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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0875**

State of Minnesota,
Respondent,

vs.

Long Vang,
Appellant.

**Filed May 28, 2019
Affirmed
Florey, Judge**

Olmsted County District Court
File No. 55-CR-16-4280

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

On appeal from his conviction of pattern-of-stalking conduct, appellant Long Vang argues that he is entitled to a new trial because the district court erred by granting the state's *Batson* challenges.¹ We affirm.

FACTS

Appellant was charged in Olmsted County with pattern-of-stalking conduct, in violation of Minn. Stat. § 609.749, subd. 5(a) (2016).² He and the female victim were in a romantic relationship and there were allegations of a pattern of domestic violence. Appellant pleaded not guilty to the stalking charge and requested a jury trial.

Voir dire commenced in early January 2018. During voir dire, appellant used his five peremptory strikes on five female jurors. The state made five *Batson* challenges, citing gender-based discrimination. The state withdrew one of its challenges. The district court denied two other challenges because a satisfactory gender-neutral reason for the strikes was provided. The district court sustained the state's two remaining challenges and allowed jurors L.T. and S.A. to sit on the jury. Appellant was convicted of the charged crime and sentenced to 76 months in prison. This appeal followed.

¹ See *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-24 (1986) (establishing three-part analysis to determine if peremptory challenge is motivated by racial discrimination); see also *J.E.B. v. Alabama*, 511 U.S. 127, 129, 114 S. Ct. 1419, 1421 (1994) (extending *Batson* to prohibit gender discrimination in jury selection).

² Appellant was also charged with third-degree murder, in violation of Minn. Stat. § 609.195(a) (2016), and second-degree murder, in violation of Minn. Stat. § 609.205, subd. 1 (2016), but those charges were dropped before trial.

DECISION

Appellant contends that the district court erred by sustaining the state's gender-based *Batson* challenges because the state did not prove that appellant's gender-neutral reasons for striking the jurors were a pretext for gender discrimination. Appellant asserts that he is entitled to a new trial as a result of this error.

The use of peremptory challenges to exclude prospective jurors is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719. A peremptory challenge against a prospective juror because of the juror's gender denies equal protection both to the prospective juror, because it denies the juror the right to participate in jury service, and to the defendant, because it violates the defendant's right to be tried by a jury made up of members selected by nondiscriminatory criteria. *State v. Reiners*, 664 N.W.2d 826, 831 (Minn. 2003); *see also J.E.B.*, 511 U.S. at 129, 114 S. Ct. at 1421. Whether discrimination motivated a peremptory challenge is a factual determination, and reviewing courts give great deference to the district court's decision unless it is clearly erroneous. *Reiners*, 664 N.W.2d at 830-31. "We afford great deference because the record may not reflect all of the relevant circumstances that the [district] court may consider." *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009) (quotation omitted). If the district court's determination was clearly erroneous, a defendant is automatically entitled to a new trial. *Reiners*, 664 N.W.2d at 835.

In *Batson*, the Supreme Court established a three-step process to determine whether a peremptory challenge had a discriminatory motive. 476 U.S. at 96-98, 106 S. Ct. at 1723-24; *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (adopting the *Batson* three-step process).

First, the objecting party must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723. Second, if the objecting party establishes a prima facie case, then the proponent of the peremptory challenge must provide a race or gender-neutral explanation. *Id.* at 97, 106 S. Ct. at 1723. Third, the district court must determine whether the objecting party has established purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724. It is important for the district court to clearly demarcate and “announce on the record its analysis of each of the three steps of the *Batson* analysis.” *Reiners*, 664 N.W.2d at 832. The supreme court has emphasized “the importance of clarity at each step of the analysis,” and when the district court fails to follow this “prescribed procedure” the appellate courts will “examine the record without deferring to the district court’s analysis.” *State v. Seaver*, 820 N.W.2d 627, 633 (Minn. App. 2012) (quotations omitted).

