge's decision to allow the peremptory strike. As discussed below the prosecutor's reasons were not based on race, but upon the juror's answers and observed demeanor, which reasons the judge specifically found were both "genuine" and "adequate." As we discern no error, the judgment is affirmed.

1 We acknowledge the amici brief submitted by Lawyers for Civil Rights, the Massachusetts Association of Hispanic Attorneys, the Jewish Alliance for Law and Social Action, and Citizens for Juvenile Justice.

Background. 1. The crime. The evidence at trial showed that on December 18, 2013, the defendant, Roberto Lopez-Ortiz, and three others, including Jonathan Rivera and Donte Okowuga, decided to commit a robbery. Okowuga had two guns, one of which he gave to Rivera prior to the attempted robbery. Testimony differed on whether Rivera thereafter gave the gun to the defendant.

The four men drove to the victim's building and entered it, encountering the victim in the entrance to his apartment. The men entered the apartment, at which time Okowuga pointed a gun at the victim while the other men, including the defendant, attacked him. The victim managed to get away and ran out of the apartment.

Three of the men thereafter left the building. The victim returned to the building, where the fourth man, who had remained just outside the apartment, shot and killed the victim. The defendant testified that Okowuga was the assailant who stayed behind at the victim's apartment, whereas Rivera and Okowuga testified that the defendant had remained behind.[2]

2 As indicated, the jury convicted the defendant of felony-murder in the second degree, with the predicate felony being unarmed assault with intent to rob. They acquitted the defendant of murder in the first degree, armed home invasion, and armed assault with intent to rob.

2. The jury selection process. The trial took place in February ***267** and March of 2017. During the second day of jury empanelment the trial judge directed questions to the venire as a whole, including whether there was "anything about the nature of this case as I've described it to you that would affect your ability to be a fair and impartial juror." Juror no. 3 raised his hand to this question.

The trial judge then questioned juror no. 3 individually, beginning by asking why the juror indicated that the nature of the case might affect his ability to be fair and impartial. Juror no. 3 replied:

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there or anything like that and I feel that he should be, if he's going to be, life and death like that there should be some of his people out there."[3]

3 The defendant was Hispanic and juror no. 3 also identified as Hispanic, as he made clear during his voir dire.

The trial judge clarified that her question was whether there was "anything about the nature of the case as I described it that would affect [juror no. 3's] ability to be a fair and impartial juror," to which juror no. 3 responded, "Oh, no, no, not at all."

The trial judge also inquired about juror no. 3's answer to question 18 on the juror questionnaire, which asked, "Do you believe that Dominicans or Puerto Ricans are more likely to [sic] than other members of ethnic groups to commit crimes?" Juror no. 3 had written: "No. I do not approve of this question." Juror no. 3 replied, "I don't like those questions, I never did, I don't think they're proper at all." The trial judge then explained that the purpose of the question was to determine whether the venirepersons were biased or prejudiced and asked, "Does that help you understand the reason for the question?" Juror no. 3 responded, "Sure."

****1073** The judge asked about a driving under the influence case that the juror disclosed on his confidential juror questionnaire, and asked when it had occurred. Juror no. 3 said, "I had gone to Florida, that was maybe four years ago and one in Maine around '13." The judge asked him, "[H]ow were you treated by the police and the prosecutors who were involved in handling your matters?" The juror replied, "Down in Florida very disgusting." The judge then asked, "And how about in Maine?" to which the juror ***268** responded, "Very nice." The judge asked, "Would your experiences with either of those cases affect your ability to be fair to both sides in this case?" The juror said, "Not at all because I'm in Massachusetts."

The judge then allowed follow-up questioning by the parties, and the prosecutor asked, "If you were seated on the jury and you felt that the rest of the panel did not adequately make up a jury of the defendant's peers; would that affect your ability to be fair and impartial as a juror in this case?" The juror said, "No, not at all, I'd put that aside." The prosecutor then asked, "So, you would be able to put aside any beliefs that you had?" The juror replied, "Yes, I would, correct."

The trial judge found juror no. 3 to stand indifferent, but the prosecutor subsequently challenged the juror for cause. In doing so, the prosecutor stated several reasons:

> "The fact that, I think he gave a number of answers that were troubling. The fact that he had what he described as a disgusting experience when he had an incident in Miami, as well as his initial reaction to the make-up of the jury pool.
>
> "While he did answer a question saying that he could put that aside, he had to think about it for a while. That gives the Commonwealth pause about whether he really can be fair and impartial to both sides in this case given what he came in with. Clearly some dis[d]ain about even the question that is on the questionnaire. And even when you explained to him the reason for the question, I believe it was No. 18, his response was just, 'Sure,' it didn't seem to the Commonwealth that he was satisfied with the reasons why that question was there."

The trial judge declined to excuse juror no. 3 for cause, but concluded her ruling by stating, "If you want to exercise a peremptory you may do so."

The prosecutor then exercised a peremptory challenge. The defendant objected and raised a "Soares" challenge, arguing that the peremptory was based in part on juror no. 3's Hispanic ethnicity. See Commonwealth v. Soares, 377 Mass. 461, 488-489, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Commonwealth v. Sanchez, 485 Mass. 491, 151 N.E.3d 404 (2020). The trial judge stated that she did not find a pattern, and additionally stated that the reasons provided by the Commonwealth for the for-cause challenge ***269** were an adequate and genuine explanation for the peremptory. Out of "an abundance of caution," however, the trial judge asked the prosecutor to state her reasons for the peremptory.

The prosecutor stated:

> "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.
>
> "And while he said that he could put that aside, the Commonwealth does not ****1074** believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this trial, again, having nothing to do with his race, gives the Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory."

The trial judge then explicitly found that the above rationale was both "adequate" and "genuine."

Discussion. On appeal, the defendant argues that the trial judge erred in allowing the Commonwealth to strike juror no. 3. The State and Federal Constitutions forbid a party from exercising a peremptory challenge on the basis of a juror's race. See Soares, 377 Mass. at 486, 488-489, 387 N.E.2d 499. See also Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The court in Soares held that there was "a legitimate and significant role for the peremptory challenge," but that the use of peremptory challenges to exclude members of discrete groups on the basis of that affiliation violated art. 12 of the Massachusetts Declaration of Rights. Soares, supra at 485-486, 488, 387 N.E.2d 499.

The law of peremptory challenges has evolved some since Soares, and can be summarized as follows. If a peremptory ***270** challenge is objected to, the trial judge must apply a burden-shifting analysis. "We generally presume that peremptory challenges are made and used properly during jury selection." Commonwealth v. Kalila, 103 Mass. App. Ct. 582, 587, 223 N.E.3d 1220 (2023), quoting Commonwealth v. Mason, 485 Mass. 520, 529, 151 N.E.3d 385 (2020). A party who challenges a peremptory strike must overcome the presumption of propriety by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Sanchez, 485 Mass. at 511, 151 N.E.3d 404, quoting Johnson v. California, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005).

If the judge finds that the challenging party has met his burden in showing an inference of discrimination, the burden shifts to the party seeking to exercise the peremptory challenge to proffer a "bona fide" nondiscriminatory justification for the peremptory. Kalila, 103 Mass. App. Ct. at 587-588, 223 N.E.3d 1220. A bona fide explanation is one that is both "genuine" and "adequate." Commonwealth v. Maldonado, 439 Mass. 460, 464, 788 N.E.2d 968 (2003). The Supreme Judicial Court explained the standard as follows:

> "An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affyliation' (in this case race), and related to the particular case being tried. Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. An explanation is genuine if it is in fact the reason for the exercise of the challenge....

