

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

No. 159346

JACQUES JEAN KABONGO,
Defendant-Appellant.

Court of Appeals No. 338733
Wayne County Circuit Court No. 16-010745-01-FH

[On Appeal from the Court of Appeals
Murray, C.J., and Meter, and Gleicher, JJ.]

**PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF ON APPEAL
FILED UNDER AO 2019-6.**

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with the Defendant-Appellant's statement of appellate jurisdiction. The Michigan Supreme Court has jurisdiction to hear this appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A trial court's findings of fact as to whether the prosecution's explanation for the peremptory challenge was pretext and, therefore, whether the defendant has proven purposeful discrimination, are both reviewed under the deferential standard of clear error. Here, the trial court made findings of fact that the prosecutor's non-discriminatory reasons for excusing juror no. two were not a pretext for discrimination and these reasons are fully supported by the record. Therefore, since there was no clear error in the trial court's findings, was it proper for the court to allow the peremptory challenge of juror number two?

The trial court would answer this question, "Yes."

The People answer, "Yes."

The Defendant answers, "No."

II.

A trial court can deny the exercise of a peremptory challenge where the purpose of the challenge is to remove persons from the venire based on race and this decision is given great deference. Here, the trial court found that the Defendant's exercise of a peremptory challenge against juror number five was based on race because she disbelieved his explanations. Where great deference is given to the trial court's findings of fact, was the trial court correct in disallowing the Defendant's peremptory challenge of juror number five?

The trial court answered this question, "Yes."

The People answer, "Yes."

The Defendant answers, "No."

COUNTERSTATEMENT OF QUESTIONS PRESENTED (CONT.)

III.

Where a trial court makes a good faith effort to comply with the antidiscrimination requirements of *Batson v Kentucky*, an erroneous denial of a peremptory challenge does not require reversal. Here, the trial court acted in good faith and complied with the three-stage process of *Batson v Kentucky* in denying the Defendant the peremptory challenge of juror number five. Therefore, did reversible error occur in this case?

The trial court would answer this question, “No.”

The People answer, “No.”

The Defendant answers, “Yes.”

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. Following a jury trial, the Defendant was convicted of carrying a concealed weapon.¹ He was sentenced to one year of non-reporting probation and 50 hours of community service.² After the successful completion of probation, the Defendant was discharged from probation on March 1, 2018.

The case stems from the following facts: On October 15, 2016, at about 4 p.m., the Defendant was at one of his properties on Monte Vista Street in Detroit.³ The police, while on patrol in the area, saw the Defendant with a gun exposed on the waistband of his pants.⁴ As the police car rolled by the house, the Defendant covered the gun with his blue shirt.⁵ The Defendant was subsequently arrested for carrying a concealed weapon.⁶ The Defendant's CPL license had expired a year prior.⁷

Officer Hernandez testified that on October 15, 2016, at around 4 p.m., he was on duty driving a police vehicle in the area of Kendall and Monte Vista in the City of Detroit when his partner, Officer Collrin, drew his attention to the Defendant who was walking toward the street carrying a gun in a pants holster, otherwise known as open carrying.⁸ Officer Hernandez saw the Defendant continue to walk into the street into a four-door pickup truck that was parked in front of a house.

¹ 4/04/2017, 59.

² 5/01/2017, 11.

³ 4/03/2017, 196.

⁴ 4/03/2017, 34.

⁵ 4/03/2017, 38.

⁶ 4/03/2017, 208.

⁷ 4/03/2017, 196.

⁸ 4/03/2017, 34.

The Defendant opened up the rear passenger door and appeared to be picking up tools.⁹ The Defendant then went to the driver's side passenger door and grabbed a blue shirt and put it on so that it covered the weapon.¹⁰ At that point, Officer Hernandez stopped the police car and exited to ask the Defendant if he had a concealed weapons permit.¹¹ The Defendant told him that his CPL was expired.¹² The Defendant showed him his CPL card.¹³ Officer Hernandez verified with his partner that the Defendant's CPL card had an expiration date of 9-12-2015.¹⁴

Officer Collrin testified on October 15, 2016, he was a passenger in the police vehicle driven by his partner, Officer Hernandez.¹⁵ They were travelling northbound on Monte Vista Street approaching Kendall Street when he observed the Defendant walking down the driveway of a house.¹⁶ He observed that the Defendant had a black semiautomatic handgun in his pants holster.¹⁷ The Defendant's shirt changed position so that the gun was concealed.¹⁸ At that point, his partner stopped the scout car and they both exited the vehicle to approach the Defendant.¹⁹ He observed a conversation take place between Officer Hernandez and the Defendant.²⁰ After the Defendant produced a concealed pistol license, the Defendant said that it was "a little expired."²¹ Officer

⁹ 4/03/2017, 37.

¹⁰ 4/03/2017, 38.

¹¹ 4/03/2017, 39.

¹² 4/03/2017, 40.

¹³ 4/03/2017, 50.

¹⁴ 4/03/2017, 41; 57.

¹⁵ 4/03/2017, 88-89.

¹⁶ 4/03/2017, 90.

¹⁷ 4/03/2017, 95.

¹⁸ 4/03/2017, 103.

¹⁹ 4/03/2017, 104.

²⁰ 4/03/2017, 105.

²¹ 4/03/2017, 106.

Collrin went back to the scout car and ran the concealed pistol license through the LEIN network and discovered that the Defendant's CPL license expired on September 12, 2015.²² He advised Officer Hernandez of this and the Defendant was disarmed and arrested for carrying a concealed weapon.²³

For the defense, Kurt Hornung testified that on October 15, 2016, he was installing a furnace for the Defendant at the Defendant's house on Monte Vista with Brian Costigan.²⁴ He had done work for the Defendant before and had known the Defendant for about five years.²⁵ He noticed that the Defendant had a gun on his hip at the house but he was unarmed that day.²⁶ That was the first time he had ever seen the Defendant with a gun.²⁷

He was mainly working in the basement of the house. The last time he saw the Defendant prior to his arrest, the Defendant was in the backyard painting. The Defendant was wearing a white t-shirt and at some point, he added a blue shirt.²⁸

When he came up from the basement to get a thermostat from his car, he heard the police tell the Defendant to put his hands behind his back.²⁹ After the Defendant was arrested, the police allowed him to take the Defendant's truck keys so that he could move the truck to the

²² 4/03/2017, 106.

²³ 4/03/2017, 106.

²⁴ 4/03/2017, 162; 170.

²⁵ 4/03/2017, 168.

²⁶ 4/03/2017, 164.

²⁷ 4/03/2017, 169.

²⁸ 4/03/2017, 164.

²⁹ 4/03/2017, 173.

Defendant's other house on Stansbury Street.³⁰ There were tools in the front passenger area of the Defendant's truck.³¹

David Nicholson testified that he was a friend of the Defendant's since 2009, when they both worked for Blue Cross Blue Shield in Southfield, Michigan.³² They socialized after work together.³³ He knew that the Defendant owned properties in Detroit, but could not remember the addresses.³⁴ He has a concealed weapon permit (CPL) and is a NRA certified trainer.³⁵ He was not happy when he heard that the Defendant let his CPL expire.³⁶ But he told him how to transport and carry his firearm without a CPL.³⁷ He had been to the Defendant's properties with the Defendant where he saw the Defendant open carry his weapon.³⁸

The Defendant testified that he owned several properties in the Detroit area including 14009 Monte Vista in Detroit.³⁹ On October 15, 2016, the Defendant was working on 14009 Monte Vista, which was one of his rental properties.⁴⁰ He was on his front lawn when he saw a black police car traveling down the street at around 15-20 mph.⁴¹ He grabbed some tools from the front passenger area of his truck, which was parked

³⁰ 4/03/2017, 166.

