

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP2230-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY J. JAMES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

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ISSUE PRESENTED

When the State strikes potential jurors of the defendant's race and the defendant objects, a circuit court decides whether the strikes were because of race. Here, Courtney J. James objected to the State's strikes of two African-American men. The State believed that the men did not trust the police based on their reactions to some questions during voir dire. Did the circuit court clearly err when it concluded that the strikes were race neutral?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

The jury panel consisted of 35 people (50:3). Jurors 3, 6, 14, 21, 22, 24, and 35 were African-American (51:69). During voir dire, the State asked whether any person on the jury panel had a strong feeling about police officers, either positive or negative (51:16). The State asked potential jurors to raise their hands if they answered that question yes (51:15-16). Jurors 6, 19, 21, and 22 raised their hands (51:17-21).¹

Juror 6 told the State that he would not believe any police officer (51:17-18). Juror 21 said that he felt negatively toward most officers, and would believe that they were lying simply based on their employment (51:20). He later said he could be fair (51:31). Juror 22 agreed that he felt “[k]ind of negative” toward all officers and could not put that feeling aside (51:21).

The parties agreed that Jurors 6 and 22 should be struck for cause (51:69). The State moved to strike Juror 21 as well, and the court denied that motion (51:62-64). The State then used its first peremptory challenge to strike Juror 21 (51:64). The State used its other peremptory challenges to strike Juror 5 because she would require scientific evidence to convict, Juror 7 because she did not understand many of the State’s questions, and Jurors 2 and 14 because they had reactions during the discussion about trusting police officers that led the State to believe that they could not be fair (51:64-65).

James challenged the strikes of Jurors 14 and 21 because they were each African-American men (51:62). The State had a race neutral reason for striking Juror 21: his comments about not trusting

¹ Juror 19 worked for the Milwaukee Police Department but would not give a police officer the benefit of the doubt simply because he or she worked for the police (51:19).

police officers (51:69). The State believed that based on their reactions, Jurors 2 and 14 agreed with Jurors 6, 21, and 22 that police officers often lie (51:65). The State believed both were disposed to ignore the State and might be potentially hostile to the State (51:65). The State concluded that neither Juror 2 nor Juror 14 could be fair and impartial (51:65-66). Juror 2 was a white male (51:64).

The court concluded that James failed to make a prima facie showing that the State's peremptory strike was purposeful discrimination (51:68). The court noted that after the strikes of Jurors 14 and 21, there were two remaining African-Americans in the pool because Juror 35 was excluded numerically (51:69-70). The court noted that the State might have interpreted the facial expressions incorrectly, but that the State did not need a plausible reason for the strike (51:70).

The court also concluded that the State offered a race neutral reason for the strikes (51:70). Even though the court had initially rejected the State's motion to strike Juror 21 for cause, the court said it did not believe that Juror 21 could be fair based on its own observations of the juror's answers, mannerisms, and demeanor (51:69). The court accepted the State's explanation that Juror 2 and Juror 14 seemed to distrust police and could not be fair and impartial (51:70). The court concluded that the State did not purposefully discriminate (51:70-71).

ARGUMENT

The circuit court properly concluded that the State struck potential jurors for race neutral reasons.

A. Standard of review.

Whether a peremptory strike had discriminatory intent is a question of fact decided by the circuit court. *State v. Lamon*, 2003 WI 78, ¶ 41, 262 Wis. 2d 747, 664 N.W.2d 607. Like any other factual finding, this court gives great deference to the circuit court's conclusion on discriminatory intent. *Id.* The circuit court is in the best position to determine the credibility of the State's race neutral reason. *Id.* ¶ 42.

This court will only overturn a circuit court's finding on the issue of discriminatory intent if it was clearly erroneous. *Lamon*, 262 Wis. 2d 747, ¶ 43. This standard applies to each step of the *Batson*² analysis. *Id.* ¶ 45.³ *De novo* review is only available if the circuit court did not have an opportunity to evaluate credibility. *Id.* ¶ 46.

B. Legal principles.

The State has a right to exercise peremptory strikes for any reason related to the State's view of the case outcome. *Lamon*, 262 Wis. 2d 747, ¶ 25. But it violates the Equal Protection Clause to "'challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.'" *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)).

This court employs a three-step process for determining if the State's peremptory strikes violated the Equal Protection Clause. *Lamon*, 262 Wis. 2d 747, ¶ 27. First, the defendant must make a prima facie showing of discriminatory intent by showing that: (1) he is a member of a cognizable group and that the State has exercised peremptory strikes to remove members of the defendant's race from the venire, and (2) the facts and relevant circumstances raise an inference that the State used peremptory strikes to exclude persons on account of their race. *Id.* ¶ 28.