The district court’s analysis of the state’s challenges did not include specific findings at each phase of the three-step analysis required under *Batson* and rule 26.02. Nevertheless, the district court followed the *Batson* three-step procedure, and the record supports the district court’s conclusions regarding all three aspects of the analysis.

Prima facie showing

At step one, respondent was required to show that one or more members of a gender had been excluded from the jury and that the circumstances raised an inference that the exclusion was based on gender. *See Martin*, 773 N.W.2d at 101. Appellant concedes that the state arguably established a prima facie case of gender discrimination with regard to his peremptory challenges. We agree.

Under Minnesota law, an “inference of discrimination can be drawn by proof of disproportionate impact” on a particular race or gender group. *Seaver*, 820 N.W.2d at 634 (quotation omitted). The state raised its *Batson* challenges because appellant struck five jurors who were “all female.” The district court found that the state established a prima facie case. If the district court had allowed appellant’s five strikes, only one female juror would have remained in a case involving a male defendant and a female victim. The record confirms that the state established a prima facie case that the peremptory strikes were impermissibly made on the basis of gender.

Gender-neutral reason

At step two, “the issue is the facial validity of the [defendant’s] explanation, which need not be persuasive or even plausible.” *Martin*, 773 N.W.2d at 101. Appellant argues that he articulated valid, gender-neutral reasons for his strikes against L.T. and S.A. The record shows that, initially, appellant could only offer generalized reasons for his strikes. Appellant’s counsel stated that he gets “a general impression for whatever [the jurors] are saying in their answers.” The district court did not accept this reason, and instead stated that appellant would need to articulate some gender-neutral reason for the strikes, otherwise voir dire would need to be restarted. Appellant’s counsel repeated that he did not “have a particular reason” for the strikes.

The district court then turned its attention to the state for comment on appellant’s supplied answer. After the state responded that it still had concerns about the remaining strikes being based on gender discrimination, the district court allowed appellant five to

ten minutes to talk with his attorney and come up with gender-neutral reasons, otherwise the district court stated it was going to grant the state's motion.

Following the short break, appellant stated his new reasons for the strikes. With regard to L.T., who had not said anything during the entire voir dire process, appellant's reason for the strike was that L.T. was a research technician at Mayo Clinic. Appellant said he wished to avoid any conflict because Mayo Clinic records were part of the evidence that was to be presented at trial. With regard to S.A., appellant stated that his reason for the strike was that S.A.'s husband is a physician, so the Mayo Clinic reports could potentially reach her husband, and he might have some knowledge that could be damaging to appellant. Appellant's counsel also said, "[p]lus, I think she was one of those that said that there can be no violence, or something like that," and "there is violence" in this case.

The district court again turned to the state for comment. On appeal, the state argues that, by asking for argument regarding pretext without sustaining its *Batson* challenge on the spot, the district court moved on to step three and implicitly decided that appellant's additional reasons were gender-neutral. We agree. Although this is not the exact procedure described under Minnesota law, and therefore we need not defer to the district court's analysis at this step, it is clear that the district court accepted appellant's gender-neutral reasons. *See Seaver*, 820 N.W.2d at 633; *see also State v. Taylor*, 650 N.W.2d 190, 202-03 (Minn. 2002). As the state effectively concedes that appellant's proffered reasons were gender neutral, we turn to step three.

Purposeful discrimination

At step three, the state had the burden of providing “(1) a demonstration that the proffered gender-neutral reason is not the real reason for the strike and (2) a demonstration that the real reason was the gender of the prospective juror.” *Seaver*, 820 N.W.2d at 635 (quotation omitted). One way to show purposeful discrimination is to show that appellant’s “reason for striking a prospective juror of one gender applies equally to a similar prospective juror of a different gender who is permitted to serve.” *Id.* (quotation omitted). Another way is “to challenge the relevance or validity of the proffered gender-neutral reason, but the failure of that reason does not demonstrate the second part, that the real reason was based on gender.” *Id.* (quotation omitted). Therefore, “[t]he elimination of a defendant’s gender-neutral reason does not, by itself, support a presumption or even an inference that the real reason was gender.” *Id.* (quotation omitted). “The state still must prove that the real reason was gender discrimination by identifying some circumstance that raises an inference of discrimination.” *Id.* (quotation omitted).