³¹ 4/03/2017, 166.

³² 4/03/2017, 176.

³³ 4/03/2017, 177.

³⁴ 4/03/2017, 178.

³⁵ 4/03/2017, 178.

³⁶ 4/03/2017, 181.

³⁷ 4/03/2017, 181.

³⁸ 4/03/2017, 187.

³⁹ 4/03/2017, 193.

⁴⁰ 4/03/2017, 194; 201.

⁴¹ 4/03/2017, 201.

in the street.⁴² He walked back toward the house and was almost to the front steps of the house when he arrested by the police.⁴³

The Defendant had a concealed pistol license (or CPL) in 2011 but it expired on his birthday in 2015.⁴⁴ He owned the Glock 19 handgun that he was arrested with and the gun was registered to him.⁴⁵ He felt he needed a gun to protect him due to thirty break-ins at his rental properties.⁴⁶ He chose not renew his CPL because he knew he could open carry the gun.⁴⁷

Following his conviction, the Defendant appealed to the Michigan Court of Appeals which affirmed his conviction in an unpublished opinion dated December 27, 2018. A motion for reconsideration was denied by the Court of Appeals on February 20, 2019. The Defendant filed an application for leave to appeal to the Michigan Supreme Court on March 26, 2019. The Michigan Supreme Court granted leave to appeal limited to four issues on March 18, 2020. The four issues are: (1) whether the peremptory challenge of juror number 2 violated *Batson v Kentucky*, (2) whether the denial of a peremptory challenge to juror number 5 was erroneous, (3) whether the harmless error standard should apply to the erroneous denial of a peremptory challenge, and if so, (4) was the error harmless in this case.

Other facts will be referenced as necessary within the brief.

⁴² 4/03/2017, 212.

⁴³ 4/03/2017, 206-209.

⁴⁴ 4/03/2017, 195.

⁴⁵ 4/03/2017, 195.

⁴⁶ 4/03/2017, 197.

⁴⁷ 4/06/2017, 197.

ARGUMENT

- I. **A trial court’s findings of fact as to whether the prosecution’s explanation for the peremptory challenge was pretext and, therefore, whether the defendant has proven purposeful discrimination, are both reviewed under the deferential standard of clear error. Here, the trial court made findings of fact that the prosecutor’s non-discriminatory reasons for excusing juror number two were not a pretext for discrimination and these reasons are fully supported by the record. Therefore, since there was no clear error in the trial court’s findings, it was proper for juror number two to be removed from the jury.**

Standard of Review

The People do not disagree with the Defendant’s statement of the standard of review. The appellate court reviews for an abuse of discretion a trial court’s ruling regarding discriminatory use of peremptory challenges.⁴⁸ A trial court’s finding of fact regarding whether the prosecution’s explanation for the peremptory challenge was a pretext and whether the defendant has proven purposeful discrimination are reviewed for clear error.⁴⁹ In reviewing a trial court’s ruling regarding the discriminatory use of peremptory challenges, the appellate court must give great deference to the trial court’s findings because they turn in large part on a determination of credibility.⁵⁰ The trial court is uniquely situated in a position to weigh the credibility of the evidence before it.⁵¹

⁴⁸ *People v Eccles*, 260 Mich App 379 (2004).

⁴⁹ *People v Knight*, 473 Mich 324, 338 (2008).

⁵⁰ *Id.*

⁵¹ *People v Skinner*, 502 Mich 89, 135 (2018).

Discussion

Batson v Kentucky held that the use of peremptory challenges to remove jurors based on their race violates the Equal Protection Clause.⁵² It went on to outline a three-step approach to determine whether a party has excluded a juror based on race. First, the challenger must make out a prima facie case of purposeful discrimination by showing that a totality of the relevant facts gives rise to an inference of discriminatory purpose.⁵³ Second, the burden shifts to the other party to come forward with a race-neutral explanation for challenging the juror.⁵⁴ And third, the trial court then has a duty to determine if the party making the challenge has established purposeful discrimination.⁵⁵

The trial court may find a *Batson* violation by ruling that the explanation given is unworthy of belief and simply a pretext for discrimination.⁵⁶ The finding “largely will turn on evaluation of credibility.”⁵⁷

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 prosecutor's state of mind based on demeanor and credibility lies “peculiarly within a trial judge's province.”⁵⁸

⁵² *Batson v Kentucky*, 476 US 79 (1986).

⁵³ *Id.* at 94.

⁵⁴ *Id.* at 97.

⁵⁵ *Id.* at 98.

⁵⁶ *People v Knight*, 473 Mich 324, 338 (2005).

⁵⁷ *Batson v Kentucky*, 476 US, at 98, n. 21.

⁵⁸ *Miller-El v Cockrell*, 537 US 322, 339 (2003), citing *Wainwright v Witt*, 469 U.S. 412, 428 (1985), citing *Patton v Yount*, 467 US 1025, 1038 (1984).

A. The trial court's findings of fact as to the Defendant's *Batson* challenge regarding juror number two were not clearly erroneous and, therefore, must be upheld.

The Defendant's *Batson* challenge to the jury array was correctly not sustained by the judge since the prosecutor's proffered reasons for striking prospective juror number two were not a pretext for excluding African-Americans from the jury.⁵⁹ The record is utterly devoid of any evidence from which it could be concluded that prospective juror number 2 was excused because of her race. Rather, the record unquestionably indicates that the prospective juror was excused by the prosecutor for valid reasons unconnected to race. The record also demonstrates that the Defendant's *Batson* challenge was designed to frustrate and delay the proceedings rather than a true concern about race or discrimination.

This is shown by the Defendant's initial challenge being concerned with the amount of peremptory challenges made, a number that was incorrect and, therefore, did not illustrate a pattern of challenges and did not satisfy a prima facie case of discrimination. A pattern is often used to show discrimination and when it is relied on to show a prima facie case it should at the very least be correct.⁶⁰ The prosecutor made four peremptory challenges, three African-American jurors and one Caucasian juror. But the Defendant made the following objection:

MR. HAPLERN: The prosecution excused four people and I can't, I can't recall whether the fourth person was an African American but three of them were. And I believe that this Court needs to at least attempt to get a definitive answer from the prosecutor about dismissing at least three, and I'm not sure of myself, the four people

⁵⁹ Defendant-Appellant's brief on appeal, p. 12-27.

⁶⁰ *People v Bell*, 473 Mich 275, 288 (2005); *People v Williams*, 174 Mich App 132 (1989); *People v Armstrong*, 305 Mich App 230, 239 (2014).

that she has excused. I'm positive, about the three but not number four.

THE COURT: The fourth was juror number 13 and that was a Caucasian person.

MR. HALPERN: Yes.⁶¹

Therefore, the Defendant initially was only concerned with the total number of challenges made by the prosecutor, not the race of those challenged, and was mistaken even to the total number of challenges made by the prosecution. Also, as the trial court noted, the challenge was untimely because it came well after these jurors had been excused and left the courtroom (and possibly the courthouse). Therefore, it is questionable as to whether the Defendant had even made out a successful prima facie case of discrimination when he made his motion. But, because the prosecution went on to make race-neutral explanations for her peremptory challenges, the People acknowledge that the question is technically moot, but in context it can still be probative of the validity of the challenge.⁶²

Indeed, the obvious reasons for the prosecution's peremptory challenges made to the other two African-American jurors (juror number three and juror number fourteen) were illustrative of the fact that the Defendant was engaged in gamesmanship and not a true concern over the racial makeup of the jury.