> An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking." (Emphasis added; citations omitted.)

Id. at 464-465, 788 N.E.2d 968.

We review a judge's decision to allow a peremptory challenge for abuse of discretion (or other error of law). See **1075 Mason, 485 Mass. at 530, 151 N.E.3d 385. An abuse of discretion occurs when the trial judge made "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). In doing so we give great deference to the findings of the trial judge, who saw, heard, and participated in the exchange with the prospective juror. *271 See Kalila, 103 Mass. App. Ct. at 590, 223 N.E.3d 1220, and cases cited ("We of course give deference to the fact finding of trial judges, who see and hear the witnesses and the counsel in real time in the court room").

In this case, the trial judge found that the justification provided by the Commonwealth for its peremptory challenge was both adequate and genuine.[4] As noted, the prosecutor began her explanation by stating that "the Commonwealth does not believe that this juror can be fair to the Commonwealth." It bears emphasis that in response to the judge's question to the venire, "is there anything about the nature of this case as I've described it to you that would affect your ability to be a fair and impartial juror?" the juror himself raised his hand. When asked why, the juror stated:

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there ... and I feel that he should be, if he's going to be, life and death like that there should be some of his people out there."

4 As the trial judge ruled on the ultimate question of whether the Commonwealth's peremptory challenge was discriminatory, her findings as to whether the defendant showed a prima facie case of discrimination are "no longer of consequence." See Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 141, 629 N.E.2d 321, S.C., 418 Mass. 773, 641 N.E.2d 1057 (1994).

The prosecutor cited this answer both times that she provided an explanation for her concerns about the prospective juror, and she cited other answers the juror gave as well. As set forth above, the prosecutor also cited an experience the juror had with police in Florida that the juror described as "disgusting." Further, the prosecutor cited concerns about the manner in which the juror answered questions, which would not be apparent from the cold transcript that we review on appeal. The prosecutor noted that while the juror subsequently stated that he could put aside his concerns about the make-up of the jury pool, the juror "had to think about it for a while." The prosecutor also cited the way the juror responded to questions and statements from the judge, which the prosecutor described as "flippant[ ]."

It was not an abuse of discretion for the judge to find that the above reasons were "adequate"—that is, "clear and reasonably specific, personal to the juror and not based on the juror's group affiliation, ... and related to the particular case being tried" *272 (quotation omitted). Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968. Indeed, a fact-based concern that a juror cannot be fair and impartial is the sine qua non of the pretrial juror evaluation process. Many years ago in Soares, the Supreme Judicial Court reaffirmed the legitimacy of peremptory challenges as a means of "assuring the parties 'that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.' " Soares, 377 Mass. at 485, 387 N.E.2d 499, quoting Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In light of the above answers, the prosecutor may well have been concerned that juror no. 3 **1076 would view the case, not through the lens of the facts presented and the law provided, but through the lens of the race of the defendant and perceived unfairness of the system. The judge could certainly find that such concerns about the impartiality of a prospective juror were not based on race, and are an adequate basis for exercising a peremptory challenge.

The Supreme Judicial Court's opinion in Commonwealth v. Williams, 481 Mass. 443, 116 N.E.3d 609 (2019), supports this conclusion. In Williams, a prospective juror was excused for cause after saying that she believed "the system is rigged against young African American males." Id. at 444, 116 N.E.3d 609. The court held that the judge's assessment of the juror's impartiality was "incomplete," because the judge's questioning had failed to recognize that the juror's general belief about the system would not necessarily render her incapable of being impartial in the case at bar—more questioning was required. Id. at 446-447, 116

N.E.3d 609. However—and importantly for this case—the court held that the defendant was not prejudiced by the exclusion of the juror for cause, because the Commonwealth had a peremptory challenge available for use at the end of jury selection, which challenge could have been used for the prospective juror. Id. at 453-454, 116 N.E.3d 609. In so holding, the court implicitly recognized that although the juror's expressed belief that the criminal justice system is rigged against a racial group was insufficient to excuse a juror for cause, such an expressed belief would be an adequate basis to exercise a peremptory challenge. See id.[5]

5 The dissent contends that our citation to Williams is inapt because Williams is not a Soares case, and does not discuss the race of the prospective juror. The dissent states that the Williams court "certainly did not opine on whether that peremptory strike would survive a possible Soares claim if the juror were a person of color." Post at 293, 252 N.E.3d at 1090 (Rubin, J., dissenting). But Williams does indicate that striking a juror based on the juror's expressed belief that the criminal justice system is rigged is not racially discriminatory on its face (i.e., is race neutral); the relevance of Williams is that the court's opinion indicates that the reason given would have been an adequate basis for a peremptory challenge—regardless of the race of the prospective juror.

***273** In short, the trial judge did not abuse her discretion, or commit an error of law, in finding and ruling that the prosecutor's reasons were adequate.[6]

6 There also was no error in the judge's finding that the prosecutor's reasons were genuine. The trial judge is uniquely positioned to make a determination as to genuineness, while the appellate courts are not. See Maldonado, 439 Mass. at 466, 788 N.E.2d 968 ("while appellate courts may be equipped to some extent to assess the adequacy of an explanation, they are particularly ill-equipped to assess its genuineness"). Here the defendant urges us to conclude on appeal that the prosecutor acted from discriminatory intent, and that the intent was shown by alleged misstatements of the record and differential questioning of juror no. 3. Based on our review of the prosecutor's statements, we perceive no clear error in the trial judge's finding that the prosecutor's justifications were genuine.

The defendant argues that the prosecutor's concern as to juror no. 3's impartiality derived from the fact that juror no. 3 and the defendant were both Hispanic, and thus that the prosecutor's concern was "not race neutral," because "the prosecutor's argument assumed that the juror's shared race would cause him to be biased." The defendant's argument, however, misstates what the prosecutor said and what the judge found. The prosecutor stated that her concerns arose from juror no. 3's statements regarding the makeup of the venire and thus the possible unfairness of the trial, the juror's prior experiences with the police, and also the manner in which the juror answered questions. ****1077** These concerns arose out of facts personal to the juror, and the judge found them adequate and genuine. See Maldonado, 439 Mass. at 464, 788 N.E.2d 968. The record does not show that the prosecutor's concern as to impartiality was based upon juror no. 3's race.[7]

7 The prosecutor's comments appear to be directed in part at the juror's demeanor throughout questioning, and the prosecutor referenced specific examples of the juror's demeanor several times in the reasons she stated to the judge. As noted, the judge found these reasons genuine. The judge correctly noted that the Commonwealth may "make a decision on the basis of body language and other observable characteristics of a potential juror, that they may interpret differently from the [c]ourt." See Commonwealth v. Caldwell, 418 Mass. 777, 779, 641 N.E.2d 1054 (1994) ("A juror's demeanor and reactions during the voir dire may constitute a sufficient basis for peremptory removal .... However, the prosecutor must have articulated, on the record, an explanation for the challenge that was not vague and general"). See also Williams, 481 Mass. at 453, 116 N.E.3d 609 ("Judges are expected to, and indeed must, use their discretion and judgment to determine whether a prospective juror will be fair and impartial based on verbal and nonverbal cues" [emphasis added]).
Here, the prosecutor's references to demeanor were not vague and general, but involved specific examples of how the juror responded to particular questions. These details allowed the judge to evaluate the genuineness of the reasons given.

