SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 17-01337

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

ANDREW DOUGLAS, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 6, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one and four of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and assault in the third degree (§ 120.00 [1]). Defendant was acquitted of the remaining two counts of the indictment. Defendant contends that Supreme Court erred in denying his *Batson* challenge with respect to the prosecutor's exercise of a peremptory strike on a prospective juror. We agree.

Pursuant to *Batson v Kentucky* (476 US 79 [1986]) and its progeny, "a three-step protocol [is] to be applied when a defendant challenges the use of peremptory strikes during voir dire to exclude potential jurors for pretextual reasons. At step one, the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]; *see People v Pescara*, 162 AD3d 1772, 1772-1773 [4th Dept 2018]).

Initially, the issue whether defendant established a prima facie

case of discrimination at step one of the *Batson* inquiry was rendered
moot by the court's ruling " 'on the ultimate question of intentional
discrimination' " (*People v Payne*, 88 NY2d 172, 182 [1996], quoting
Hernandez v New York, 500 US 352, 359 [1991]; *see People v Smocum*, 99
NY2d 418, 423 [2003]; *People v Burroughs*, 299 AD2d 969, 970 [4th Dept
2002]; *cf. People v Smouse*, 160 AD3d 1353, 1355-1356 [4th Dept 2018]).

     With respect to step two, the prosecutor stated that the reason
that he exercised a peremptory challenge on the prospective juror at
issue was due to "her answer as to why she wanted to sit on the jury."
Specifically, the prosecutor explained that the prospective juror
expressed an "odd interest in the defendant's right to remain silent,
right to testify," and that "[t]he way she answered the question . . .
was very strange." However, as the People correctly concede on
appeal, the statements the prosecutor attributed to the prospective
juror at issue were, in fact, made by a prospective juror upon whom
defendant exercised a peremptory strike. Because "a proffered race-
neutral reason cannot withstand a *Batson* objection where it is based
on a statement that the prospective juror did not in fact make"
(*People v Coleman*, 195 AD3d 1411, 1413 [4th Dept 2021]; *see generally
People v Fabregas*, 130 AD3d 939, 941-942 [2d Dept 2015]; *People v
Dalhouse*, 240 AD2d 420, 422 [2d Dept 1997], *lv denied* 91 NY2d 871
[1997]), "an equal protection violation was established" (*Smocum*, 99
NY2d at 422; *see Smouse*, 160 AD3d at 1355). We therefore reverse the
judgment and grant a new trial on courts one and four of the
indictment (*see Coleman*, 195 AD3d at 1413; *see generally People v
Mallory*, 121 AD3d 1566, 1568 [4th Dept 2014]). In view of our
determination, we do not address defendant's remaining contentions.

Entered: March 18, 2022   Ann Dillon Flynn
                                           Clerk of the Court