MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Bryan Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 18, 2022

Court of Appeals Case No. 21A-CR-1946

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No. 49D21-2101-F6-762

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, David Jones (Jones), appeals following his conviction for escape, a Level 6 felony, Ind. Code § 35-44.1-3-4(b); and battery, a Class A misdemeanor, I.C. § 35-42-2-1(c)(1), (d)(1).

[2] We affirm and remand with instructions.

ISSUES

[3] Jones presents this court with two issues, which we restate as:

> (1) Whether remand is necessary to correct clerical errors in the trial court's written sentencing order and the abstract of judgment; and
>
> (2) Whether the trial court's denial of Jones' *Batson* challenge to the State's exercise of two peremptory challenges was clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] On December 18, 2020, Jones was ordered onto home detention monitoring, one of the conditions of which was that he was to remain at his father's residence in the 7400 block of North Michigan Road in Indianapolis unless he had permission from the home detention administrator to leave. On January 4, 2021, Jones left his father's residence without permission and traveled to the area of Tibbs Avenue and 10th Street in Indianapolis, where he encountered J.H. Jones and J.H. went to a hotel together, and Jones rented a room. An altercation took place in the hotel room, and Jones pushed J.H. away from the

door as she attempted to leave, causing her to experience pain. J.H. fled to the hotel lobby, and the desk clerk summoned law enforcement around 1:00 a.m. on January 5, 2021. J.H. reported to responding officers that, among other things, Jones had strangled her with a pair of stockings and with his hands. After officers spoke with J.H. and Jones and saw the disarray of their hotel room, Jones was taken into custody.

[5] On January 8, 2021, the State filed an Information, charging Jones with Level 6 felony strangulation and Class A misdemeanor battery resulting in bodily injury. On March 15, 2021, the State filed an amended Information, adding a Level 6 felony escape charge. On July 8, 2021, the trial court convened Jones' jury trial. A jury of six jurors and one alternate was to be chosen from the venire panel. During voir dire, the deputy prosecutor informed the panel of prospective jurors that the State had charged Jones with battery resulting in bodily injury and that, in Indiana, pain is considered to be a bodily injury. The deputy prosecutor asked the panel for a show of hands of those who "could not convict with pain as injury[.]" (Transcript Vol. I, p. 74). Q.W. raised his hand, and the following exchange took place:

> Deputy Prosecutor: Okay. Tell me more about that, Mr. Q.W.
>
> Q.W.: Pain's just like you said, getting out of the tub that stubs - when you stub your toe, that'll hurt. Like with some – like to me that would. . . I just get up stuff like – certain stuff, certain pain people deal with. Certain pain people express differently. . . So, like you could put someone up there and have no clue that they

were going through pain. You could put someone else up there, complete opposite who knew they were going through pain.

Deputy Prosecutor: So, let me ask you this, do all people show injury the same?

Q.W.: No.

(Tr. Vol. I, p. 75). Later during voir dire, the deputy prosecutor asked prospective juror T.B. about her indication on the juror questionnaire that she might not be able to be fair and impartial due to her distrust of law enforcement. T.B. affirmed that she did distrust law enforcement. The deputy prosecutor noted that law enforcement officers would testify in the case and asked T.B. if there was "anything about that then that you could not give the State or the defendant a fair trial?" (Tr. Vol. I, p. 79). T.B.'s response to this question was largely indiscernible and was not fully transcribed. To the deputy prosecutor's next question, "Are you going to weight the testimony of any police officers that get on the stand differently than you would other witnesses?" T.B. responded, "No I could – I feel like I could be totally fair." (Tr. Vol. I, p. 79). In response to a question by defense counsel, T.B. stated that she is "African-American" and responded affirmatively when defense counsel asked if her race probably affects the way that T.B. perceived law enforcement. (Tr. Vol. I, p. 98).

[6] The parties held an unrecorded sidebar during which they exercised their challenges to the prospective jurors. The State used two of its peremptory