The dissent goes all out in criticizing the result we reach, but the dissent suffers from several basic flaws. Most importantly, the ***274** dissent ignores the findings of the trial judge, treating them as irrelevant. But we are not engaged in de novo review. The question of counsel's "genuineness" is a question of fact. See Maldonado, 439 Mass. at 465, 788 N.E.2d 968 ("An explanation is genuine if it is in fact the reason for the exercise of the challenge"). The question of "adequacy" is more of a mixed question of law and fact, but there can be no denying that the adequacy determination has a significant factual component; in making an adequacy determination a trial judge must determine and evaluate what reasons are actually being advanced, based on a

colloquy with counsel (and often, the juror) that is unstructured and often shifting. Most important, the ultimate question for the judge is whether the party's strike was "motivated ... by," or "based on" the prospective juror's race (here, ethnicity). See Flowers v. Mississippi, 588 U.S. 284, 303, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019), quoting Foster v. Chatman, 578 U.S. 488, 513, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) ("The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent' "); Commonwealth v. Burnett, 418 Mass. 769, 771, 642 N.E.2d 294 (1994). The question of motivation is fundamentally a question of fact, and the trial judge is far better positioned to make that determination than we are on appellate review.[8] See Burnett, supra ("the judge must ... decide whether the challenges ****1078** were exercised improperly because ***275** they were based on the juror's membership in a discrete group. Once the judge decides that an adequate reason exists for exercising the challenge, an appellate court will accord substantial deference to the decision if it is supported by the record").[9]

8 The dissent nevertheless claims that the question whether a proffered justification is "race neutral" is reviewed de novo, citing primarily Federal cases dealing with the second "step" of the Federal Batson analysis. But under the Federal analysis that second step review is quite limited—an appellate court reviews counsel's stated reasons only for whether those reasons are racially discriminatory (that is, not "race neutral") on their face. The United States Supreme Court has stated the test thusly:

> "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this 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." (Emphasis added.)

Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). See Purkett v. Elem, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (quoting with approval the Hernandez plurality opinion and stating "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"). No case suggests a more searching de novo review under Massachusetts law.

While the dissent appears to be arguing, at least in part, that it considers the prosecutor's stated reasons to be discriminatory on their face, that position cannot be squared with the tests, or the holdings, of Hernandez and Purkett. The prosecutor's stated reasons here addressed juror no. 3's impartiality as evidenced by his answers and demeanor; the prosecutor's statements cannot be said to demonstrate discriminatory intent on their face.

9 The dissent's reliance on Commonwealth v. Prunty, 462 Mass. 295, 968 N.E.2d 361 (2012), is misplaced for precisely this reason. Prunty is a case where the trial judge declined the defendant's peremptory challenge of a juror, finding that defense counsel's reasons were in fact based on race. Id. at 302, 968 N.E.2d 361. In affirming, the Supreme Judicial Court emphasized the need to defer to the trial judge's findings—as we do here. See id. at 309-314, 968 N.E.2d 361.

Unconstrained by the judge's findings, the dissent conducts its own de novo review of what the prosecutor said. For example, the dissent states that "in this Commonwealth where a Latino man is struck for expressing concern about an all-white[10] jury hearing a Latino's murder trial, that strike is 'based on race.' " Post at 291, 252 N.E.3d at 1089 (Rubin, J., dissenting). But this statement is erroneous on two fronts. First, the dissent's characterization is not a fair summary of what the prosecutor actually said. As discussed above, the prosecutor was concerned about the substance and manner of the juror's answers to several questions, writ large. The prosecutor specifically cited, for example, the juror's demeanor when he was asked if he could "put ... aside" the make-up of the jury pool. Picking through paragraphs of reasons to isolate two of the prosecutor's statements takes them out of their larger context and recasts the thrust of the prosecutor's expressed concerns. And second, the dissent is wrong when it suggests that its proposition must be accepted as a matter of law. Rather, under our cases the prosecutor's statements must be evaluated for whether the strike is motivated by race, and we as an appellate court do not do our own fact finding. The trial judge found that the reasons given were genuine and adequate, and on this record that was neither an ***276** abuse of discretion nor an error of law.[11]

10 As is reflected in the transcript, the jury venire was not "all-white," and it appears the petit jury was not either, although the record as to the race of the jurors is by no means complete.

11 There are places where the dissent seems to be suggesting that the prosecutor's reasons were not "race neutral" for the simple reason that the prosecutor referenced answers by the juror that discussed race (ethnicity). The dissent's reasoning in this regard is faulty. If, as here, a juror (or a questionnaire) raises issues of race or ethnicity, the prosecutor is not precluded from addressing the juror's statements, as they might bear on the juror's ability to be impartial. As indicated, the actual question for the judge is whether the

strike was motivated by, or "based on," race. See Flowers, 588 U.S. at 303, 139 S.Ct. 2228; Burnett, 418 Mass. at 771, 642 N.E.2d 294. The fact that a party references issues of race raised by a juror during the colloquy of course does not ipso facto render the party's reasons discriminatory, or not "race neutral." As discussed in note 8, supra, "race neutral" simply means an explanation that is not based on (motivated by) the race of the juror; it is not some new and different standard for determining whether a peremptory strike is appropriate.

**1079 In sum, the trial judge did not err in allowing the Commonwealth's peremptory challenge of juror no. 3. The judgment and the order denying the renewed motion for a new trial are affirmed.

So ordered.

D'ANGELO, J. (concurring)

Because we grant great deference to the trial judge's findings on whether a permissible ground for a peremptory challenge has been shown, I feel constrained to concur in the majority's decision. See Commonwealth v. Kalila, 103 Mass. App. Ct. 582, 590, 223 N.E.3d 1220 (2023) ("We of course give deference to the fact finding of trial judges, who see and hear the witnesses and the counsel in real time in the court room"). I, like Justice Lowy in his concurring opinion in Commonwealth v. Sanchez, write separately to urge the Supreme Judicial Court to reevaluate the three-step analysis established in Commonwealth v. Soares, 377 Mass. 461, 492, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Sanchez, 485 Mass. 491, 151 N.E.3d 404 (2020), and eliminate the first step requiring a prima facie showing that a challenge is based on race or other protected status. See Sanchez, supra at 517, 151 N.E.3d 404 (Lowy, J. concurring). Additionally, I wish to emphasize the need for clear and concise findings in matters related to alleged race-based challenges during jury selection.

