

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0220**

State of Minnesota,
Respondent,

vs.

Nougai Xiong,
Appellant.

**Filed April 12, 2021
Affirmed
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-18-4722

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Smith, Tracy M., Judge; and
Rodenberg, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from final judgment, appellant Nougai Xiong argues that his conviction of aiding and abetting second-degree intentional murder must be reversed and a new trial ordered because the district court erred when it sustained respondent State of Minnesota's challenges to his peremptory challenges to two Hmong prospective jurors. Because the district court did not clearly err by finding that Xiong's challenges were racially motivated, we affirm.

FACTS

The following facts were established at Xiong's jury trial. The charges in this case stemmed from a gang-related altercation that ended in a fatal shooting at the Hmong International Freedom Festival. The festival is a Hmong cultural gathering that attracts up to 50,000 attendees each year. The altercation occurred between rival Asian gang members, and the victim of the shooting was Hmong. In an amended complaint, the state charged Xiong with (1) aiding and abetting second-degree intentional murder for the benefit of a gang, (2) aiding and abetting second-degree intentional murder, (3) aiding and abetting second-degree unintentional felony murder for the benefit of a gang, and (4) aiding and abetting second-degree unintentional felony murder.

At Xiong's trial, the state asserted a *Batson* challenge to Xiong's peremptory challenges of three prospective jurors—Juror 9, Juror 3, and Juror 26. *See Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-24 (1986) (establishing test for determining race discrimination in jury selection). The district court found that the state

did not meet its burden of finding purposeful discrimination relating to Juror 9 and permitted that challenge, but it found that the state did establish purposeful discrimination as to Jurors 3 and 26 and denied those challenges.

The *Batson* challenge followed a two-day jury-selection process. On the first day, jurors were first questioned individually, based on their answers to the juror questionnaire. Juror 9, self-identifying as Asian, was questioned regarding his knowledge of the case. He indicated that he had seen a video and read comments on social media about the shooting, and he referred to the victim by his first name when discussing the video. Juror 9 also indicated that he wished to hear “both stories.” Xiong moved to dismiss Juror 9 for cause. The district court denied Xiong’s motion, stating that Juror 9 would remain on the panel “at this time.” Juror 26, who self-identified as Asian, was questioned about the possibility that she was related to a witness. After her answers suggested no relationship, no motions were made to remove Juror 26 for cause. Juror 3, who self-identified as Asian, was also questioned individually, and no motions were made relating to him.

Another juror, Juror 4, self-identified as Asian and discussed “growing up in the Hmong community.” Juror 4 was dismissed for cause by the district court following an off-the-record bench conversation because he was “arguably a witness” since he attended the festival on the day of the shooting and heard the gunshots. A number of other prospective jurors were challenged for cause during individual questioning.

On the second day of jury selection, the prospective jurors were called into the courtroom as a group and questioned. Juror 9, Juror 26, and Juror 3 all answered questions. The parties then passed the panel for cause.

Each party exercised its peremptory challenges. Among the first four of his five challenges, Xiong exercised peremptory challenges to Jurors 3, 9, and 26. These jurors were the only remaining prospective jurors on the panel who self-identified as Asian.

The State asserted its *Batson* challenge with respect to each peremptory challenge. Following arguments, the district court ruled from the bench, followed by a written order. The district court found that the challenge to Juror 9 was not motivated by racial discrimination, and that juror was therefore excused as a result of the peremptory challenge. But the district court found that the challenges to Juror 3 and Juror 26 were racially motivated and denied those challenges. Jurors 3 and 26 therefore served on the jury.

The jury returned a verdict of guilty on all four counts, and the district court sentenced Xiong to 378 months' imprisonment.

Xiong appeals.

DECISION

The Equal Protection Clause of the Fourteenth Amendment prohibits purposeful racial discrimination in jury selection, including in making peremptory challenges to prospective jurors. U.S. Const. amend. XIV, § 1; *Batson*, 469 U.S. at 89, 106 S. Ct. at 1719. This prohibition extends to race discrimination by defendants. *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 2359 (1992).

