

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0818**

State of Minnesota,
Respondent,

vs.

DaJuan Wendell Webster Rayford,
Appellant.

**Filed April 27, 2020
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-18-16931

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions for two driving-while-impaired (DWI) offenses, arguing that the district court erred by rejecting his challenge to the state's exercise of a peremptory strike during voir dire and by entering a judgment of conviction for each offense. Because the district court did not err in ruling on the state's exercise of the peremptory challenge, we affirm in part. But because caselaw permits only one conviction for the two DWI offenses in this case, we reverse one of the convictions and remand for the district court to vacate that conviction.

FACTS

In July 2018, respondent State of Minnesota charged appellant DaJuan Wendell Webster Rayford with felony first-degree DWI—alcohol concentration of 0.08 or more, felony first-degree DWI—driving under the influence of alcohol, and gross misdemeanor driving after cancellation. An October 2018 jury trial on the charges resulted in a mistrial.

The case was retried in January 2019. The jury venire consisted of 24 prospective jurors. On the juror-profile list, 20 venire members self-identified as white, three self-identified as black or African American, and one self-identified as two or more races. The state exercised a peremptory strike against venire member L, who had self-identified as two or more races. Rayford challenged the state's peremptory strike, and the district court rejected his challenge.

The jury found Rayford guilty as charged, and the district court entered a judgment of conviction for each offense. The district court sentenced Rayford to serve 51 months in

prison for DWI—alcohol concentration of 0.08 or more and a concurrent term of 365 days for driving after cancellation. The district court did not sentence the offense of DWI—driving under the influence of alcohol.

Rayford appeals.

DECISION

I.

Rayford contends that the district court erred by denying his challenge to the state’s peremptory strike of venire member L, which was based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). “In *Batson v. Kentucky*, the United States Supreme Court held that the exclusion of prospective jurors through peremptory challenges is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” *State v. Harvey*, 932 N.W.2d 792, 810 (Minn. 2019) (citing *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719). A peremptory challenge that is used against a prospective juror based on the juror’s race “denies equal protection both to the prospective juror, because it denies [him] the right to participate in jury service, and to the defendant, because it violates his right to be tried by a jury made up of members selected by nondiscriminatory criteria.” *Id.* at 810-11 (quotation omitted).

The *Batson* Court articulated a three-step process for determining whether a peremptory challenge was motivated by racial discrimination. *Id.* at 811; *see also State v. Carridine*, 812 N.W.2d 130, 136 (Minn. 2012) (“To determine whether a peremptory strike was discriminatory, we apply the three-step test articulated by the United States Supreme Court in *Batson v. Kentucky*.”); Minn. R. Crim. P. 26.02, subd. 7(3) (adopting the *Batson*

three-step process). First, a defendant must establish a prima facie case of purposeful discrimination by showing “(1) that a member of a protected racial group has been peremptorily excluded from the jury and (2) that circumstances of the case raise an inference that the exclusion was based on race.” *State v. Blanche*, 696 N.W.2d 351, 364-65 (Minn. 2005). A district court “should consider all relevant circumstances in deciding whether an inference of discrimination might exist.” *Id.* at 365. Second, if the objecting party establishes a prima facie case of racial discrimination, “the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.” *Id.* at 364 (quotation omitted). Third, “[i]f a race-neutral explanation is tendered, the [district] court must then decide . . . whether the opponent of the strike has proved purposeful discrimination.” *Id.* at 364-65 (quotation omitted).

The existence of racial discrimination in the use of a peremptory challenge is a factual determination. *State v. Diggins*, 836 N.W.2d 349, 355 (Minn. 2013). This court gives “great deference to the district court’s [*Batson*] ruling and will uphold the ruling unless it is clearly erroneous.” *Id.* (quotation omitted). This deference recognizes “that the record may not reflect all of the relevant circumstances that the court may consider.” *State v. Pendleton*, 725 N.W.2d 717, 724 (Minn. 2007).

In district court, Rayford argued that he had made a prima facie showing of purposeful discrimination because although “[t]here [were] other people of color on the [jury] panel . . . they [were] all female” and the state had stricken venire member L, “the single black man on [the] jury panel.” Rayford also argued that the state had not stricken a white juror who, like L, had expressed concern about the believability of a witness in a

case with only one witness. The state countered that three black jurors had been seated on the jury and that, therefore, Rayford had not met his burden of proving a prima facie case.