⁶¹ 3/30/2017, 145.

⁶² "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges 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 becomes moot." *Hernandez v New York*, 500 US at 359 (1991) (plurality opinion); see also *Bell*, 473 Mich at 296-297.

For example, the Defendant's *Batson* challenge to the peremptory strike of juror number three was completely spurious as the prosecutor correctly explained that the juror suffered several ailments and obviously did not want to attend the proceedings. The assistant prosecutor gave multiple non-race related reasons for peremptorily excusing potential juror number three, including that the juror did not want to be on the jury, that she had arthritis, and that she avoided eye contact with the prosecutor when she spoke to her. The assistant prosecutor gave the following justification for her peremptory challenge:

MS. POSIGIAN: As it relates to juror number three who I believe was the first juror that I struck, Ms. Whitford. She clearly did not want to be here. She was refusing to make eye contact with myself asking her questions, she was sitting down rolling her eyes, she had her arms crossed [sic at] a number of points. When the Court asked about real hardships it was my job, it was my kids. The Court asked about medical reasons, oh, I have arthritis. And then also she said she had a torn ligament in her leg and she said it made it difficult for her to sit stand and then she said she had a broken – and then didn't even tell us what the broken part of her body was. And the People would like jurors that – I know everyone doesn't necessarily want to be here, it's not their favorite thing, but people that are going to be attentive jurors. And based on her body language and her lack of interaction with me when I was trying to interact with her as well as the multitude of excuses she gave that is the reason that the People excused her.⁶³

The prosecutor's reasons are borne out by the transcript. For example, when asked by the court if anyone had a genuine hardship, prospective juror number three gave the following response: "POTENTIAL JUROR THREE: Yes. Also, my job and get my kids to

⁶³ 3/30/2017, 150.

school.”⁶⁴ When asked about health problems that would make jury service difficult, prospective juror number three gave the following response:

POTENTIAL JUROR THREE: I have a torn ligament and I have a broken – I have arthritis bad in my knee so I can't sit or stand at periods of time.⁶⁵

Other things pointed out by the prosecutor cannot be contained in the transcript, such as the juror folding her arms and rolling her eyes, but the trial judge confirmed that she did see the prospective juror fold her arms and roll her eyes during voir dire.⁶⁶ All of the reasons stated by the assistant prosecutor were legitimate non-race related reasons for exercising a peremptory challenge to the juror.

Likewise, the *Batson* challenge to the peremptory challenge of juror number 14 was also outlandishly false since juror number 14 was obviously pregnant and was having trouble paying attention because she did not feel well.⁶⁷ In regards to prospective juror 14, the assistant prosecutor gave the following justification for her exercise of a peremptory challenge to remove the juror:

MS. POSIGIAN: With regard to juror 14, Ms. Reynolds, it's not on record but Ms. Reynolds was quite clearly pregnant. She indicated that she had gone to the doctor the day before for severe pain. As she's sitting in the jury seat her head was in her hand and she also just appeared to be in extreme pain. It did not appear to the People that she was going to be necessarily inattentive or trying to off the jury but based on her quite extreme pregnancy and the fact that she was having severe pains the day before the People had a concern both with her

⁶⁴ 3/30/2017, 35.

⁶⁵ 3/30/2017, 36.

⁶⁶ 3/30/2017, 151.

⁶⁷ Juror number fourteen said that she was in pain and had just went to see the doctor yesterday for pain. 3/30/2017, 78.

being able to sit through today as well as possibly losing her over the weekend if she has to keep going back to the doctor. But, again, the head in her hands, her eyes are closing, and she's clearly in distress. The People excused juror number 14.⁶⁸

The trial court confirmed the observations made by the prosecutor in regard to prospective juror number 14.⁶⁹ The trial court made the following ruling:

So I'm going to find that there is a race neutral explanation for the peremptory challenge. This lady is pregnant, she did have her head in her hand, she testified to having a doctor's appointment, she was clearly not feeling well. She testified that she has flexible work hours, she has children at home, she is dependent upon her mother for childcare assistance.⁷⁰

Indeed, the record supports both the prosecutor's and the judge's observations as to prospective juror number 14. For example, when asked if she had a genuine hardship in serving on the jury, prospective juror number 14 raised her hand and explained, "Mine is just, basically, my kids missing school because I had to, you know, get here early enough because don't get to school until 8:30."⁷¹ Further, when asked if she could get a good night's sleep on Sunday and pay attention to the trial on Monday, prospective juror number 14 replied as follows:

POTENTIAL JUROR FOURTEEN: Mine is direct care. It varies because it goes by my mother's hours because she works two jobs and I take care of my handicap little sister so it's kind [sic] fluctuated between when she works.

⁶⁸ 3/30/2017, 152.

⁶⁹ 3/30/2017, 155.

⁷⁰ 3/30/2017, 155.

⁷¹ 3/30/2017, 35.

MS. POSIGIAN: But Sunday night, though, you think you can get sleep before you come on in here Monday morning?

POTENTIAL JUROR FOURTEEN: Well, I'm deal with the three kids I got at home and –

MS. POSIGIAN: You never sleep.

POTENTIAL JUROR FOURTEEN: Yeah, I don't. And I definitely don't sleep now.

MS. POSIGIAN: Are there any issues with your pregnancy or anything?

POTENTIAL JUROR FOURTEEN: Well –

MS. POSIGIAN: Medically, that would prevent you or make it difficult for you?

POTENTIAL JUROR FOURTEEN: Personally, I don't really want to say that part. But other than that I'll be okay but I do be in pain sometimes. I'm early but still be in pain now. So I just went to the doctor yesterday for being in pain. Other than that I'm okay right now.⁷²

To make a *Batson* challenge where there clearly were readily available and obvious non-discriminatory reasons to the exclude the jurors strains credibility. It also means that the Defendant did not establish, even in a prima facie way, a pattern of discrimination.

The prospective juror cited in this Court's order, prospective juror two, was also excused for valid non-discriminatory reasons and the Defendant utterly failed to prove that the prosecutor's race-neutral explanation was a mere pretext for racial discrimination. The assistant prosecutor gave the following reasons for excusing juror number two:

⁷² 3/30/2017, 77-78.

APA POSIGIAN: With regards to juror number two, she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was, and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated she's having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort of specifics. Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago. I don't remember anything. So she had a problem with memory and it's the People's concern for her that if we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget testimony seemed fairly probable and the People were concerned about that.⁷³

In looking at the trial transcript, the prosecutor's proffered reasons for choosing to excuse the juror are borne out by the responses given by prospective juror number two. For example, prospective juror number two did say that she suffers from "senior moments" as an excuse for her poor memory. The exchange was as follows:

THE COURT: Now has anyone on the panel or a member of your family, or a close friend been the victim of a crime? Anybody in the first row? I usually get a lot of yes's on this one so I'm going to take my time and make sure I cover everybody. Yes, juror number two?

POTENTIAL JUROR TWO: Yeah, we have been – our family has been but it was a long time ago. I can't remember the years and stuff. Senior moment. I'm 64 so...

⁷³ 3/30/2017, 146.

THE COURT: I'm not so far behind you.

POTENTIAL JUROR TWO: We have had, you know, robbery and stuff like that but it was, like, a long time ago nothing recent.⁷⁴

Prospective juror number two also could not remember when she last served on a jury or what happened in the case she served on:

THE COURT: Have any of the panel ever been on a criminal jury panel before by show of hands? Okay. Let's start with juror number two. How long ago was that?