Second, if the circuit court finds that the defendant has made a prima facie showing, then the burden shifts to the State to give a neutral explanation for challenging the dismissed person. *Lamon*, 262 Wis. 2d 747, ¶ 29. The explanation must be "clear, reasonably specific, and related to the case at hand." *Id.* The explanation need not rise to the level of justifying exercise of a strike for cause. *Id.* The

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³ James asserts that the standard of review is *de novo* and cites to *United States v. Stephens*, 421 F.3d 503, 511 (7th Cir. 2005), *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000), and *Mehaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998). James's brief at 17. Those decisions are not binding on this court. The supreme court's decision in *Lamon* is binding. The correct standard of review is for clear error. *Lamon*, 262 Wis. 2d 747, ¶ 45.

explanation need not be persuasive or plausible. *Id.* ¶ 31. Even a silly or superstitious reason may satisfy the second step if it is facially nondiscriminatory. *Id.*

Third, the circuit court must weigh the credibility of the testimony and determine that the defendant has proven purposeful discrimination or that the State's explanations were a pretext for intentional discrimination. *Lamon*, 262 Wis. 2d 747, ¶ 32. Intuitive strikes have been upheld. *Id.* ¶ 33.

C. The circuit court's finding that the peremptory strikes were race neutral is not clearly erroneous.

James challenged the peremptory strikes of jurors at trial on the grounds that the strikes were impermissibly based on the potential jurors' race (51:62). The circuit court determined that James failed to make a prima facie showing that the strikes were exercised with discriminatory intent (51:68). The court went further and concluded that the State made the strikes for race neutral reasons (51:70).

First, in the circuit court, everyone agreed that James was an African-American and that the State excluded two African-Americans by peremptory strikes. But to make a prima facie showing, James also needed to show that the facts and relevant circumstances raised an inference that the State used peremptory strikes to exclude persons based on race. *See Lamon*, 262 Wis. 2d 747, ¶ 28.

There was no pattern to indicate intent to eliminate all African-Americans from the jury pool. James implies that the strikes for cause of two African-American men played a role in this court's analysis. James's brief at 14. It does not. A juror is struck for cause if that juror is biased. *See State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). Exclusion of biased jurors is not only allowed, but required. *Id.* But the State cannot exclude otherwise unbiased jurors simply because of their race. *See Batson*, 476 U.S. at 97. The jurors struck from the jury for cause played no role in the analysis of whether the State's peremptory strikes were discriminatory.

The State used two of its five peremptory challenges to strike African-Americans from the jury pool (51:54, 62). But considering the

facts and relevant circumstances, it cannot be inferred that the strikes were made based on the race of the potential jurors. Juror 21 had stated that he believed that most police officers lie (51:20). Juror 21 said he could be fair, and the circuit court concluded that he was not biased (51:62-64). The State disagreed, and used one of its peremptory strikes on Juror 21. Based on those facts, James cannot show an inference that Juror 21's race was the reason for the strike. This court has previously held that negative feelings toward the police can be a justifiable reason to strike a potential juror. *See State v. Lopez*, 173 Wis. 2d 724, 730-31, 496 N.W.2d 617 (Ct. App. 1992).

That leaves only one of the five peremptory strikes—i.e. the State's strike of Juror 14—to even have the potential of being based on race. Given that the State struck one of the four remaining African-Americans, James did not show a discriminatory pattern by the State to allow the inference that the strike of Juror 14 was based on his race.

Contrary to James's citation to nonbinding decisions, statistical facts alone do not establish an inference of discrimination. *See James's brief at 14.* In Wisconsin, the relevant circumstances include any pattern of strikes against jurors of the defendant's race. *See Lamon*, 262 Wis. 2d 747, ¶ 28. It is not whether a percentage of the strikes are used to strike African-American's in the jury pool. One strike is not a pattern.

James asserts that the circuit court failed to consider the disproportionate use of strikes against African-American men. James's brief at 12-13. Parties cannot discriminate in jury selection, whether based on race or on gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994). The group "African-American men" are not a cognizable group. *Batson* and *J.E.B.* seek to keep the State from discriminating against a potential juror solely based on race or gender, but not both.

James fails to make a prima facie showing based on the facts that the strikes of Juror 14 and Juror 21 raised an inference that the strikes were intended to exclude panel members on account of their race. *Lamon*, 262 Wis. 2d 747, ¶ 28. The strike of Juror 21 was based on comments about not trusting police. And the strike of Juror 14

while leaving three African-Americans in the jury pool does not show a pattern of racial discrimination.