Discussion. 1. Batson-Soares challenges. Article 12 of the Massachusetts Declaration of Rights, and the Sixth and Fourteenth Amendments to the United States Constitution, guarantee a criminal defendant "the right to a trial by an impartial jury." Commonwealth v. Susi, 394 Mass. 784, 786, 477 N.E.2d 995 (1985). See *277 Soares, 377 Mass. at 492, 387 N.E.2d 499. Pursuant to these same protections, the Commonwealth may not exercise a peremptory challenge on the basis of race or other protected classes. See Sanchez, 485 Mass. at 493, 151 N.E.3d 404.[1]

1 See Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

"A challenge to a peremptory strike, whether framed under State or Federal law, is evaluated using a [three-step] burden-shifting analysis" (quotation and citation omitted). Commonwealth v. Ortega, 480 Mass. 603, 606, 106 N.E.3d 675 (2018). "First, the burden is on the objecting party to establish a 'prima facie showing of impropriety' sufficient to 'overcome[ ] the presumption of regularity afforded to peremptory challenges.' " Commonwealth v. Henderson, 486 Mass. 296, 311, 157 N.E.3d 1277 (2020), quoting Commonwealth v. Robertson, 480 Mass. 383, 390-391, 105 N.E.3d 253 (2018). If the judge finds that a prima facie case has been established, "the burden shifts to the party attempting to strike the prospective juror to provide a group-neutral reason for doing so." Commonwealth v. Jones, 477 Mass. 307, 319, 77 N.E.3d 278 (2017). Finally, the judge must "evaluate[ ] whether the proffered reason is adequate and genuine" (quotation and citation omitted). Robertson, supra at 391, 105 N.E.3d 253.

Trial judges have extraordinary tasks during jury trials. Selecting a jury can be time consuming and arduous depending on the circumstances. Currently, in determining whether a prima facie case of discriminatory impropriety has been established, a judge must consider all relevant circumstances, including all of the excluded jurors and the similarities in their race, differences compared to the challenged juror, and the composition of the jurors already seated. See **1080 Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This can prove a herculean task—especially if jury selection spans numerous days. Much of our appellate analysis over the years has been spent deciding whether a judge abused their discretion in finding that a prima facie showing has been made.[2]

2 See Robertson, 480 Mass. at 390, 105 N.E.3d 253 (reviewing "judge's finding that there was no prima facie showing of a discriminatory pattern for an abuse of discretion"); Jones, 477 Mass. at 325, 77 N.E.3d 278 (determining judge abused her discretion in finding that defendant made necessary prima facie showing of discrimination); Commonwealth v. Issa, 466 Mass. 1, 11, 992 N.E.2d 336 (2013) (concluding "judge did not abuse his discretion in finding that the defendant had fallen short of making a prima facie case of bias"); Commonwealth v. Lugo, 104 Mass. App. Ct. 309, 313, 237 N.E.3d 1206 (2024) (reviewing "judge's decision relative to a peremptory challenge for an abuse of discretion"); Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 843, 43 N.E.3d 340 (2016) (determining judge did not abuse his discretion in finding that "a prima facie showing of impropriety was made").

***278** Additionally, the first step in the analysis forces judges to find "that the challenging attorney may have engaged in discriminatory conduct." Sanchez, 485 Mass. at 517, 151 N.E.3d 404 (Lowy, J., concurring). Such a task "often requires the judge to make a finding of discriminatory intent concerning an attorney whose ability and integrity the judge respects based on years of the judge's experience." Id. "One can understand a judge's reticence to do so, and perhaps even a fellow attorney's as well, in the face of what appears to be minimal evidence of discriminatory purpose." Id.

Recently, the Supreme Judicial Court described the first step of the analysis in greater detail:

> "As to the first step of the Batson-Soares inquiry, the presumption of propriety is rebutted when the totality of the relevant facts gives rise to an inference of discriminatory purpose. Specifically, the inquiry is merely a burden of production, not persuasion. Because establishing a prima facie case of impropriety is not an onerous task, we have long cautioned that judges should think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact." (Quotations and citations omitted.)

Commonwealth v. Carter, 488 Mass. 191, 196, 172 N.E.3d 367 (2021).

Notably, however, the court has "persistently urged, if not beseeched" judges to elicit group-neutral explanations regardless of whether the first prong of the inquiry has been satisfied. Sanchez, 485 Mass. at 515, 151 N.E.3d 404 (Lowy, J., concurring).

Judges, like the one in this case, should not spend time determining whether the burden of persuasion of step one has been met. It is often a time consuming, clumsy, and difficult endeavor. Therefore, it is time for the first step of this analysis to be eliminated.[3] Once an attorney objects to a ****1081** peremptory challenge ***279** arguing that it is race based, the burden should immediately shift to the challenging party. If the challenge is not race based, the attorney who seeks to have the juror excluded should immediately provide the reason. This should not be difficult because there should not be any discriminatory intent involved. The judge should carefully observe what happens next, because

> "[t]he [attorney's] own demeanor—the furtiveness of a glance, the hesitation in giving a response, or the frantic reading of the juror questionnaire before proffering an explanation may provide valuable clues as to whether even a sound reason for the challenge is genuine or merely a post hoc justification for an impermissibly motivated challenge."

Commonwealth v. Maldonado, 439 Mass. 460, 466, 788 N.E.2d 968 (2003).

3 Other States have eliminated step one of the analysis in order to combat race-based peremptory challenges. Some have gone further and created presumptively invalid reasons for a peremptory challenge. This concurrence merely suggests eliminating step one. It does not attempt to go further as other States have done.
Washington adopted a court rule listing presumptively invalid reasons for a peremptory challenge. See Wash. Rule of General Application 37(h) (2018). Subsequently, California passed legislation with the same sentiment: to provide a list of reasons "presumed to be invalid" for a peremptory challenge. See Cal. Civ. Pro. Code § 231.7(e) (effective 2020). In 2022, the New Jersey Supreme Court amended its rules of court to include a list of "reasons [that] are presumptively invalid" as a justification for a peremptory challenge. N.J. R. 1:8-3A (2022 comment).

In this case, the trial judge went to great lengths to decide whether a prima facie showing was made and reiterated this fact repeatedly. The judge emphasized that she did not find a pattern in the challenges. Under this suggested approach to eliminate the first inquiry following the invocation of a peremptory challenge, the judge would turn to the challenging party to provide the reason(s) for the challenge immediately. Such an approach would spare the judge from the complicated and difficult inquiry

into the objecting party's prima facie showing. Instead, it would place the burden on the challenging party to immediately give an answer as to why they challenged the juror.

2. Findings. Ultimately, the trial judge has the difficult task of making factual and credibility determinations of an attorney's explanation for a peremptory challenge. See Commonwealth v. Prunty, 462 Mass. 295, 313, 968 N.E.2d 361 (2012) (judge's decision on ultimate question of discriminatory intent represents finding of fact). The Supreme Judicial Court has explained that

> "[t]he determination whether an explanation is bona fide entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how sound it might appear) is the actual motivating force behind the challenging party's decision. In other words, the judge must decide whether the explanation is both adequate and genuine.
>
> ***280** "An explanation is adequate if it is clear and reasonably specific, personal to the juror and not based on the juror's group affiliation ... and related to the particular case being tried. Challenges based on subjective data such as a juror's looks or gestures, or a party's gut feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation. An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking." (Quotations and citations omitted.)

Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968.

Therefore, a judge is "obligated to make a specific determination or specific findings, in some form" regarding the adequacy and genuineness of an attorney's proffered reasons for a peremptory challenge. Commonwealth v. Benoit, 452 Mass. 212, 221, 892 N.E.2d 314 (2008).

In this case, the trial judge requested that the prosecutor provide a race-neutral reason for exercising a peremptory challenge as to juror no. 3. The Commonwealth responded:

> ****1082** "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.
>
> "And while he said that he could put that aside, the Commonwealth does not believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this ***281** trial, again, having nothing to do with his race, gives the Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory."