Minnesota courts have adopted the three-step framework established in *Batson* to determine whether a peremptory challenge was motivated by racial discrimination. *See* Minn. R. Crim. P. 26.02 subd. 7(3); *accord State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009) (citations omitted). First, the party objecting to the peremptory challenge must make

a prima facie showing that the challenge was exercised against a prospective juror based on race. *State v. Wilson*, 900 N.W.2d 373, 378 (Minn. 2017). Second, if the objector satisfies this burden, the burden shifts to the party exercising the peremptory challenge to articulate a race-neutral reason for the challenge. *Id.* Third, if a race-neutral reason is articulated, the burden shifts back to the objecting party to establish that the race-neutral reason is merely a pretext for purposeful discrimination. *Id.* The objecting party thus “has the ultimate burden of proving pretext and discriminatory intent.” *Id.* (quotation omitted).

Reviewing courts give great deference to a district court’s factual determination of the existence of racial discrimination and will not reverse the district court’s ruling unless it is clearly erroneous. *See Martin*, 773 N.W.2d at 101.

A. The district court did not err by finding that the state made a prima facie showing of race discrimination.

The prima facie requirement of step one has a low bar. *Wilson*, 900 N.W.2d at 382. The objecting party must show two things: “(1) that one or more members of a racial minority has been peremptorily excluded *and* (2) that circumstances of the case raise an inference that the exclusion was based on race.” *State v. Onyelobi*, 879 N.W.2d 334, 345 (Minn. 2016) (quotations omitted). Xiong argues that the state showed neither.

The district court found that the state satisfied both requirements of a prima facie case, explaining:

After challenges for cause, there were three members of the final jury pool that were of Hmong descent. All three Hmong jurors were, then, [challenged] by Defendant’s counsel. Further, the particular facts of the underlying case in connection with the removal of all three Hmong jurors create an inference that the exclusion was based on race. Specifically,

the underlying charges stem from a shooting that occurred at the Hmong Freedom Festival and the victim who was shot and died was also Hmong.

Xiong argues that the state failed to satisfy the first requirement because it did not prove that the jurors were Hmong. As an initial matter, we note that this requirement asks whether members of a racial minority have been excluded. *Wilson*, 900 N.W.2d at 378. The record reflects that all three jurors identifying as “Asian” were peremptorily challenged by the defense, and the district court noted that the jurors were of Asian descent. Regarding the district court’s description of the jurors as Hmong, the record also supports that determination. Although the jurors were not questioned about their specific ethnicity, other information indicated that they were Hmong. Juror 9, when questioned individually about why he did not attend the Hmong Freedom Festival, said it was due to incidents that were occurring in out-of-state festivals “for the Hmong community.” Juror 26 indicated that she attended a Hmong church, and, when responding to a question on the juror questionnaire asking prospective jurors about their feelings towards “Minnesota’s Hmong immigrant population,” Juror 26 indicated that she is “one in the community [her]self.” Finally, the district court observed that the challenged jurors all had Hmong surnames. This record is sufficient to support the district court’s finding. We also observe that, in responding to the *Batson* challenge, defense counsel agreed with the district court that the jurors were Hmong, arguing that Xiong would not have a motive to remove Hmong jurors since Xiong himself is Hmong.

Xiong also contends that the state failed to satisfy the second requirement of a *prima facie* case—that the circumstances raise an inference that the challenges were based on the

jurors' race. He contends that that the circumstances raise no such inference because the victim and the defendant are the same race, because the case involved rival gangs, and because all of the key people in the case were Hmong. It is true that the supreme court has said "[w]hether the circumstances of the case raise an inference of discrimination depends in part on the races of the defendant and the victim." *Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005), *abrogated on other grounds by Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446 (2009). But additional circumstances were present here. As the district court noted, the shooting occurred between rival Asian-associated gangs at a festival celebrating Hmong culture and the victim was Hmong. Together, these circumstances are sufficient to support the district court's determination of an inference that Xiong's challenges to the three Hmong prospective jurors was racially motivated.