challenges on Q.W.[1] and T.B. Jones is a Black male. Defense counsel raised a challenge based on *Batson v. Kentucky* to the State's striking of the two prospective Black jurors, arguing that the State's striking of Q.W. and T.B. was based on improper racial discrimination. The trial court rejected the *Batson* challenge, and after the sidebar, eight prospective jurors were dismissed, including Q.W. and T.B. After additional voir dire for the selection of the alternate juror, the trial court dismissed the jurors and held an on-the-record hearing on defense counsel's *Batson* challenge. The State argued that it had sought to exclude Q.W. because he was "almost flippant about, um, the idea that pain could be injury" and because "he did not [sic] indicate that he could get behind that because it is such a subjective, you know, measurement." (Tr. Vol. I, p. 118). As to T.B., the State argued that it sought to exclude her due to her stated distrust of law enforcement. The trial court again denied the *Batson* challenge, reasoning that Q.W.'s views on pain as an injury, an element of the battery offense, was a sufficiently race-neutral reason for striking Q.W. and that, although the State's proffered reason for striking T.B. might not support a for-cause challenge, there was no Indiana precedent holding that distrust of law enforcement was an insufficiently race-neutral reason for exercising a peremptory challenge. Prior to the presentation of the evidence, defense counsel noted for the record that "the seated jury appears to me to be entirely white except for one [B]lack woman." (Tr. Vol. I, p. 124). After hearing the

[1] Defense counsel later described Q.W. as a Black male, a description which the deputy prosecutor did not appear to dispute.

testimony of J.H., one law enforcement officer, and Jones, among others, the jury found Jones not-guilty of strangulation but guilty of battery and escape.

[7] On August 25, 2021, the trial court held Jones' sentencing hearing. The trial court stated at the hearing that it sentenced Jones to "a year and a half executed" for the Level 6 felony escape conviction and to "one year" for the Class A misdemeanor battery conviction, to be served concurrently. (Tr. Vol. II, p. 33). However, the trial court's written sentencing order and the abstract of judgment, also issued on August 25, 2021, indicate that Jones received concurrent sentences of 545 days for the battery and 365 days for the escape.

[8] Jones now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Written Sentencing Order*

[9] Jones first contends that the trial court's written sentencing order and the abstract of judgment are inconsistent with its oral sentencing statement. Where a trial court's oral and written sentencing statements conflict, we will examine them together to determine the intent of the trial court in imposing its sentence. *Skipworth v. State*, 68 N.E.3d 589, 593 (Ind. Ct. App. 2017). If the trial court's intent is unambiguous, we may remand the case for what is essentially the correction of clerical errors. *See Willey v. State*, 712 N.E.2d 434, 445 n.8 (Ind. 1999) (remanding for correction of "clerical errors" creating an inconsistency between the trial court's oral sentencing statement and its written sentencing order and the abstract of judgment, which themselves were consistent).

[10] Neither Jones nor the State contends that the trial court intended to impose any other sentence but 545 days for the Level 6 felony escape and 365 days for the Class A misdemeanor, as it did in its oral sentencing statement. Therefore, we remand for the correction and reissuing of the written sentencing order and the abstract of judgment. *See id*.

II. *Batson Challenge*

[11] Jones contends that the trial court erred when it denied his challenge to the State's exercise of two peremptory challenges to remove potential jurors Q.W. and T.B., both of whom, like Jones, are Black. In *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 1716, 90 L.E.2d 69 (1986), the Supreme Court reaffirmed the principle that the State denies a Black criminal defendant equal protection of the law when it tries him before a jury from which members of his race have been purposefully excluded. While a criminal defendant "has no right to a petit jury composed in whole or in part of persons of his own race[,]" he "does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id*. at 85, 106 S.Ct. 1717 (internal quotes omitted). To effectuate this right, the *Batson* Court announced a three-step analysis for assessing challenges to the racial makeup of the venire panel, an analysis which has been applied by the Indiana supreme court to allegations of the use of racially-discriminatory peremptory juror strikes as follows:

> First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its

> peremptory challenge to present a race-neutral explanation for using the challenge. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination.

Jeter v. State, 888 N.E.2d 1257, 1263 (Ind. 2008) (internal citations to *Batson* omitted). The ultimate burden of persuasion rests with the party opposing the strike. *Id*. at 1264. "The trial court's conclusion that the prosecutor's reasons were not pretextual is essentially a finding of fact that turns substantially on credibility" and "is therefore accorded great deference." *Highler v. State*, 854 N.E.2d 823, 828 (Ind. 2006). We will only overturn the trial court's determination if it is clearly erroneous. *Forrest v. State,* 757 N.E.2d 1003, 1004 (Ind. 2001).

A. *Prima Facie Showing*

[12] The prima facie burden for the challenger to the strike to show discriminatory intent is "low" and only requires that the defendant show circumstances raising an inference that discrimination has occurred. *Addison v. State*, 962 N.E.2d 1202, 1208 (Ind. 2012). The use of peremptory challenges to remove some Black jurors does not, by itself, raise the required inference of racial discrimination, but the removal of the only Black jurors who could have served on the petit jury does make the required prima facie showing. *See id*. at 1208-09 (holding that Addison had made a prima facie showing of discriminatory use of peremptory strikes where, in the first round of voir dire, the State had removed the only three Black potential jurors in the venire panel).