The Minnesota Supreme Court has “consistently held [that] the mere removal of a member of a racial group does not necessarily establish a prima facie case [of discrimination]—an inference of racial discrimination based on the surrounding circumstances is also required.” *State v. Onyelobi*, 879 N.W.2d 334, 348 (Minn. 2016). For example, an inference of racial discrimination can be drawn upon “proof of disproportionate impact upon the racial group, [such as when] the prosecutor totally excluded all blacks from the venire.” *State v. Moore*, 438 N.W.2d 101, 107 (Minn. 1989).

Conversely, the Minnesota Supreme Court has relied on the inclusion of other jurors of color on the jury to conclude that there was no inference of discrimination. *See, e.g., Harvey*, 932 N.W.2d at 815 (concluding that the district court properly considered “that one African-American venire member had already been seated” on the jury); *State v. Wilson*, 900 N.W.2d 373, 382 (Minn. 2017) (determining that there was no inference of discrimination in part because “the State accepted one black juror”); *Onyelobi*, 879 N.W.2d at 348 (noting that because the defendant did not identify any other circumstance raising an inference of discrimination, it was significant that a minority venire member was selected before the state struck a person of color); *State v. White*, 684 N.W.2d 500, 507 (Minn. 2004) (concluding that defendant had not established a prima facie case in part because a minority member “had already been accepted as a juror and eventually, she would serve as the foreperson of the jury”).

In ruling that Rayford failed to make a *prima facie* case, the district court reasoned that two other jurors “who identified as African American” had been selected for the jury, that “neither of them were struck,” and that the exclusion was therefore not based on race. The district court’s reasoning was consistent with caselaw. *See Harvey*, 932 N.W.2d at 815 (“The fact that an African-American was seated on the jury was a proper consideration at step one of the *Batson* analysis.”).

But an inference of discrimination can be drawn from “other surrounding circumstances, such as the prosecutor’s questions in voir dire, the stated reasons for exercising the peremptory challenge, or established past patterns of racial discrimination in the current jury’s selection.” *Onyelobi*, 879 N.W.2d at 345 (quotation omitted). Rayford argues that the state’s peremptory strike of venire member L raised an inference of discrimination because the state did not strike two other jurors who expressed similar concerns about the believability of a witness in a case with only one witness. The district court rejected that argument, reasoning that venire member L was the “only person who really fully developed that line of questioning from the State” because Rayford objected and “cut off” the state’s line of questioning on that topic. Because the views of the other two prospective jurors were not fully explored as a result of Rayford’s objection, we cannot say that the district court erred by concluding that the circumstances did not raise an inference of discrimination.

Again, the district court’s ruling on a *Batson* challenge is entitled to “great deference” and will not be reversed unless it was clearly erroneous. *Diggins*, 836 N.W.2d at 355. The district court rejected Rayford’s *Batson* challenge at the first step of the

analysis, relying on a consideration that the supreme court has consistently recognized as proper. The district court did not err in concluding that Rayford failed to make a prima facie showing of racial discrimination and that his *Batson* challenge therefore failed.¹

II.

Rayford contends that the district court erred by entering a judgment of conviction for each DWI offense because they “arose from a single act and are criminalized under different subdivisions of the same statute.” The state agrees.

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). An “included offense” includes “[a] lesser degree of the same crime” and “[a] crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(1), (4). The Minnesota Supreme Court has “consistently held that section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

“[W]hen [a] defendant is convicted on more than one charge for the same act . . . the [district] court [is] to adjudicate formally and impose sentence on one count only.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). If a defendant’s adjudicated conviction is vacated, the finding of guilt with respect to that offense remains intact. *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999). Whether a conviction violates Minn. Stat.

¹ The district court allowed the state to make a record regarding the second and third steps of the *Batson* analysis for purposes of appeal. Because the district court properly rejected Rayford’s challenge at step one, we do not review the remainder of its analysis.