Xiong suggests that the district court improperly considered Xiong's peremptory challenge to Juror 9 when determining whether the state made a prima facie case of discrimination because the district court later found that the state did not prove purposeful discrimination with respect to that juror. He cites *State v. Campbell*, in which this court reversed a district court's determination that the defendant discriminated on the basis of race in challenging one non-White juror, but not two others, based on race. 772 N.W.2d 858, 860-61, 866 (Minn. App. 2009). There, we concluded that the district court clearly erred by finding a "pattern" of discrimination based on the defendant's challenges to three non-White jurors when all but one of the three challenges were ultimately found to be nondiscriminatory. *Id.* at 864. Here, the district court did not rely solely on a pattern of discrimination based on the removal of the three Hmong jurors to establish a prima facie

case. And, unlike in *Campbell*, it did not later find that all but one of the challenges was valid—rather, it found that the challenges to Jurors 3 and 26 were discriminatory. *Campbell* does not undermine the finding of prima facie case here.

Because the state met its initial burden in making a prima facie showing of discrimination, the burden shifted to the defense as the party exercising the peremptory challenge to proffer race-neutral reasons for the challenges. The state does not assert Xiong failed to proffer facially race-neutral reasons for the peremptory challenges, so we turn to the third step of the *Batson* analysis.

B. The district court did not clearly err by finding that Xiong’s reasons for the challenges were pretexts for race discrimination.

Xiong argues that the district court clearly erred by finding that the reasons that he articulated for the challenges to Jurors 3 and 26 were pretextual and that the real reason for the challenges was race discrimination. Reviewing courts give great deference to a district court’s factual determination of discrimination. *Martin*, 773 N.W.2d at 101. This deference is owed because the district court “occupies a unique position to observe the demeanor of the prospective juror and evaluate the credibility of the party that exercised the peremptory challenge.” *State v. Diggins*, 836 N.W.2d 349, 355 (Minn. 2013).

Xiong offered the following reasons for the challenges. He said that he was concerned about Juror 3’s “willingness to be here and his willingness to commit and really focus and pay attention.” He asserted that Juror 3 “gave very short answers,” “did not seem to be very engaged,” and appeared to be “looking off in other directions while people were talking.” As to Juror 26, Xiong offered that he was concerned that Juror 26 was “not very

engaged,” did not seem “very interested in being here,” and gave “limited answers” during questioning. He also noted that Juror 26 stated she watched unspecified videos on social media about forensics and expressed concern that the videos are “not exactly a great source for watching that.”

The state argued that Xiong’s proffered reasons were inadequate and that the real reason for the challenges was the fact Jurors 3 and 26 were Hmong. In support, the state argued that Xiong treated Jurors 3 and 26 differently from others because other jurors who indicated they extensively watched forensic shows were not challenged and because the defense asked the challenged jurors the fewest questions in the group. The state asserted that, because the defense asked almost no questions of Juror 3 and very limited questions of Juror 26, the defense did not attempt to engage them. Finally, in support of its contention the real reason for the challenges was the prospective jurors’ race, the state noted that the case involved the Hmong community, that almost all of the witnesses were Hmong, and that both the defendant and the victim were Hmong.

The district court found that the state had met its burden of proving purposeful discrimination with respect to Jurors 3 and 26.¹ First, the district court found that defense counsel’s claim that she had “no idea that she had [challenged] all three Hmong jurors, leaving no jurors of Asian descent on the panel,” was not plausible given the circumstances of the case. The district court reasoned that, because the underlying facts of this case

¹ We agree with Xiong that the district court appears to mislabel Jurors 3 and 26 in its description of the facts in its order, but Xiong does not argue this mistake as a basis for reversal nor do we believe that it is.

involved an altercation between “rival Asian gang members, the victim . . . is Hmong, most of the witnesses were Hmong, and . . . the incident occurred at a large community Hmong festival,” it was implausible that defense “counsel would be unaware that, due to her peremptory [challeng]es, the jury panel would now have zero people of Asian descent.”