[13] Relying on *Addison*, Jones argues that he made the *Batson* prima facie case of discrimination because he showed that the State "struck the only two African-Americans on the jury panel." (Appellant's Br. p. 11). However, we cannot find Jones' argument persuasive because, unlike the circumstances of *Addison*, the State did not remove all of the Black potential jurors from the entire venire panel, as evinced by defense counsel's statement for the record that the seated jury comprised at least "one [B]lack woman." (Tr. Vol. I, p. 124). However, even though Jones offers little in support of his prima facie showing, "where, as here, a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing of purposeful discrimination becomes moot." *Cartwright v. State*, 962 N.E.2d 1217, 1222 (Ind. 2012). Because the deputy prosecutor provided the State's race-neutral explanations for the peremptory strikes and the trial court ruled on the issue, the prima facie issue is moot, and our analysis proceeds to the next step.

B. *Race-Neutral Reasons*

[14] Pursuant to the second step of a *Batson* analysis, if the State offers an explanation which, on its face is based on something other than race, the explanation will be deemed to be race-neutral. *Cornell v. State*, 139 N.E.3d 1135, 1142 (Ind. Ct. App. 2020), *trans. denied*. Put another way, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Dickens v. State*, 754 N.E.2d 1, 7 (Ind.

2001). The explanation proffered by the State need not be particularly persuasive or plausible. *Richardson v. State*, 122 N.E.3d 923 (Ind. Ct. App. 2019), *trans. denied*. However, the reasons offered by the State must be related to the particular case to be tried, and the State may not make its showing through a prosecutor's mere denial of any discriminatory motive or affirmance of good faith in exercising his strikes. *Batson*, 476 U.S. at 98, 106 S.Ct. 1724. The *Batson* Court emphasized that "the prosecutor's explanation need not rise to the level of justifying exercise of a challenge for cause." *Id*. at 97, 106 S.Ct. 1723.

[15] Here, the State's explanation for striking Q.W. was his apparent unwillingness or inability to view pain as an injury for purposes of the battery offense. We conclude, as did the trial court that, on its face, this was an explanation which was related to the case that was based on something other than race. Therefore, we conclude that it was sufficient to meet the *Batson* second-step requirement. *See id*. at 98, 106 S.Ct. 1724; *Cornell*, 139 N.E.3d at 1142. Jones argues that the State's characterization of Q.W.'s attitude "as being 'almost flippant' about whether pain could be an injury" was an insufficient race neutral-explanation because "that's not what Q.W. said." (Appellant's Br. p. 15). Jones maintains that Q.W. merely stated that different individuals have differing thresholds of pain tolerance. Jones' argument misses the mark, as he ignores that the State did not argue that Q.W. had said that he was flippant about the issue of pain as injury; rather, it argued that he actually was flippant about the issue. Jones also ignores the portions of voir dire where the deputy prosecutor asked the panel if

there was anyone among them who could not convict based upon the pain as injury, and Jones indicated that he could not due in part to the fact that "certain stuff, certain pain people deal with[,]" a remark which the prosecutor reasonably characterized as not taking the idea of pain as an injury seriously. (Tr. Vol. I, p. 75).

[16] As to T.B., the State's proffered reason for striking her was that she expressed a distrust of law enforcement. In *Williams v. State*, 700 N.E.2d 784, 786 (Ind. 1998), our supreme court upheld the trial court's denial of a *Batson* challenge where the trial court found the State's justification for striking a juror, that he was unsure that he could trust a police officer, to be race-neutral. The Indiana supreme court has also held strikes to be race-neutral where the stricken juror's negative feelings against law enforcement were more personal and pointed than the removed and abstracted general distrust expressed by T.B. in this case. *See*, *e.g.*, *Holifield v. State*, 572 N.E.2d 490, 494 (Ind. 1991) (upholding a peremptory strike exercised on a juror who was related to the suspect of the murder of a prison guard and whose entire family was upset with local police department and its general law-enforcement policies). In light of this authority, we conclude that the State offered an adequately race-neutral explanation for striking T.B.

[17] On appeal, Jones does not provide a concise argument that the State's proffered reason for striking T.B., namely that she distrusted law enforcement, was not race-neutral. However, even if he had, we would still find no error in the trial court's denial of his *Batson* challenge, as set forth below.