The majority writes that, "[i]n this case, the trial judge found that the justification provided by the Commonwealth for its peremptory challenge was both adequate and genuine." Ante at 271, 252 N.E.3d at 1075. Although the judge did use that phraseology, it was primarily in conjunction with the judge's initial finding that there had not been a showing of prima facie pattern. Specifically, the judge stated:

> "That said, I will state that in the Court's view based on what [the prosecutor] already said about her reasons for requesting an excuse for cause of this juror, although I didn't find it sufficient for a basis for cause I do find it sufficient if I were to find a pattern I would find there was an adequate and genuine rationale that has nothing to do with the ethnicity of this juror because of the reasons [the prosecutor] put on the record previously. So, that is my ruling, I am not finding a pattern.
>
> "...

> "Okay, but, [defense counsel], remember I have not asked the Commonwealth to justify their exercise of a peremptory because I have not found that a pattern has been established, so that's where we are in terms of this exercise. What I did state was, if we got to that point I was persuaded that there was an adequate and genuine reason. We haven't even gotten to that point because on the record that is before me based on my observations of this juror and the entire course of this empanelment, I am not persuaded that there is a pattern."

I agree that it was not an abuse of discretion for the judge to find that the above reasons were "adequate." However, the judge should have made more clear and concise findings regarding the prosecutor's reasoning regarding the challenge. The judge simply concluded that "the Commonwealth [was] entitled to make a decision on the basis of body language and other observable characteristics of a potential juror." The judge went on: "[T]he Commonwealth ... may exercise a peremptory on the basis of information that they legitimately believe would make that person a juror who could not be fair to both sides."

***282** When an attorney challenges a juror—even partially—based on their answers being "flippant[ ]" or on their attitude, the judge should make specific and clear findings. Demeanor-based reasons "should rarely be accepted as adequate because such explanations can easily be used as ****1083** pretexts for discrimination." Maldonado, 439 Mass. at 465-466, 788 N.E.2d 968. Based on a transcript alone, an appellate court cannot ascertain the veracity of the attorney's perceptions. Thus, we need the benefit of substantial judicial findings regarding observations made of the jurors and attorney alike.

RUBIN, J. (dissenting).

As the court majority correctly indicates, a peremptory challenge based even in part on race or ethnicity violates the State and Federal constitutional rights of the defendant.[1] Race- or ethnicity-based challenges (what courts refer to collectively as race-based challenges) are so serious a matter, that "a Batson-Soares error constitutes structural error" requiring in every case vacatur of the conviction and a new trial. Commonwealth v. Jones, 477 Mass. 307, 325-326, 77 N.E.3d 278 (2017).[2]

1 See Foster v. Chatman, 578 U.S. 488, 513 n.6, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) (noting that Supreme Court had "not previously allowed the prosecution to [prevent invalidation of a strike by] show[ing] that 'a discriminatory intent [that] was a substantial or motivating factor' behind a strike was nevertheless not 'determinative' to the prosecution's decision to exercise the strike" [citation omitted]); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (equal protection clause, which prohibits intentional racial discrimination, "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes"); Commonwealth v. Long, 485 Mass. 711, 726, 152 N.E.3d 725 (2020) (where traffic stop is "motivated at least in part by race" it "violate[s] the equal protection principles of arts. 1 and 10" of Massachusetts Declaration of Rights); id. at 736, 152 N.E.3d 725 (Gants, C.J., concurring) ("it is the unanimous view of this court that ... judges should suppress evidence where a motor vehicle stop is motivated, even in part, by the race of the driver or passenger").

2 The Supreme Judicial Court has abandoned any distinction between discrimination on the basis of race and discrimination on the basis of ethnicity. See Commonwealth v. Colon, 482 Mass. 162, 179, 121 N.E.3d 1157 (2019).

In this case, at least some of the prosecutor's given reasons for her peremptory challenge were race based, not race neutral. That should be the end of the inquiry. Other arguably race-neutral reasons, whether legitimate or not, put forward by the prosecutor do not protect the peremptory strike from invalidation, or disentitle the defendant to a new trial with a jury selection process not tainted by a peremptory challenge in part motivated by race.

To reach the contrary result, the court majority abdicates our well-settled responsibility to determine which proffered reasons ***283** are race-or other protected group-based. Contrary to the teaching of the Supreme Judicial Court, the majority explicitly renders the protection in this Commonwealth against racial discrimination in jury selection weaker, eliminating decades of antidiscrimination law by freeing a party from the need to articulate a race- or other group-neutral explanation for its peremptory strike after a judge has found a prima facie case of discrimination. See ante at n.6. It thus critically weakens the protections against discrimination set out by the Supreme Judicial Court in Commonwealth v. Soares, as broadened in Commonwealth

v. Sanchez, and these cases' progeny. See Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Commonwealth v. Sanchez, 485 Mass. 491, 511, 151 N.E.3d 404 (2020). Given this court's unfortunate and unwarranted action, it will be up to the Supreme Judicial Court to restore Massachusetts antidiscrimination law to what it was before today's decision.

**1084 Background. To begin with, the facts of the crime of which the defendant was convicted are described in part in the body of the majority opinion in a way that may cast him in a false light. To the extent that any the facts are relevant, the jury in this case concluded that the defendant was not armed and was not the shooter. He was acquitted of murder in the first degree, armed home invasion, and armed assault with intent to rob. He was convicted, rather, of unarmed assault with intent to rob, and, with that as the predicate crime, felony-murder in the second degree, a judge-made crime "of questionable origin," that "eroded the relation between criminal liability and moral culpability," and that ceased to exist in this Commonwealth 187 days after the defendant's conviction, but for which he was sentenced to, and is now serving a sentence of, life imprisonment (quotations and citations omitted). Commonwealth v. Brown, 477 Mass. 805, 825, 826, 832, 81 N.E.3d 1173 (2017).

1. Facts about jury selection. During the general voir dire portion of jury empanelment, juror no. 3 raised his hand in response to a question about whether anything about the nature of the case would affect his ability to be fair and impartial. When asked by the judge at individual voir dire why he raised his hand, the juror said,

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there or anything like that and I feel that he should *284 be, if he's going to be, life and death like that there should be some of his people out there."

When the judge pointed out, "The question though was there anything about the nature of the case as I described it that would affect your ability to be a fair and impartial juror," the juror said, "Oh, no, no, not at all."

The judge asked the juror to explain the extent of his contact with persons of Hispanic descent. The juror said,

> "Well, I'm 100 percent Puerto Rican and I try, you know, it's, I grew up here as a young kid so I'm kind of, how would you say, not pro this or pro that because now I don't appear to be Hispanic, but I've gone through my life having to deal with something like that so."

The judge clarified that the question was what sources of contact the juror had had with persons of Hispanic descent, and he said, "Oh, family, friends, music, everything, I try to stay into the community still."

The judge said, "Question 18 asks, 'Do you believe that Dominicans or Puerto Ricans are more likely ... than other members of ethnic groups to commit crimes?' You checked, 'No. I do not approve of this question.' " The juror replied, "Yeah, I don't like those questions, I never did, I don't think they're proper at all." The judge explained the need for the question was to ensure that no one had a personal bias or prejudice that might make them unqualified to serve. She then asked, "Does that help you understand the reason for the question?" The juror responded, "Sure."