POTENTIAL JUROR TWO: Years and years ago but we didn't have to serve because the defendant pled or something and then we left.⁷⁵

Prospective juror number two also could not remember when she had been pulled over by the police. The assistant prosecutor asked the following question:

MS. POSIGIAN: All right. Now, the judge asked you if you knew people in the court system at all but does anyone – police officers. Has anyone had a bad experience with a police officer? Got pulled over? Only juror number seven out of everybody?

...

POTENTIAL JUROR TWO: I'm sure I have been pulled over and stuff like that before, but I don't remember how long ago that was.⁷⁶

Even when the defense attorney was questioning the jurors, prospective juror number two could not remember the question that he had just asked. For example:

⁷⁴ 3/30/2017, 49-50.

⁷⁵ 3/30/2017, 43.

⁷⁶ 3/30/2017, 63.

MR. HALPERN: Are there any of you, taking the judge's question, are there any of you that have any kind of an opinion whatsoever about people having – doing an open carry of a gun; like, boy, I can't stand that, or that's terrible, or that's the People's rights? Some opinion about open carry, okay? Juror number four, and others?

I'll begin because it's the lowest number anyway, number two, and you can tell me as we go. Please, juror number two, tell me what your beliefs and feelings are about that?

POTENTIAL JUROR TWO: Open carry?

MR. HALPERN: Yes.⁷⁷

The trial judge made the following ruling:

I'm going to find in this case that the prosecutor as to juror number two has offered a race neutral explanation for the peremptory challenge and further has articulated a neutral explanation for the dismissal. Juror number two *did indeed have a difficult time with memory* she did discuss senior moments. She had to kind of had to *step back and reach back in her memory to recall things* such as whether or not she had been the victim of a crime, such as — there were some other specific ones. But I do remember she did seem to have a problem keeping up with this case.

And Batson's second step does not required [sic require] articulation of persuasive reason or even a plausible one so long as the reason is not inherently discriminatory it suffices. And that's the case of Rice versus Collings, 546 US 333, which is a 2006 case.

So here the prosecutor has provided a race neutral explanation for her peremptory challenges to number two so I'm going to then deny the Batson challenge as to juror number two.

⁷⁷ 3/30/207, 85-86.

And I'll even go to the third step which requires that the trial Court make a final determination of whether the challenger of the strike, which would be the defense, has established purposeful discrimination. And whether there is purposeful discrimination is the persuasiveness of the prosecutor's justification for the peremptory strike. It comes down to whether the trial Court finds the prosecutor's race neutral explanations to be creditable. And in this case I will find that it was reasonable, her explanation is not improbable, there was a rationale that had some basis in accepted trial strategy. And so I'm going to deny the Batson challenge as to juror number two.⁷⁸

Therefore, contrary to the Defendant's viewpoint, the prosecutor's version of events and the claim of bad memory of prospective juror number two was not a total fabrication. Rather, it was completely supported by the record and the Defendant's claim of race-based exclusion is wholly without merit and was properly rejected by the trial court.⁷⁹ It is undisputed that, "a reviewing court which analyzes only the transcript from voir dire is not as well positioned as the trial court to make credibility determinations."⁸⁰ The Defendant has not shown how any of the proffered reasons were pretextual. In summary, the prosecution's proffered reasons were not a pretext to disguise intentional discrimination and the trial court's ruling that there was no violation of *Batson v Kentucky* should be upheld.

⁷⁸ 3/30/2017, 148-149 (emphasis supplied).

⁷⁹ 3/30/2017, 149.

⁸⁰ *Miller-El v Cockrell*, 537 US 322, 339 (2003).

- II. A trial court can deny the exercise of a peremptory challenge where the purpose of the challenge is to remove persons from the venire based on race and this decision is given great deference. Here, the trial court found that the Defendant's exercise of a peremptory challenge against juror number five was based on race because she disbelieved his explanation. Where great deference is given to the trial court's findings of fact, the trial court was correct in disallowing the Defendant's peremptory challenge of juror number five.**

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. The clear error standard governs appellate review of a trial court's resolution of *Batson's* third step as to whether the race-neutral explanation for the use of a peremptory challenge is a pretext and whether the opponent of the challenge has proved purposeful discrimination.⁸¹

Discussion

- A. The trial court's factual findings regarding the peremptory challenge of prospective juror five were not clearly erroneous.**

The prosecution objected to the Defendant's exercise of a peremptory challenge to prospective juror number five. The prosecution argued that the Defendant was exercising his peremptory challenges to remove white jurors from the panel, specifically potential jurors 11, 14, and 5.⁸² All three of these jurors were Caucasian.⁸³ The dismissal of a potential juror based solely on his or her race violates the Equal

⁸¹ *People v Knight*, 473 Mich 324 (2005).

⁸² 3/30/2017, 173.

⁸³ 3/30/2017, 173.

Protection Clause of the Fourteenth Amendment.⁸⁴ Following the prosecution's *Batson* challenge, the Defendant gave the following explanation for his removal of prospective juror number five:

MR. HALPERN: Father and brother, I think, were somehow connected with law enforcement. And there were some personal feelings back and forth that I had when I was questioning her that would seem to me to be negative.

THE COURT: Such as what?

MR. HALPERN: Just my feelings, my feelings of exchange of words that I felt were unfriendly, somewhat antagonistic I felt. So all of those reasons.⁸⁵

The trial court ruled that the defense's explanation was insufficient and found that the prosecutor had established purposeful discrimination.⁸⁶ The issue comes down to whether the trial court found the Defendant's race-neutral explanations to be credible.⁸⁷ Here, the trial court did not believe the Defendant's attorney. This finding must be given significant deference.⁸⁸

Defense counsel's purported reason for striking the potential juror (his "feelings") had no grounding in fact and simply should not be credited. The ultimate issue in a *Batson* challenge is a pure question of fact – whether a party exercising a peremptory challenge engaged in intentional discrimination on the basis of race. If the party contesting a particular peremptory challenge makes out a *prima facie* case (that is, points out a pattern of strikes that calls for further inquiry), the party

⁸⁴ *People v Knight*, 473 Mich 324, 335 (2005).

⁸⁵ 3/30/2017, 175.

⁸⁶ 3/30/2017, 179.

⁸⁷ *Miller-El v Cockrell*, 537 US 322 (2003).

⁸⁸ *Id.*

exercising the challenge must provide a legitimate race-neutral reason for the strike.⁸⁹ If that is done, the trial judge must then make a finding as to whether the party exercising the peremptory challenge is telling the truth.⁹⁰

There is no mechanical formula for the trial judge to use in making that decision, and in some cases the finding may be based on very intangible factors, such as the demeanor of the prospective juror in question and that of the attorney who exercised the strike.⁹¹ For this reason and others, the finding of the trial judge is entitled to a very healthy measure of deference.⁹² Determinations as to the demeanor of jurors and the credibility of the proffered reasons for using peremptory challenges lies peculiarly within the trial court's province, and, in the absence of exceptional circumstances, an appellate court will defer to the trial court's determinations.⁹³

Here, as the trial judge pointed out, the juror had been seated on the panel since the very beginning of jury selection.⁹⁴ Defense counsel did not exercise any peremptory challenges in the first round of jury selection despite there being another potential juror with ties to law enforcement. Juror nine had an uncle who was a retired police officer but was left on the jury from the beginning of voir dire.⁹⁵ Also, Defense counsel only expressed concern about juror number five's police ties after he had allowed juror number four, who had a brother who was a parole officer, to remain on the jury, despite not exhausting his

⁸⁹ *Batson v Kentucky*, *supra*.

⁹⁰ *Id.*

⁹¹ *Snyder v Louisiana*, 552 US 472, 477 (2008).

⁹² *Id.*, at 479.