C. *Ultimate Showing of Discriminatory Intent*

[18] Under the third step of a *Batson* analysis, the trial court is required to assess whether the proponent of the *Batson* challenge has met his burden to show discriminatory intent, which also entails assessing the persuasiveness of the race-neutral explanations for the strikes provided by the State. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1171, 131 L.Ed.2d 834 (1995).

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the [proponent's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.

Jeter, 888 N.E.2d at 1264-65 (internal citations and quote omitted).

[19] Here, the trial court denied Jones' *Batson* challenge as to Q.W. because it credited the deputy prosecutor's explanation that she was concerned about how Q.W. "viewed pain as a possible element of the crime[.]" (Tr. Vol. I, p. 118). It is a reasonable, non-discriminatory trial strategy for a prosecutor to be concerned that a juror has expressed doubt or flippancy about an element of the offense upon which the State has the burden of proof. The trial court believed the credibility of the prosecutor's explanation, and without more, we will not second-guess that credibility assessment. *See id*.

[20] Jones does not offer an extended argument regarding the trial court's ruling as to Q.W. apart from casting doubt on the deputy prosecutor's characterization of Q.W.'s demeanor, an argument we have already addressed, and directing our attention to the fact that Q.W. "was never asked whether he could be fair and impartial." (Appellant's Br. p. 15). However, the *Cartwright* court held that the defendant had failed to show discriminatory intent by the State in the exercise of a peremptory strike by arguing that the stricken juror had "never indicated that he would be unwilling to judge the case fairly and impartially[,]" without explaining why it rendered the strike pretextual. *Cartwright*, 962 N.E.2d at 1224. The *Cartwright* court also observed that he was essentially arguing that the State failed to meet its burden to demonstrate its strike was not motivated by discriminatory purpose, an unpersuasive argument given that the ultimate burden remained with Cartwright himself. *Id*. We find that Jones' argument suffers from the same defects and, therefore, find no clear error in the trial court's ruling. *See Forrest,* 757 N.E.2d at 1004.

[21] Jones' argument regarding the trial court's ruling on T.B. is more extensive but no more persuasive. The trial court ruled that, although in light of T.B.'s statement that she could be fair and impartial despite her feelings about law enforcement, it would not grant a for-cause challenge to T.B., the State was exercising a peremptory challenge for which it had provided a valid justification. Because Jones offered no evidence-based argument to the strike of T.B., such as showing that the deputy prosecutor had failed to strike other white jurors who expressed distrust of law enforcement, the trial court's ruling also

appears to be based on its finding that the deputy prosecutor was credible when offering her explanation for striking T.B. On appeal, Jones does not direct our attention to, and our own review failed to reveal, any evidence in the record tending to show discriminatory bias on the part of the deputy prosecutor. A prosecutor may reasonably be concerned about a juror's distrust of law enforcement if, as here, she intends to call an officer to testify as part of the State's case. Without more, we will not find the trial court's assessment of the deputy prosecutor's credibility to be clearly erroneous. *See id; see also Jeter*, 888 N.E.2d at 1264-65.

[22] Jones' argument regarding T.B. is essentially that the trial court erred when it differentiated between a peremptory strike and a for-cause strike when assessing whether the State's rationale for striking T.B. was persuasive. However, Jones' argument flies in the face of *Batson* itself, in that the Court explicitly stated that "the prosecutor's explanation need not rise to the level of justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S.Ct. 1723. In light of this clear and explicit direction provided in *Batson*, we do not find Jones' authority, *Mason v. United States*, 170 A.3rd 182 (D.C. Ct. App. 2017), to be persuasive, as that case involved a for-cause strike, not a peremptory one. *Id*. at 185. Lastly, contrary to Jones' implications, we can find no support in *Addison* for his argument that we should treat peremptory and for-cause strikes similarly when engaging in *Batson* analysis, as our supreme court simply did not address the issue. *See generally*, *Addison*, 962 N.E.2d at 1208-17. Accordingly, we also affirm the trial court's denial of Jones' *Batson* challenge to T.B.

CONCLUSION

[23] Based on the foregoing, we conclude that remand is necessary to correct the clerical errors in the trial court's written sentencing order and in the abstract of judgment and to reissue the corrected documents. However, we find no clear error in the trial court's denial of Jones' *Batson* challenge to the striking of Q.W. and T.B.

[24] Affirmed and remanded with instructions.

[25] Robb, J. and Molter, J. concur