The judge asked the juror about a driving under the influence case that was mentioned on the confidential juror questionnaire, and asked when it occurred. The juror said, "I had gone to Florida, that was maybe four years ago and one in Maine around '13." The judge asked him, "[H]ow were you treated by the police and the prosecutors who were involved in handling your matters?" The juror replied, "Down in Florida very disgusting." The judge then asked, "And how about in Maine?" to which the juror responded, "Very nice." The judge asked, "Would your experiences with either of those cases affect your ability **1085 to be fair to both sides in this case?" And the juror said, "Not at all because I'm in Massachusetts."

The judge then allowed follow-up questioning by the parties, and the prosecutor asked, "If you were seated on the jury and you *285 felt that the rest of the panel did not adequately make up a jury of the defendant's peers; would that affect your ability to be fair and impartial as a juror in this case?" The juror said, "No, not at all, I'd put that aside." The Commonwealth then asked, "So, you would be able to put aside any beliefs that you had?" The juror replied, "Yes, I would, correct." The judge found that the juror could be fair and impartial and that he stood indifferent.

The Commonwealth moved to strike the juror for cause on the ground "that he had what he described as a disgusting experience when he had an incident in Miami, as well as his initial reaction to the make-up of the jury pool." The judge found the juror fair and impartial and that he stood indifferent, and she denied the motion. The prosecutor then exercised a peremptory challenge.

The defendant objected on Batson-Soares grounds. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Soares, 377 Mass. at 486, 387 N.E.2d 499. The judge said she found no "pattern" of discrimination, also stating, "I do recognize a pattern can be demonstrated with a single challenge." The defendant requested that the judge ask the Commonwealth its race-neutral reason for the challenge. The judge said, "I'm not persuaded there is a pattern but in abundance of caution I will ask the Commonwealth to state its reasons for the record." The prosecutor then responded:

> "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.
>
> "And while he said that he could put that aside, the Commonwealth does not believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this trial, again, having nothing to do with his race, gives the ***286** Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory." (Emphases added.)

Without any further questioning and without any specific factual findings, the judge said, "I find that the Commonwealth has identified, for the same reasons they previously identified, a rationale for the exercise of this peremptory that is both adequate and genuine."

Discussion. The procedure for addressing a Batson-Soares challenge to a peremptory strike is well known. "A challenge to the peremptory strike of a potential juror is subject to a three-step burden-shifting analysis. See Batson, 476 U.S. at 94-95 [106 S.Ct. 1712]; Soares, 377 Mass. at 489-491 [387 N.E.2d 499]." Commonwealth v. Jackson, 486 Mass. 763, 768, 162 N.E.3d 48 (2021). In the usual case, "[f]irst, to rebut the presumption that the ****1086** strike was proper, the challenger must make out a prima facie case that it was impermissibly based on race or other protected status by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (quotation and citations omitted). Id. Second, if the challenger makes that showing, the burden shifts to the party exercising the challenge to provide a "race-neutral" (or other-protected "group-neutral") explanation for it. Id. See Commonwealth v. Carter, 488 Mass. 191, 192, 172 N.E.3d 367 (2021). "Third and finally, the judge must then determine whether the explanation is both 'adequate' and 'genuine' " (quotation and citation omitted). Jackson, supra at 768, 162 N.E.3d 48.

Trial judges are "strongly encouraged to ask for an explanation as questions are raised regarding the appropriateness of the challenges. A judge has the broad discretion to do so without having to make the determination that a pattern of improper exclusion exists" (quotation and citations omitted). Commonwealth v. Lopes, 478 Mass. 593, 598, 91 N.E.3d 1126 (2018). Where, as in this case, the Commonwealth has given a purportedly race-neutral explanation for a challenged peremptory strike, and the trial judge has ruled on whether the strike was motivated by race, "the preliminary issue of whether the defendant had made a prima facie showing"—on appeal what is ordinarily required at the first step of the analysis—"becomes moot." Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 141-142, 629 N.E.2d 321, S.C., 418 Mass. 773, 641 N.E.2d 1057 (1994), quoting Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion of Kennedy, J., in which Rehnquist, C.J., and White and Souter, JJ., joined).

The initial question we face therefore is the second-step one, whether the reasons put forward by the Commonwealth for the ***287** strike are race neutral. As described above, see supra at —— & n.1, 252 N.E.3d at —— & n.1, a strike motivated even

in part by race is impermissible. We "make our own [de novo] determination whether the Commonwealth's reasons for the challenge were race-neutral" (citation omitted). Commonwealth v. Rodriguez, 457 Mass. 461, 473, 931 N.E.2d 20 (2010). See Paulino v. Harrison, 542 F.3d 692, 699 (9th Cir. 2008) ("At Batson's second step, the question of whether the state has offered a 'race-neutral' reason is a question of law that we review de novo"); United States v. Mulero-Algarin, 535 F.3d 34, 39 (1st Cir. 2008) ("A district court's determination of the facial adequacy of the government's proffered explanation for withholding a substantial assistance motion presents a question of law that, logically, engenders de novo review"); United States v. Smith, 534 F.3d 1211, 1226 (10th Cir.), cert. denied, 555 U.S. 1058, 129 S.Ct. 654, 172 L.Ed.2d 631 (2008) ("When considering a Batson claim, we review de novo whether the proffered explanations were race-neutral").

The majority's first error, and one that substantially weakens the protection of defendants and jurors against race-based peremptory strikes, is its rewriting of the law articulated in innumerable cases over several decades to eliminate the requirement that in the face of a prima facie case of discrimination, or on request of the judge, the party seeking to strike the juror state a race-or other group-neutral explanation for the strike. See Commonwealth v. Grier, 490 Mass. 455, 458, 191 N.E.3d 1003 (2022) (party defending challenge must provide "group-neutral explanation"); Commonwealth v. Kozubal, 488 Mass. 575, 581, 174 N.E.3d 1169 (2021), cert. denied, —— U.S. ——, 142 S. Ct. 2723, 212 L.Ed.2d 787 (2022) (same); Commonwealth v. Carter, 488 Mass. 191, 196, 172 N.E.3d 367 (2021) (same); ****1087** Commonwealth v. Sanchez, 485 Mass. 491, 493, 151 N.E.3d 404 (2020) (same); Commonwealth v. Long, 419 Mass. 798, 807, 647 N.E.2d 1162 (1995) ("group-neutral reason"). This requirement has been part of antidiscrimination law for decades. See, e.g., Trevino v. Texas, 503 U.S. 562, 565, 112 S.Ct. 1547, 118 L.Ed.2d 193 (1992) (Batson "announced the now familiar rule that when a defendant makes a prima facie showing that the State has exercised its peremptory challenges to exclude members of the defendant's racial group, the State bears the burden of coming forward with a race neutral justification"). Yet the court eliminates the requirement that at the second step of analysis the party defending the strike articulate a race-or group-neutral justification for it. See ante at ——, 252 N.E.3d at ——. The court majority writes instead that "[i]f the judge finds that the challenging party has met his burden in showing an inference of discrimination, the burden shifts to the party seeking to exercise ***288** the peremptory challenge to proffer a 'bona fide' nondiscriminatory justification for the peremptory challenge. Kalila, 103 Mass. App. Ct. at 587-588, 223 N.E.3d 1220. A bona fide explanation is one that is both 'genuine' and 'adequate.' Commonwealth v. Maldonado, 439 Mass. 460, 464, 788 N.E.2d 968 (2003)." Ante at 270, 252 N.E.3d at 1074. The court's entire analysis then purports to relate only to genuineness and adequacy.