Even if this court finds a *prima facie* showing of discriminatory intent, the State offered a race neutral reason for the strike. The circuit court's decision was not clearly erroneous.

During the discussion about whether police officers lie, the State believed that Jurors 2 and 14 agreed with Jurors 6, 21, and 22 that police officers often lie based on their reactions during that discussion (51:65). The State believed both were disposed to ignore the State and might be potentially hostile to the State (51:65). The State concluded that neither Juror 2 nor Juror 14 could be fair and impartial (51:65-66).

James argues that the State's proffered reason for the strike was not clear or reasonably specific. James's brief at 18. The State told the court that:

Juror number two is a white male, juror number 14 is an African-American male. Both of them had reactions during the discussions [about police trustworthiness], and I have never had a series of discussions like this about officers where so many individuals have had such blatantly hostile view of officers. I [have] never experienced that before.

Jurors number two and 14 had inclinations or had reactions that I view to be inclinations along those grounds. Oftentimes you will see that, and I believe that I did see this and it did appear that both of them appeared at least not -- not disposed to listening to the State if not potentially hostile, and that was my reasoning for striking both of those.

(51:64-65).

The State's explanation was reasonably specific, clear, and related to the case. *See Lamon*, 262 Wis. 2d 747, ¶ 29. James's argument that the State did not explain the juror's reactions should be rejected. The reactions are not captured by the trial transcript, and were not verbal. The State asked whether anyone had strong feelings about police officers. Although Jurors 2 and 14 did not raise their

hands, that does not mean that their reactions did not happen or that the State's description was not clear enough.

The reason this court gives circuit courts discretion is because the circuit court is in the best position to determine the credibility of the State's race neutral reason. *See Lamon*, 262 Wis. 2d 747, ¶ 42. The transcript cannot capture facial expressions, gestures, or body language. The fact that there is no record in the transcript of any reaction does not mean that a reaction did not occur or that the prosecutor did not sense one. The circuit court accepted the State's explanation. That conclusion is not clearly erroneous.

The State offered a race neutral reason for the strike. "Unless discriminatory intent is inherent in the prosecutor's explanation, 'the reason offered will be deemed race neutral.'" *Lamon*, 262 Wis. 2d 747, ¶ 30 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). The disparate impact on African-Americans alone does not violate the principle of race neutrality. *Id.*

James argues that the State's reason needed to be "plausible" and "persuasive." James's brief at 20-23. But the State's reason "need not be 'persuasive or even plausible.'" *Lamon*, 262 Wis. 2d 747, ¶ 31 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). The reason does not have to make sense, and can be silly or superstitious. *Id.* The court observed that the State might have been wrong in its interpretation, but that is not the standard (51:70). The court believed that the State showed a nexus between concern based on officers testifying and strikes (51:70-71). The State's reason was not facially discriminatory and satisfies the second *Batson* step.

Contrary to James's assertion, this case is not like *Snyder v. Louisiana*, 552 U.S. 472 (2008). In *Snyder*, the State struck a potential juror because he "looked very nervous." *Snyder*, 552 U.S. at 478. Here, the State struck two jurors because they seemed to agree with other jurors that police were not trustworthy (51:65). The State's explanation was much more specific than that in *Snyder*. The court concluded that the State offered a race neutral reason (51:70). That conclusion was not clearly erroneous.

James argues that because the State did not move to strike the jurors for cause, the reaction must not have happened. James's brief

at 25-27. The State's reason for the peremptory strike does not need to rise to the level of a challenge for cause to be race neutral. *Lamon*, 262 Wis. 2d 747, ¶ 31. The fact that the State did not challenge either juror for cause is irrelevant to the determination of whether the challenges violated James's equal protection rights.

Finally, James argues that since the State struck two jurors for the same reaction and only one was African-American, there was proof that the State's strike was pretextual and not race neutral. James's brief at 29. This argument must fail. The State explained that two men of two different races had the same reaction to a discussion regarding the trustworthiness of police officers. The State struck each man. The State's rationale was race neutral because it applied equally to men of two different races.

Third, the circuit court considered the credibility of the testimony and determined that there was no purposeful discrimination (51:70-71). *See Lamon*, 262 Wis. 2d 747, ¶ 32. The court's conclusion that the State's reason for striking Juror 14 was racially neutral is not clearly erroneous. This court should affirm that conclusion.

CONCLUSION

The State respectfully requests this court affirm James's judgment of conviction.

Dated this 9th day of April, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,707 words.

Dated this 9th day of April, 2015.

Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of April, 2015.

Christine A. Remington
Assistant Attorney General