The district court then addressed Xiong’s proffered reasons for challenging Jurors 3 and 26 and found them inconsistent with its own observations. The district court determined, based on its own observations of the jurors’ demeanor and participation, that neither juror was uninterested. It found that Juror 3 “listened carefully and provided thoughtful and honest answers to the questions” and that “[t]here was nothing in his responses or body language that indicated that he was not interested in serving as a juror.” The district court found that Juror 26 “was engaged in the process,” that she “listened and did her best to answer the attorney’s questions,” and that in tone, demeanor, and manner of response, she was very similar to another prospective juror who was non-Asian and who was not challenged. Further, the district court noted that both jurors indicated that they wanted to serve as jurors. The district court observed that, although Xiong claimed a concern about lack of engagement, defense counsel asked “few, if any” questions to Jurors 3 and 26 on that issue and thus failed to provide a meaningful opportunity for those jurors to engage. It determined that defense counsel’s “lack of questioning or meaningful follow-up questions” to Jurors 3 and 26 supported the state’s argument that the proffered race-neutral reasons were pretextual. The district court concluded that, under the totality of the circumstances, Xiong’s decision to challenge Jurors 3 and 26 “was rooted in the legally

impermissible belief that Hmong jurors were less favorable to the defense than non-Hmong jurors.”

Xiong contends that the district court’s findings are contradicted by the record. He argues that the district court’s “skepticism” that defense counsel did not realize that the defense’s peremptory challenges left no jurors of Asian descent on the panel carries no weight because the district court found the peremptory challenge to Juror 9 to be valid. But the fact that the challenge to one of the three jurors was ultimately not found to be discriminatory does not mean that the district court erred by finding it not credible that defense counsel had “no idea” that, as a result of her peremptory challenges, there were no jurors of Asian descent left on the panel. And the district court could fairly consider that lack of credibility in making its factual determination as to whether the challenges to Jurors 3 and 26 were motivated by race. *Cf. Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995) (observing that, at the third step of *Batson*, “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination”).

Xiong also argues that the district court in its findings did not actually address his concern that Jurors 3 and 26 were not engaged or less engaged than others. We disagree. The district court gave a detailed description of its observations during voir dire of Jurors 3 and 26—their demeanor, body language, and responsiveness—explaining that those observations led it to find that both jurors were, in fact, “interested” and “engaged.” This case is therefore unlike *Campbell*, a case heavily relied upon by Xiong. There, the district court made the irrelevant finding that the challenged juror was “pleasant, articulate, [and]

a bright individual” when the reasons proffered for the challenge were that the juror was less engaged, appeared to favor the state, and had formed a rapport with the state during voir dire. 772 N.W.2d at 863, 865. To the extent that Xiong argues that the district court’s personal observations about the jurors are not supported by the record, we are not persuaded. As the district court explained, it was present throughout the entire jury-selection process and was able to observe all of the jurors.

Xiong also argues that, apart from the issue of pretext, the district court clearly erred by determining that the real reason for the peremptory challenges was race discrimination. He contends that the district court’s reasoning is “superficial” and does not explain “how [challeng]ing Asian jurors would yield a benefit to the defense.” This argument is unavailing. The district court explained that the totality of the circumstances led it to find that the challenges were based on race. Those circumstances included the factual circumstances of the case, the implausibility of the explanations for the challenges, and the lack of credibility of defense counsel’s claim of being unaware that Xiong’s challenges removed the last Asian jurors from the panel. The district court did not need to find what specific benefit Xiong thought would be achieved by challenging Asian jurors in order to find race discrimination in violation of *Batson*.

In sum, applying due deference to the district’s credibility and factual determinations, we conclude that the district court did not clearly err by determining that race was the real reason for the challenges to Jurors 3 and 26.

Affirmed.