As myriad cases, including those quoted above, hold, in order for the party defending the strike to meet its step-two burden under Soares, and for there even to be a need to proceed to step three of the analysis, its articulated justification must be race or other group neutral. See Sanchez, 485 Mass. at 493, 151 N.E.3d 404 (under both State and Federal law, proffered reason must be "group neutral"—if it is, judge must determine whether it is adequate and genuine). The majority never considers whether the proffered reasons given by the prosecutor were "race neutral" or "group neutral," in its entire analysis. In a final footnote the majority states, again contrary to law, that the phrase "race neutral" refers not to the proffered justification, but to the judge's ultimate conclusion about whether there was discriminatory intent. Indeed, the majority suggests that applying step two of the Batson-Soares analysis as it has been articulated for decades to require a race-neutral justification for the peremptory strike before proceeding to the questions of genuineness and adequacy, would be to implement "a new and different standard." Ante at 271 n.11, 252 N.E.3d at 1078 n.11. The majority's suggestion of unfamiliarity with step two of the Batson-Soares analysis is, to say the least, difficult to understand.

In response to this dissent, the majority does drop a footnote where it states that the "second step review is quite limited - an appellate court reviews counsel's stated reasons only for whether those reasons are racially discriminatory (that is, not 'race neutral') on their face. But that review is quite limited." Ante at 274 n.8, 252 N.E.3d at 1077 n.8. This incorrect assertion, however, that at the second step we look at the proffered reasons only "on their face" is just another elliptical way of eliminating the careful, de novo review of those reasons at the second step required under the law of this Commonwealth to prevent racial discrimination in jury selection. See, e.g., Commonwealth v. Prunty, 462 Mass. 295, 313, 968 N.E.2d 361 (2012) ("An explanation that is 'race neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice" [citation omitted]). Indeed, even the Supreme Court plurality that the majority cites for its supposed statement of law

recognized that some facially race-neutral proffered justifications will not meet the requirement of ***289** step two because they must "be treated as a surrogate for race." Hernandez, 500 U.S. at 371, 111 S.Ct. 1859 (plurality opinion).

****1088** The court further insists that we are not engaged in de novo review because the race neutrality of a given proffered reason is not a question of law to be reviewed de novo, but one of fact, requiring deference to the trial judge's conclusion. See ante at 274 n.8, 252 N.E.3d at 1077 n.8. This is a serious error. It amounts to an abdication of our long-settled role in protecting against discrimination by engaging in de novo appellate review of the race-neutrality of proffered justifications for a peremptory challenge when a prima facie case has been made out that it is racially discriminatory.

This is, indeed, a particularly inapt case in which to announce incorrectly that we must defer to the trial judge's finding of race neutrality because it is a question of fact, since the judge here did not, in fact, find each of the Commonwealth's reasons race neutral. The entire finding of the trial judge given after the Commonwealth proffered its justifications for the strike is quoted above: "I find that the Commonwealth has identified, for the same reasons they previously identified, a rationale for the exercise of this peremptory that is both adequate and genuine." A close reading of the majority opinion reveals that it is these findings of adequacy and genuineness to which the court defers –- not a finding, that it ultimately does not claim was made, that each reason was race neutral.

Having skipped the critical question of reviewing whether the reasons given were as a matter of law race-neutral –- indeed having stripped the question from the legal analysis –- the court majority focuses as described only on what it calls the "factual findings" of the trial judge with respect to the genuineness and adequacy of the prosecutor's proffered reasons for the strike. Ante at ——, 252 N.E.3d at ——.

But these are questions that may not properly be reached if the party exercising the strike has not, at the previous step of analysis, met its burden by proffering race-neutral reasons for the strike. See supra at ——, 252 N.E.3d at —— (quoting description of proper procedure in Jackson, 486 Mass. at 768, 162 N.E.3d 48). Of course this makes sense. If a race-based (rather than race-neutral) reason is "genuine," which is indeed a question of fact, it is not a permissible basis for a peremptory strike. As for adequacy, the court majority concedes that it contains subsidiary questions of law. But one of them, in fact, is whether the proffered reason is race neutral. Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968 ("An explanation is adequate if it is 'clear ***290** and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' [in this case race] ... and related to the particular case being tried").

I turn therefore to the proper initial step-two question whether, as a matter of law, any of the reasons put forward by the Commonwealth was based on race. And of course, contrary to the assertion of the court majority, I engage in no fact finding. Ante at ——, 252 N.E.3d at ——.

Before us, the Commonwealth defends only one of the reasons given by the prosecutor at trial, the prosecutor's asserted concern about the juror's interactions with police, particularly the one in Florida he described as "disgusting."[3] But accepting that reason as race neutral does not resolve the case, because even if the challenge was motivated only in part by race, it would be impermissible. The Commonwealth ****1089** does not mention the alleged "demeanor" or "flippancy" of the juror—reasons that "should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination," Maldonado, 439 Mass. at 465-466, 788 N.E.2d 968—although the court majority does. Nonetheless, even if these reasons were before us and adequate to support a peremptory strike, because the strike was at least in part motivated by race, the analysis would be the same.

3 Without specifying what they were, the Commonwealth does also say in its brief conclusorily that the prosecutor "articulated several justifiable, non-race-based reasons for Juror No. 3 to be excused. The trial judge properly exercised her discretion in accepting these proffered justifications and allowing the peremptory challenge."

The Commonwealth does not attempt to defend as race neutral the prosecutor's assertion that the juror could not be "fair" to the Commonwealth because of his "beliefs that he feels that the defendant cannot get a fair trial." Although that argument is thus waived, because the court majority upholds the strike, I must address it.

First, juror no. 3 did not even say what the prosecutor said he did. He said that if a Latino person was going to be tried for murder, his jury should include some Latino people, and indeed the reason the prosecutor gave explicitly for her for-cause challenge was precisely the juror's reaction to the all-white jury venire present that day.[4] The prosecutor also said that she was striking the juror because he "seemed upset or offended in some ***291** way" that jurors in this criminal case were being asked if members of the juror's specific ethnicity—not merely Latino, but Puerto Rican—are, as a well-known racist stereotype asserts, prone to criminality.

4 The transcript indicates that, although two Latino jurors were among the venire on the first day of jury selection, on the second day, when juror no. 3 was present, he was the only Latino person in the venire.

Neither of these reasons is race neutral. A person of Puerto Rican or Dominican descent is the person most likely to be upset about seeing what appears to be an all-white jury about to try a Puerto Rican or Dominican American defendant for murder. And a person of Puerto Rican or Dominican descent is likely to be the most offended by a question in a government court room asking, "Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?" Indeed, if you asked all people of Puerto Rican descent whether they shared the juror's offense at the stereotype, you would likely find overwhelming, maybe unanimous, agreement with it.