Appellant contends that the state did not disprove appellant’s reasons or prove that the real reason was gender discrimination. With regard to L.T., the state argued that appellant was only able to come up with his gender-neutral reason for striking her after being given the opportunity to revise his original answer, that L.T. did not speak during voir dire, and that her position as a research technician at Mayo Clinic was not going to cause her to favor one party more than the other. The district court granted the state’s challenge as to L.T., finding that appellant’s proffered reason was pretextual. It reasoned

that there were other male individuals on the jury who spoke about their employment at Mayo Clinic, including juror J.M., who was a supervisor for the Mayo Foundation.

Appellant argues that a comparison between L.T. and J.M. is misplaced because J.M. worked for Mayo Foundation, not Mayo Clinic. We disagree. While “[t]he potential jurors being compared must be similarly situated,” appellant’s distinction is clearly made in hindsight, considering his initial stated reason, which identified only a generalized impression of L.T. *Seaver*, 820 N.W.2d at 636. The state argues, and we agree, that this new reasoning was not before the district court when it made its ruling. The juror questionnaires are not in the record on appeal and neither is information regarding J.M.’s exact job duties. The district court was therefore justified in considering similarly situated jurors when evaluating appellant’s gender-neutral reasoning, and it was not clearly erroneous to sustain the state’s challenge to L.T.

With regard to S.A., the state admitted that she gave one favorable response to the state, but then argued that appellant’s theory regarding her being married to a doctor and receiving prejudicial information as a result was “far-fetched” and assumed that she would violate the court’s order not to discuss the case with others. The district court granted the state’s *Batson* challenge as to S.A., likewise finding appellant’s reasoning to be pretextual. The district court noted that S.A.’s responses during voir dire were very limited, and that the record did not indicate whether her husband was a physician at Mayo Clinic, there having been no follow up with her about this topic during questioning.

Appellant argues that the state failed to meet its burden regarding juror S.A. because it did not sufficiently dispute appellant’s reasoning that S.A.’s husband was a physician.

Additionally, appellant claims that the state struck a male juror, G.K., for having been convicted for domestic assault against a family member and states that this was similar logic to appellant striking S.A. for her views on violence.

The district court is entitled to broad deference at this step of the analysis, and it did not clearly err by disregarding appellant's theory that assumed a juror would break the court's rules. *See Taylor*, 650 N.W.2d at 203. Additionally, no evidence was elicited or presented that S.A.'s husband was in any way connected to Mayo. The state's strike of one juror for having a prior domestic-violence conviction in a case involving domestic violence does not convert appellant's discriminatory strike into a gender-neutral one.

We conclude that the state successfully challenged the validity of appellant's proffered gender-neutral reasons, but the state still needed to prove that the real reasons for the strikes were gender discrimination. *See Seaver*, 820 N.W.2d at 635. Here, the circumstance which raises an inference of discrimination is that appellant struck five out of six women from the juror pool in a case with a male defendant and a female victim. Appellant's gender-neutral basis for striking S.A., which centered on S.A.'s husband, assumed that S.A. would violate a court order and speak with her husband about the case. This thin basis was overcome by the state given the context and nature of appellant's strikes. Further, it was not even established that S.A.'s husband worked at Mayo. As for appellant's other gender-neutral reason, which centered on S.A.'s response to a question about violence, appellant initially failed to cite this reason, and appellant displayed uncertainty over S.A.'s exact response. Having overcome these proffered reasons, the

remaining reason for striking S.A. could only have been based in discrimination.

Therefore, the district court did not clearly err in determining that the state met its burden.

Affirmed.