⁹³ *Davis v Ayala*, 576 US 257 (2015).

⁹⁴ 3/30/2017, 27.

⁹⁵ 3/30/2017, 47-48.

peremptory challenges.⁹⁶ In addition, defense counsel did not question juror number five about her police ties in any way.

Defense counsel also argued (after his other reasons were seemingly unsuccessful) that juror number five must have been lying about her criminal record,⁹⁷ but the record does not support that assertion since the sheriff deputy checked her criminal background and found nothing.⁹⁸ The juror stated that she could be fair and that she respected the right of gun owners to openly carry weapons, so she was not antagonistic to the Defendant's view of the case.⁹⁹

Therefore, given the weakness of the stated justifications for the challenge of juror number five and considering the overall circumstances, the trial court's finding of intentional discrimination was not clearly erroneous and should be upheld.

⁹⁶ 3/30/2017, 45-46.

⁹⁷ 3/30/2017, 177.

⁹⁸ 3/30/2017, 177.

⁹⁹ 3/30/2017, 57-58; 88-89.

III. Where a trial court makes a good faith effort to comply with the antidiscrimination requirements of *Batson v Kentucky*, an erroneous denial of a peremptory challenge does not require reversal. Here, the trial court acted in good faith and complied with the three-step process of *Batson v Kentucky* in denying the Defendant the peremptory challenge of juror number five. Therefore, no reversible error occurred in this case.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. The issue is one of law which is reviewed *de novo*.¹⁰⁰

Discussion

In a reverse-*Batson* challenge, as is the case here, it is the prosecution that challenges the defendant's use of peremptory challenge.¹⁰¹ The prosecution challenged the Defendant's use of a peremptory challenge of juror number five based on the fact that the Defendant had excused three jurors all of whom were Caucasian.¹⁰² The Defendant claimed that the peremptory challenge was appropriate because the juror had family ties to the police.¹⁰³ This would not disqualify the juror for cause. Juror number five was qualified to be juror. The fact that the Defendant would have preferred someone else to sit in the juror's place does not rise to the level of a constitutional deprivation. The Defendant is not entitled to a perfect jury or the jury of his choice through unlimited peremptory challenges.¹⁰⁴ Where a

¹⁰⁰ *People v Bell*, 473 Mich 275, 282 (2005).

¹⁰¹ *People v Bell*, 472 Mich 275, fn 18 (2005).

¹⁰² 3/30/2017, 173-174.

¹⁰³ 3/30/2017, 174.

¹⁰⁴ *Ross v Oklahoma*, 478 US 81 (1988).

peremptory challenge is denied, and the juror is left to deliberate, as long as the jury is impartial there is no complaint.¹⁰⁵

A. The United States Supreme Court has held that there is no federal automatic reversal rule for reverse-*Batson* errors.

In *Rivera v Illinois*, the United States Supreme Court held that the good faith error in denying a defendant's peremptory challenge to a prospective juror did not deprive the defendant of his right to a fair trial before an impartial jury.¹⁰⁶ In *Rivera*, the defendant appealed the state trial court's rejection of his peremptory strike of a Hispanic juror who then sat on the jury that convicted him. The United States Supreme Court found that because Rivera could not show that a biased juror sat on his jury, the trial court's error in sustaining the *Batson* challenge was harmless. The erroneous denial of a peremptory challenge does not require automatic reversal of a defendant's conviction as a matter of federal law.¹⁰⁷ Instead, errors are to be assessed by inquiring whether the jury that actually decided the case was qualified and impartial.¹⁰⁸ Under *Rivera*, therefore, unless the defendant can show that a biased or otherwise unqualified juror sat on the jury that rendered the verdict against them, any error in granting a *Batson* challenge would have been harmless as a matter of federal constitutional law.

Rivera specifically left it up to the individual states to determine whether a good faith erroneous denial of a peremptory challenge would constitute structural error or not under state law:

Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require

¹⁰⁵ *People v Bell*, 473 Mich 275 (2005).

¹⁰⁶ *Rivera v Illinois*, 556 US 148 (2009).

¹⁰⁷ *Id.* at 156.

¹⁰⁸ See *id.* at 157–59,

automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*. Or they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore, the error could rank as harmless under state law.¹⁰⁹

B. Michigan's statute requires harmless error review.

In Michigan, structural error exists in only a very limited class of cases in which error had the effect of rendering the factfinding process unreliable or causing the trial to be fundamentally unfair. If, on the other hand, there was effective legal representation and an absence of bias on the part of the court or the jury, most trial errors are reviewed for prejudice. The erroneous denial of a peremptory challenge is not structural error but is to be evaluated using the harmless error approach.¹¹⁰ In Michigan this result is required by statute. MCL 769.26 states:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, *or for error as to any matter of pleading or procedure*, unless in the opinion of the court, after an examination of the

¹⁰⁹ *Rivera v Illinois*, 556 US 148, 161–62 (2009).

¹¹⁰ The erroneous denial of a peremptory challenge does not require automatic reversal. See *State v Carr*, 300 Kan 1, 139; 331 P3d 544, 641 (2014), rev'd on other grounds and remanded 136 S Ct 633; 193 L Ed 2d 535 (2016).; *Robinson v State*, 255 P 3d 425, 430 (Okla. Crim. App. 2001). *People v. Singh*, 234 Cal App 4th 1319 (2015); *State v Letica*, 356 SW 3d 157, 165-66 (Mo. 2011). Louisiana has a harmless beyond a reasonable doubt approach; The *Batson* arguments may be harmless if the evidence overwhelmingly supports the verdicts of guilt and/or no rational jury would have returned a verdict of not guilty. That is, the harmless error must be so beyond a reasonable doubt. *State v Pierce*, 131 So 3d 136, 152 (La Ct App, 2013), writ den 147 So 3d 702 (La, 2014).

entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.¹¹¹

Thus, this statute provides a framework that controls this case and dictates that in all criminal cases, unless the error results in a miscarriage of justice, the error does not entitle a defendant to a new trial. The denial of a peremptory challenge does not rise to the level of a miscarriage of justice because the defendant was ultimately tried before an impartial and fair jury.

Peremptory challenges are a means by which the parties can insure an impartial jury.¹¹² But it is only where a juror should have been removed for cause but was not that it can be rightly said that a structural error exists. A deprivation of a right that is not of a structural dimension must be analyzed under the harmless error doctrine as are all other such kind of errors.¹¹³

An error in providing a peremptory challenge is not a structural error. This holds true because “structural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for a determination of guilt or innocence.”¹¹⁴ An error becomes a structural defect when it “infects the entire trial mechanism.”¹¹⁵ For an error to constitute structural error and be automatically reversible error, the error must be one that is intrinsically harmful, such that the error deprives the defendant of basic

¹¹¹ MCL 769.26 (emphasis supplied).

¹¹² *Ross v Oklahoma*, 487 US 81, 88 (1988).

¹¹³ *People v Mateo*, 453 Mich 203 (1996); *People v Lukity*, 460 Mich 484 (1999).

¹¹⁴ *People v Duncan*, 462 Mich 47, 52 (2000), citing *Rose v Clark*, 478 US 570, 577-578 (1986).

¹¹⁵ *People v Anderson*, 446 Mich 392 at 406 (1994). See also *Arizona v Fulminate*, 499 U.S. 279, 309–310; (1991).

protections without which a criminal trial cannot reliably serve its function as a vehicle for a determination of guilt or innocence;¹¹⁶ otherwise it is subject to harmless error review. Indeed, a jury trial could be decided without any peremptory challenges and this would not be violative of the Constitution.¹¹⁷ If the jury was fair and impartial, as it was in this case, the Defendant has no real complaint.