Under art. 12 of the Declaration of Rights as construed in Soares and its progeny, in this Commonwealth where a Latino man is struck for expressing concern about an all-white jury hearing a Latino's murder trial, that strike is "based on race." See, e.g., Prunty, 462 Mass. at 313, 968 N.E.2d 361. In Prunty the Supreme Judicial Court stated:

> "In this case, defense counsel based his challenge on an assumption that an individual who had suffered racism would feel subtle biases against an alleged racist. This assumption, however, is undoubtedly 'based' on race, and therefore provides an illegitimate basis for a peremptory challenge. See Georgia v. McCollum, [505 U.S. 42,] 59 [112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)]. It would require a measure of 'willful intellectual blindness,' Love v. Yates, 586 F. Supp. 2d 1155, 1180 (N.D. Cal. 2008), for us to conclude that Juror 16's experience of racism (particularly the race-specific examples described by the judge in his questioning) does not correlate almost perfectly with his race and therefore serve as a 'surrogate for race.' Hernandez v. New York, [500 U.S. 352,] 371 [111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)]."

Prunty, supra. The same is true where a Puerto Rican man is offended by a question ****1090** asking jurors if they agree that Puerto Ricans are prone to criminality, or expresses concern about an all-white jury venire in a trial of a Latino defendant.

That some white people may share these concerns does not make the strike race-neutral. A Black person's residence in a ***292** primarily Black neighborhood, for example, has been held to be a proxy for race, despite some white people living there, too. See, e.g., United States v. Bishop, 959 F.2d 820, 822 (9th Cir. 1992) (impermissible to strike Black juror because he lived in Compton). As amici Lawyers for Civil Rights, and others, put it in their brief, a "critical evaluation of the[se] ... justifications ... shows that they were based on Juror No. 3's [race] ... and thus were not race-neutral."

We may not ignore as judges what we know as people: A person of color who shares a murder defendant's race is far more likely to express concern about an all-white jury venire than anyone else. Likewise such a person is far more likely to take and express offense at a vicious stereotype about his own people. Thus, although the prosecutor said that the juror "seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' " we know why the juror was upset. This is a racist stereotype that has led to violence against and injustice toward Puerto Ricans in the United States, and the juror was Puerto Rican.

> "The growing Hispanic and Latino population ... has encountered varied sources of discrimination. See, e.g., Commonwealth v. Buckley, 478 Mass. 861, 878 [90 N.E.3d 767] (2018) (Budd, J., concurring) (Hispanic drivers are stopped more often by police than Caucasian drivers); Bradley v. Lynn, 443 F. Supp. 2d 145, 148, 149 (D. Mass. 2006) (finding disparate and adverse impact on Hispanic candidates for entry-level firefighter positions); Kane v. Winn, 319 F. Supp. 2d 162, 179 (D. Mass. 2004)

(citing statistics that Latinos are overrepresented in country's prison population, and 'Latino youths are incarcerated at twice the rate of [Caucasian] American youths').")

Commonwealth v. Colon, 482 Mass. 162, 179-80, 121 N.E.3d 1157 (2019). The Commonwealth's objections were thus not race neutral.

Oddly, the Commonwealth does not even discuss, much less defend, these proffered reasons, relying instead entirely on Commonwealth v. Williams, 481 Mass. 443, 116 N.E.3d 609 (2019). But that is not a Batson-Soares case at all and says nothing about strikes of jurors of color on grounds that are race-based. In fact, nothing in that case or its record indicates that the juror who stated her opinion ***293** that the "system is rigged against young African American males" was a person of color. Williams, at 449, 116 N.E.3d 609. Putting aside that juror no. 3 did not say what the juror in Williams said, the actual holding of Williams is that the judge erroneously struck the juror for her "inability to disregard [her] life experiences and resulting beliefs." Id. at 452, 116 N.E.3d 609. She said those beliefs were formed when "[she] worked with ... low income youth in a school setting. [She] worked a lot with ... teenagers who were convicted of drug crimes." Id. at 444, 116 N.E.3d 609. In dictum, the court did say that the juror might nonetheless have been struck peremptorily by the Commonwealth. Id. at 453-454, 116 N.E.3d 609. But it certainly did not opine on whether that peremptory strike would survive a possible Soares claim if the juror were a person of color.[5] ****1091** There was in fact no claim made in the trial court or the Supreme Judicial Court that the juror was struck by the judge on the basis of her race, which, again, was not even indicated in the record. Indeed, the Supreme Judicial Court said that "[i]n contrast [to Soares], here, the prospective juror was not struck due to being a member of a discrete group." Id. at 456, 116 N.E.3d 609. Williams thus does not "indicate that striking a juror based on the juror's expressed belief that the criminal justice system is rigged is not racially discriminatory on its face." Ante at 272 n.5, 252 N.E.3d at 1076 n.5. It could not, because we do not even know the race of the juror. Williams is thus literally irrelevant to this case.

5 It thus did not "indicate[ ] that the reason given would have been an adequate basis for a peremptory challenge—regardless of the race of the prospective juror," ante at 293 n.5, 252 N.E.3d at 1076 n.5, if the peremptory strike was challenged under Soares.

As to the court majority, although it purports to recognize that a strike motivated even in part by race is impermissible, rather than addressing whether the two reasons described above are as a matter of law race neutral, it says my assessment of them takes them "out of their larger context," and thus misses the "thrust" of the prosecutor's concerns, which were about the juror's responses throughout voir dire "writ large." Ante at 275, 252 N.E.3d at 1078. This unjustified, newly-minted approach for assessing reasons articulated by the prosecutor amounts to little more than an obfuscatory way of saying the court majority without warrant will ignore some of the actual, specific justifications for the strike explicitly articulated by the prosecutor.

The actual "context" in which these justifications were given was that the prosecutor was asked to justify on a race-neutral basis her peremptory strike of a Puerto Rican juror. The prosecutor articulated, as required, her reasons for the strike. Two were ***294** race based.

That the majority concludes that the peremptory strike was nonetheless permissible, first by eliminating from our analysis the foundational requirement that the prosecutor's justifications be race neutral, and then by the use of verbal formulae that amount to asserting without any legal or factual basis that the prosecutor really did not mean what she said, is disappointing. It seems to me like less than should be expected of our court.

The court majority repeatedly states that the juror was struck because of the Commonwealth's "concern that [the] juror [could not] be fair and impartial." Ante at 272, 252 N.E.3d at 1075. Of course the judge, who herself found the juror impartial, did not say that in her finding. But in any event every race-based strike is borne of what might be characterized a "concern about" the juror's partiality. The party exercising the strike thinks the juror will vote in favor of the other side because of the juror's race. See, e.g., Thompson v. United States, 469 U.S. 1024, 1026, 105 S.Ct. 443, 83 L.Ed.2d 369 (1984) (Brennan, J., dissenting) (before it was overruled by Batson, Swain v. Alabama, 380 U.S. 202, 221, 85 S.Ct. 824, 13 L.Ed.2d 759 [1965], had "h[eld] that the State may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly"). The court majority says that "[i]n light of the [juror's] answers, the prosecutor may well have been concerned

that juror no. 3 would view the case, not through the lens of the facts presented and the law provided, but through the lens of the race of the defendant and perceived unfairness of the system." Ante at 272, 252 N.E.3d at 1075–76. If concern about an all-white jury venire trying a Latino person, or taking offense at a poisonous stereotype of Puerto Rican **1092 people, means one cannot be fair in a trial of a Latino defendant, then all jurors of Puerto Rican dissent will be subject to peremptory strikes.

Under art. 12, the trial judge erred in allowing the Commonwealth's peremptory challenge of juror no. 3. Therefore, the defendant's conviction should be vacated and the case remanded for a new trial. With respect, I dissent.

All Citations

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