§ 609.04, subd. 1, is a legal question, which is reviewed de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

In *State v. Clark*, a jury found the defendant guilty of driving while under the influence of alcohol and driving with an alcohol concentration of 0.10 or more. 486 N.W.2d 166, 169 (Minn. App. 1992). The district court entered a judgment of conviction for each offense and sentenced the defendant for the offense of driving under the influence of alcohol. *Id.* at 170-71. This court held that because “section 609.04 forbids multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident,” one of the convictions must be vacated. *Id.* (quotation omitted).

Similar to *Clark*, Rayford’s DWI convictions were based on different subsections of Minn. Stat. § 169A.20 (2016 & Supp. 2017), and there is no dispute that they stemmed from acts committed during a single behavioral incident. See Minn. Stat. § 169A.20, subd. 1(1) (driving under the influence of alcohol), (5) (driving with an alcohol concentration over 0.08) (2016). Under *Clark*, one of the convictions must be vacated. We therefore reverse Rayford’s conviction for DWI—driving under the influence of alcohol, for which sentence was not imposed, and remand for the district court to vacate that conviction.

III.

In a pro se supplemental brief, Rayford contends that he received ineffective assistance of counsel in district court. This court examines an ineffective-assistance-of-counsel claim under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To prevail under *Strickland*, a “defendant must show that counsel’s

representation fell below an objective standard of reasonableness” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068; see *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland*).

An objective standard of reasonableness is defined as the level of customary skill and diligence that a reasonably competent attorney would employ in representation under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). Appellate courts apply a strong presumption that an attorney’s performance falls within the wide range of reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). An ineffective-assistance-of-counsel claim involves mixed questions of law and fact that this court reviews de novo. *Rhodes*, 657 N.W.2d at 842.

Attorneys have discretion in representing their clients and regarding trial tactics such as “[w]hat evidence to present to the jury” and “which witnesses to call.” *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). “Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight.” *Jones*, 392 N.W.2d at 236. Appellate courts “give trial counsel wide latitude to determine the best strategy for the client,” and “the extent of any investigation is a part of trial strategy and, thus, should not be readily second-guessed.” *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). Appellate courts generally “will not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014).

Rayford argues that his attorney “failed to make a reasonable diligent effort to apply a discovery plan in favor of [his] defense” and should have done the following:

(1) researched statutes, policies, licensing, certification, and laws on automated-license-plate-reader technology; (2) called expert witnesses; (3) cross-examined Minnetonka Police Department Officer Heather Olson about her licensing and authority to operate an automated plate reader; (4) investigated the Minnetonka Police Department for not reporting its plate-reader technology use; (5) showed that the police department's loss of data resulted from a lack of compliance with Minnesota statutes; and (6) requested a hearing on the admissibility of plate-reader technology. Rayford also argues that his attorney should have moved to suppress the “illegal *Terry* stop and its fruit, which was obtained after seizing [his] person,” because “an unconfirmed hit on the [automated plate reader] does not, alone, form the reasonable suspicion necessary to support an investigatory detention.”²

Rayford fails to establish that the complained-of conduct is anything other than unreviewable trial strategy. Moreover, Rayford does not explain how more information regarding plate-reader technology would have helped his defense. Indeed, the record shows that such information would have been irrelevant. At trial, Officer Olson testified that although she uses the automated plate reader because “it’s easier and faster than [her] typing [license plates] in the computer,” on the day she stopped Rayford’s vehicle, the reader “had technical difficulties” and she manually entered the plate number of the car Rayford was driving. In sum, Rayford has failed to meet his burden under *Strickland*.

² We note that the district court held an evidentiary hearing on constitutional search and seizure issues before trial.

Rayford also appears to challenge the jury's credibility determinations. The jury is in the best position to weigh witness credibility and thus determine which witnesses to believe and how much weight to give their testimony. *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012). We defer to the fact-finder's assessment of witness credibility. *Id.* Rayford's credibility challenges are therefore unavailing.

We have reviewed Rayford's remaining pro se arguments and conclude that none provides a basis for relief. See *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (concluding that appellant's pro se arguments were without merit after "a thorough review of the record and case law relevant to [appellant's] arguments").

Affirmed in part, reversed in part, and remanded.