Structural error is only found in a very limited class of cases such as the right to an impartial judge,¹¹⁸ the complete denial of counsel,¹¹⁹ the denial of self-representation at trial,¹²⁰ the denial of a public trial,¹²¹ or a defective reasonable doubt instruction.¹²² The denial of a peremptory challenge does not fall into any of those categories. As Justice Ginsberg pointed out in *Rivera*, to allow the erroneous denial of a peremptory challenge to constitute structural error will ultimately have the effect of discouraging trial courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges.¹²³ Therefore, the better policy decision is to not consider a non-constitutional trial error such as this not as structural error but instead analyze it under the harmless error doctrine.

¹¹⁶ *People v Duncan*, 462 Mich 47, 51 (2000).

¹¹⁷ Justice Marshall in his concurrence in *Batson v Kentucky* argued that such a procedure should be adopted. *Batson v Kentucky*, 476 US at 103.

¹¹⁸ *Tumey v Ohio*, 273 US 510 (1927).

¹¹⁹ *Gideon v Wainwright*, 372 US 335 (1963).

¹²⁰ *McKaskle v Wiggins*, 465 US 168 (1984).

¹²¹ *Waller v Georgia*, 467 US 39 (1984).

¹²² *Sullivan v Louisiana*, 508 US 275 (1993).

¹²³ *Rivera v Illinois*, 556 US 148, 160 (2009).

C. The Defendant is not even claiming that the Michigan law requires automatic reversal.

It is well established that peremptory challenges are not enshrined in the constitution, neither the United States Constitution nor the Michigan Constitution.¹²⁴ They are a product of statutory law and court rule.¹²⁵ The Defendant does not dispute that peremptory challenges are a product of state statute and court rule and are not of constitutional dimension.¹²⁶ The Defendant, instead, argues that juror number five should have been removed for cause and, in the alternative, that reversal is somehow required by the United States Constitution because he was theoretically denied an impartial trial by the denial of a peremptory challenge. But peremptory challenges are not required in order to obtain an impartial jury. Indeed, a jury could be constitutionally impaneled without the use of peremptory challenges at all.

¹²⁴ *Ross v Oklahoma*, 487 US 81 (1988); *United States v Martinez-Salazar*, 528 US 304 (2000).

¹²⁵ Challenges by Right. Each defendant is entitled to 5 peremptory challenges unless an offense is punishable by life imprisonment, in which case a defendant being tried alone is entitled to 12 peremptory challenges, 2 defendants being tried jointly are each entitled to 10 peremptory challenges, 3 defendants being tried jointly are each entitled to 9 peremptory challenges, 4 defendants being tried jointly are each entitled to 8 peremptory challenges and 5 or more defendants being tried jointly are each entitled to 7 peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.

MCR 6.412(E)(1):

¹²⁶ “While these state rules are not of any constitutional dimension, they are a means by which a state has chosen to assure an impartial jury.” Defendant-Appellant’s brief, p. 32.

Challenges for cause are designed to ensure the right to an impartial jury. Persons who may be biased by circumstances are disqualified from service by challenges for cause. Juror number five could not have been removed for cause since she was qualified and did not express any bias against the Defendant.¹²⁷ Therefore, even though the presence of juror number five on the panel resulted in a different panel that which would have otherwise decided the Defendant's case, because no member of the jury was removable for cause, there was no violation of the Sixth Amendment right to an impartial jury or the Fourteenth Amendment right to due process.¹²⁸

Although the Defendant now attempts to argue that the juror should have been removed for cause, there was no basis for that result.

¹²⁷ MCR 2.511(D) sets out the grounds for a challenge for cause. They include the following grounds: that the prospective juror –

- (1) is not qualified to be a juror;
- (2) has been convicted of a felony;
- (3) is biased for or against a party or attorney;
- (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
- (5) has opinions or conscientious scruples that would improperly influence the person's verdict;
- (6) has been subpoenaed as a witness in the action;
- (7) has already sat on a trial of the same issue;
- (8) has served as a grand or petit juror in a criminal case based on the same transaction;
- (9) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;
- (10) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
- (11) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
- (12) has a financial interest other than that of a taxpayer in the outcome of the action;
- (13) is interested in a question like the issue to be tried.

¹²⁸ *Rivera v Illinois*, 556 US 148 (2009).

The Defendant argues for the first time on appeal (Defendant did not make this argument in his application for leave to appeal)¹²⁹ that a juror who is somehow associated with law enforcement is grounds for dismissal for cause.¹³⁰ The Defendant did not make that argument before the trial court. No Michigan court has ever held this to be true, and that would be a significant change in the existing law.¹³¹ Therefore, it could not have been true at the time of the Defendant's trial and is, therefore, irrelevant to the analysis as to whether the trial court abused its discretion in disallowing the Defendant's peremptory challenge.

D. While other states are divided on the issue, those states who consider it structural error do so for lack of any other remedy, but MCL 769.26 provides that there is no remedy where the error does not affect the fairness or reliability of the trial.

States are divided on the issue of the proper standard to review the erroneous denial of a peremptory challenge. The Michigan Supreme Court Order granting leave in this case cited to *Hardison v State* for the proposition that states should always regard the denial of a peremptory challenge as structural error, but actually that case did not hold that.¹³² In that case, the trial court had failed to follow the tenants of *Batson v Kentucky*, specifically as to the first and third step: The trial court did not make the prosecution show a prima facie case of discrimination and that the defendant's race neutral reason for striking the juror was in fact a pretext for discrimination.¹³³ Therefore, the court held that where

¹²⁹ Defendant's reply brief to the People's answer to the application for leave to appeal argued that juror number five had to be disqualified based on a past conviction. Defendant-Appellant's reply brief, p. 8.

¹³⁰ Defendant-Appellant's brief, p. 24.

¹³¹ The court rule also does not include this as a disqualification.

¹³² *Hardison v State*, 94 So. 3d 1092 (Miss. 2012).

¹³³ *Id* at 1097.

the trial court failed to follow the proper *Batson* analysis and denied the defendant a peremptory challenge, prejudice is presumed and it is reversible error.¹³⁴ That is different than holding that even where the trial court has done the proper analysis, but the appellate court disagrees with the ultimate decision, that is automatically reversible error. This case leaves open the issue of where there was no procedural error, only a difference of opinion on the ultimate resolution of the challenge, whether harmless error analysis would be appropriate.

Hardison v State cites to five other states that purportedly hold that the erroneous denial of a peremptory challenge is grounds for automatic reversal¹³⁵ – Iowa,¹³⁶ Massachusetts, Minnesota, New York,¹³⁷ and Washington.¹³⁸ The Minnesota case cited to by *Hardison*, *Angus v State*, was based on the incorrect assumption that federal law required reversal, a holding that *Rivera* corrected by specifically holding that federal law does not regard the denial of a deprivation of a right that is not of a constitutional dimension as structural error.¹³⁹ Thus, the holding of *Angus v State*'s abrogation was later recognized by the Minnesota Supreme Court in *State v Harvey*.¹⁴⁰

The Minnesota case post-*Rivera* that does hold that any incorrect denial of a peremptory challenge is a structural error requiring automatic reversal is *State v Campbell*, which was a Minnesota Court of

¹³⁴ “Therefore, when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper *Batson* analysis, prejudice is automatically presumed, and we will find reversible error.” *Hardison v State*, 94 So 3d 1092, 1102 (2012) (emphasis supplied).

¹³⁵ *Hardison v State*, 94 So. 3d 1092, fn. 37 (Miss. 2012).

¹³⁶ See *State v Mootz*, 808 NW2d 207 (Iowa, 2012).

¹³⁷ See *People v Hecker*, 15 NY3d 625 (2010).

¹³⁸ Louisiana is also an automatic reversal state. See *State v Pierce*, 131 So. 3d 136 (La. App. 4 Cir. 2013).

¹³⁹ *Angus v State*, 695 NW2d 109 (Minn. 2005).

¹⁴⁰ *State v Harvey*, 932 NW2d 792 (Minn. 2019).

Appeals case decided shortly after *Rivera* in September 2009 (*Rivera* was decided in March 2009).¹⁴¹ Following *Rivera v Illinois* in 2009, there is no Minnesota Supreme Court case which refers to a reverse *Batson* error as structural error. Indeed, in *State v Jackson*, the Minnesota Supreme Court held that: “The loss of a peremptory challenge of a prospective juror does not automatically deprive a defendant of a fair trial or require reversal of his conviction.”¹⁴² Therefore, following the United States Supreme Court’s decision in *Rivera*, it is not entirely clear that Minnesota adheres to a strictly structural error approach to reverse *Batson* errors.

The same can also be said of Washington State. Although *State v Vreen* held that *Batson* errors were structural, it also was decided relying on cases decided prior to *Rivera* and thus its holding is abrogated.¹⁴³ Following the United States Supreme Court’s decision in *Rivera*, the Supreme Court of Washington, in *Matter of Meredith*, held that the trial court’s error in giving the parties seven peremptory challenges instead of eight peremptory challenges at trial did not constitute structural error.¹⁴⁴ In that case, the Court pointed out that *Vreen* adopted reasoning from a Ninth Circuit decision, *Annigoni*, that has since been overruled by the United States Supreme Court in *Rivera*.¹⁴⁵ *Matter of Meredith*, further made the point: “*Even if we decided to still adopt the reasoning in Annigoni*, it addressed only

¹⁴¹ *State v Campbell*, 772 NW2d 858 (Minn. 2009).

¹⁴² *State v Jackson*, 773 NW2d 111, 121 (Minn 2009), citing *United States v Martinez–Salazar*, 528 US 304, 307 (2000); *Ross v Oklahoma*, 487 US 81, 88 (1988); *State v Barlow*, 541 N.W.2d 309, 311 (Minn.1995).

¹⁴³ *State v Vreen*, 143 Wash 2d 923 (2001)..

¹⁴⁴ *Matter of Meredith*, 191 Wash 2d 300 (2018).

¹⁴⁵ *United States v Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc), overruled by *Rivera v Illinois*, 556 US 148 (2009) as recognized in *United States v Lindsey*, 634 F 3d 541, 548 (9th Cir. 2011).

circumstances in which a court erroneously denies the use of a peremptory challenge, resulting in that objectionable juror sitting on the jury that convicts the defendant.”¹⁴⁶ Therefore, from this quote, it is unclear whether the Supreme Court of Washington would still adhere to their previous holding in *State v Vreen*.¹⁴⁷

The Iowa case cited by *Hardison v State*, *State v Mootz*, found that where the court erroneously denied a defendant’s proper exercise of a peremptory strike, and the juror in question remained on the jury, “we will presume the error is prejudicial.”¹⁴⁸ As did New York, holding that the mistaken denial of a peremptory challenge under New York law mandates automatic reversal.¹⁴⁹

Similarly, *Commonwealth v Hampton*, a Massachusetts case also held that the erroneous denial of a peremptory challenge is structural reversible error.¹⁵⁰ Delaware also adheres to the same rule: “Therefore, we hold that a new trial is required when a juror is erroneously allowed to remain on the jury despite the defendant's valid peremptory challenge to that juror's presence.”¹⁵¹

But by the same token, several other states adhere to the same harmless error rule announced in *Rivera*.¹⁵² For example, Oklahoma, Kansas, Colorado, and Missouri all hold that the erroneous denial of a peremptory challenge can be harmless error. In the Colorado case *People v Novotny*, the Colorado Supreme Court overruled the earlier

¹⁴⁶ *Matter of Meredith*, 191 Wash 2d 300, 311; 422 P3d 458, 464 (2018), citing *United States v Annigoni*, 96 F.3d 1132 at 1145 (CA9, 1996) (emphasis supplied).

¹⁴⁷ *State v Vreen*, 143 Wash 2d 923 (2001).

¹⁴⁸ *State v Mootz*, 808 NW2d at 225.

¹⁴⁹ *People v Hecker*, 15 NY3d 625; 942 NE2d 248 (2010).

¹⁵⁰ *Commonwealth v Hampton*, 457 Mass. 152, 928 N.E.2d 917 (2010).

¹⁵¹ *McCoy v State*, 112 A3d 239, 258 (Del, 2015).

¹⁵² *Rivera v Illinois*, 556 US 148 (2009).

decision of *People v Macrander*,¹⁵³ that had held a trial court's erroneous denial of a challenge for cause required reversal if the defendant then exercised a peremptory challenge to remove the challenged juror and exhausted all of his or her remaining peremptory challenges. The Colorado Supreme Court concluded in *People v Novotny* that (1) allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, is not, in and of itself, structural error; and (2) reversal for other than structural error is appropriate only when dictated by a *case-specific, outcome-determinative evaluation of the likelihood that the error affected the verdict*.¹⁵⁴

The Oklahoma case of *Robinson v State*, held that there is a strong presumption that errors which occur during trial are subject to harmless error analysis as long as a defendant is represented by counsel and is tried by an impartial judge.¹⁵⁵ Thus, it decided that the erroneous denial of a peremptory challenge by a defendant is subject to harmless error review, citing *Rivera v Illinois*.¹⁵⁶

Similarly, the state of Kansas holds that the erroneous denial of a peremptory challenge after a reverse *Batson* challenge is subject to harmless error analysis where the trial judge acts in good faith in not dismissing the juror and does not misapply the law or act in an arbitrary or irrational manner.¹⁵⁷ As was held in the Kansas Supreme Court case, *State v Carr*: “The erroneous denial of a peremptory challenge does not

¹⁵³ *People v Macrander*, 828 P.2d 234, 244 (Colo.1992).

¹⁵⁴ *People v Novotny*, 320 P 3d 1194 at 1203 (Colo. 2014). See also *People v Bonvicini*, 366 P3d 151, 158 (Colo, 2016).

¹⁵⁵ *Robinson v State*, 255 P3d 425, 428 (Okla Crim App, 2011).

¹⁵⁶ *Robinson v State*, 255 P3d 425, 430-431 (Okla Crim App, 2011).

¹⁵⁷ *State v Carr*, 331 P3d 544, 637 (Kansas 2014), reversed and remanded on other grounds, *Kansas v Carr*, 136 S Ct 633 (2016).

require automatic reversal. This holding is not only permissible under *Rivera*, but also consistent with this court's development of harmless error review in recent years and the legislature's expressed preference for the same.”¹⁵⁸ The trend enunciated by the Kansas Supreme Court toward harmless error analysis is also true of the trend in Michigan and the legislature’s preference as evidenced by MCL 769.26.

In *State v Letica*, the Missouri Supreme Court found an erroneous ruling on a reverse-Batson challenge to be harmless error where the ruling “merely resulted in the empaneling of an otherwise-qualified juror.”¹⁵⁹ In that case, the appellant failed to allege or demonstrate that the venire member at issue was biased or otherwise unqualified to serve on the jury. Therefore, the Missouri Supreme Court found that the appellant was not prejudiced by the trial court’s error in denying the peremptory strike.¹⁶⁰ The same reasoning applies in the instant case where the Defendant has failed to demonstrate that juror number five was unqualified or biased.

E. *People v Bell* is controlling authority which has decided the issue in this case.

People v Bell held that the denial of a statutory peremptory challenge is subject to the harmless error standard of review and not subject to automatic reversal.¹⁶¹ The order granting leave in this case refers to the holding of *People v Bell* as arguable dictum.¹⁶² The People

¹⁵⁸ *State v Carr*, 331 P3d 544, 641 (2014), rev'd and remanded on other grounds, 136 S Ct 633 (2016).

¹⁵⁹ *State v Letica*, 356 SW3d 157, 166 (Mo. 2011).

¹⁶⁰ *Id.*

¹⁶¹ *People v Bell*, 473 Mich 275, 293-295 (2005).

¹⁶² *People v Bell*, 473 Mich 275 (2005) was a divided case producing five opinions. Only parts I through III of the lead opinion in *Bell* garnered

do not believe that the holding of *People v Bell* (that harmless error analysis applies to the erroneous deprivation of a peremptory challenge) was merely dictum since the holding has become part of the jurisprudence of *Batson* challenges in Michigan for over fifteen years and it also specifically overruled the holding of two prior cases, *People v Miller*¹⁶³ and *People v Schminitz*.¹⁶⁴

People v Bell was also cited by the United States Supreme Court in its decision in *Rivera* as an example of a state that has categorized the denial of a peremptory challenge as harmless error.¹⁶⁵ Also, the fact that the Court gave an alternative means of deciding the case does not, therefore, turn the holding into dictum. Dicta is defined as “[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).”¹⁶⁶ This Court's interpretation of the applicability of harmless error analysis was not dictum. The lead opinion in *Bell* included an entire section labeled “Standard of Review for Denials of Peremptory Challenges,” which was separated from the subsequent heading “Response to the Dissent.”¹⁶⁷ Therefore, the Court's statements on this issue, signed or agreed to by a majority of the Justices, were more than a passing comment and should be followed.¹⁶⁸

majority support. Justice Weaver concurred, then Chief Justice Taylor dissented in part and concurred in part, then Justice Kelly dissented, and Justice Cavanagh also separately dissented.

¹⁶³ *People v Miller*, 411 Mich 321 (1981).

¹⁶⁴ *People v Schmitz*, 231 Mich App 521 (1998).

¹⁶⁵ *Rivera v Illinois*, 556 US 148 (2009).

¹⁶⁶ *People v Higuera*, 244 Mich App 429, 437 (2001), quoting Black's Law Dictionary (7th ed.).

¹⁶⁷ *Id.* at 293-298.

¹⁶⁸ *Bell*, 473 Mich at 293-298.

Five years after *People v Bell* was decided, the Michigan Supreme Court in *Pellegrino v AMPCO System Parking* held that it was not harmless error for the trial court to deny the defendant the use of a peremptory challenge in that civil case.¹⁶⁹ On the surface it would seem that the two cases are opposed, but the holdings of both cases can be harmonized.¹⁷⁰ In *Pellegrino*, the Court held that the trial court acted contrary to existing law by disallowing the defendant a peremptory challenge so that the trial court could maintain a racial balance on the jury. The trial judge in that case would not allow the defense to exercise a peremptory challenge simply because he believed that there were not enough African-Americans seated on the jury. The trial judge thereby ignored MCR 2.511(F)(2) and did not follow the proper *Batson* procedure in denying the peremptory challenge.

Because the trial judge took race into account in the denial of an otherwise appropriate peremptory challenge, this was held to be a violation of the equal protection guarantees of both the and state constitutions.¹⁷¹ This was not a good faith misapplication of *Batson*, but rather a complete denial of *Batson* and a misapplication of the law. This is a distinction from a case (such as the instant case) where a judge makes a good faith mistake rather than where the trial court deliberately mis-applied the law or acted in an arbitrary or irrational manner. A good faith mistake should not lead to mandatory reversal of an otherwise valid conviction.

¹⁶⁹ *Pellegrino v AMPCO System Parking*, 486 Mich 330 (2010).

¹⁷⁰ *Pellegrino* cites to *Bell* with approval: “And, as the lead opinion stated in *Bell*, ‘it is ...improper...to engineer the composition of a jury to reflect the race’ of a party.” *Pellegrino v AMPCO System Parking*, 486 Mich 330 (2010), citing *People v Bell*, 473 Mich at 290.

¹⁷¹ *Id* at 354.

In contrast to the situation in *Pellegrino*, in the instant case, even if the trial court ultimately made a mistake by denying the Defendant a peremptory challenge, it did so in good faith. It adhered to the components of *Batson* in ruling on the challenge and made an evaluation of the credibility of the defense's explanation for the peremptory challenge, something it alone was in a unique situation to do. There are many non-verbal cues that cannot be picked up in a transcript that are important to the credibility determination such as demeanor and non-verbal communication.

Also, the defense attorney had injected the idea of race into the case through his entire voir dire, even at one point asking the Caucasian prospective jurors if they would have a problem with an all-Black person jury.¹⁷² Therefore, the trial court certainly had a good faith basis upon which to decide that defense counsel may have exercised the peremptory challenge of juror number five based on race. Even though another court may have had a different opinion, it should not create structural error that results in the reversal of a valid conviction.¹⁷³

Some trial errors will never be corrected, nor should they be. To be sure, due process doesn't guarantee a perfect trial, only a fair one.¹⁷⁴ Under *Carines*, a non-constitutional error does not require automatic reversal. If the error is preserved, the case is subject to reversal only for a miscarriage of justice under the *Lukity* more probable than not standard. Here, it does not "affirmatively appear that it is more

¹⁷² 3/30/2017, 84.

¹⁷³ As was said in the to the holding in *Rivera*: "... the trial judge's conduct reflected a good faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of our *Batson*-related precedents." *Rivera v Illinois*, 556 US 148, 160 (2009).

¹⁷⁴ *Michigan v Tucker*, 417 US 433, 446 (1974).

probable than not” that the trial court’s abuse of discretion (if there was one) was “outcome determinative” in this case.¹⁷⁵

It is not more probable than not that the outcome of the case would have been any different had the Defendant been allowed the peremptory challenge. The trial court asked each potential juror about their occupations, families, and any interactions or associations they had or families and friends had with the criminal justice system, and with carrying concealed weapon cases in particular. The trial court instructed potential jurors to consider whether they could set aside their personal beliefs regarding guns and follow the law. It was also attentive to oblique risks of prejudice, instructing one juror who did not like guns that the law allows people to have guns and sets out ways in which people can carry guns.¹⁷⁶ Defense counsel was also allowed to thoroughly explain the presumption of innocence and the burden of proof, and test the jurors’ understanding of those concepts with questions. Defense counsel was also able to question potential jurors about the concept of open carry. There is no reason to believe that the impaneled jury was prejudiced against the Defendant in any way.

The People had presented compelling evidence of the Defendant’s guilt of carrying a concealed weapon. All the police officers that testified gave virtually the same account of what occurred on October 15, 2016 – that the Defendant deliberately concealed his weapon with his shirt when he saw the police while he was in the street. The jury reached a verdict in only two hours.¹⁷⁷ Therefore, the Defendant did not suffer a miscarriage of justice by his conviction before an impartial jury.

¹⁷⁵ *Lukity*, 460 Mich at 496.

¹⁷⁶ 3/30/2017, 184.

¹⁷⁷ 4/04/2017, 58.

RELIEF REQUESTED

THEREFORE, the People respectfully request that this Honorable Court should affirm the decision of the Court of Appeals in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 12222 countable words.

/s/ Deborah K. Blair

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