IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONALD DALE MCKEE,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
v.	)	Case No. F-99-36
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, JUDGE:

Appellant was charged by Information in Greer County District Court, Case No. CRF-98-21, with three counts of Second Degree Burglary (Counts I-III) and one count of Larceny of an Automobile (Count IV), after former conviction of two or more felonies. Jury trial was held before the Honorable Mike Warren, Associate District Judge, on December 10th and 11th, 1998. The jury found Appellant guilty as charged on Counts I-III and found Appellant guilty of the lesser-included offense of Unauthorized Use of a Motor Vehicle on Count IV. After the second stage proceedings, the jury set punishment at fifty (50) years' imprisonment on each count. Formal sentencing was held on January 8, 1999, and Judge Warren sentenced Appellant in accordance with the jury's verdict. From the Judgments and Sentences imposed, Appellant filed this appeal.

Appellant raised the following propositions of error:

1. Because the State was allowed to exercise peremptory challenges against minority jurors without demonstrating neutral reasons for the challenges, Mr. McKee was denied an impartial jury composed of a fair cross-section of the community in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution;

2. The State wholly failed to establish a chain of custody for State's Exhibits 14, 16, 19-21, 27, 32, 33, and 38 in this case, thus rendering the evidence inadmissible and denying the Appellant his due process rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 20 of the Oklahoma Constitution;

3. Mr. McKee's sentence must be modified because his sentence was improperly enhanced by prior felony convictions which arose out of the same transaction, thus resulting a denial of the Appellant's due process rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 20 of the Oklahoma Constitution;

4. Trial counsel's failure to object to the State's erroneous admission of multiple convictions arising out of the same transaction to enhance Mr. McKee's sentence deprived the Appellant of the effective assistance of counsel to which he is entitled by the Sixth Amendment of the United States Constitution and corresponding provisions of the Oklahoma Constitution; and

5. The judgment and sentences should be modified to accurately state the sentence imposed.

After thorough consideration of the propositions raised and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief on Proposition 1.

During voir dire, the State of Oklahoma exercised two peremptory challenges against minority venire persons. After the State exercised its second

peremptory challenge against Mr. Mason, defense counsel approached the bench, noted on the record that Mr. Mason was "a man of color and race" and asked that a reason be stated for his excusal. The State refused to give a reason, because the "Defendant's not a person of color." Even though defense counsel argued that the defendant's status did not matter, the State refused to give a reason and the trial court did not require the State to set forth a race-neutral reason. The trial court then overruled defense counsel's objection to the exercise of the peremptory against Mr. Mason and excused Mr. Mason.

On appeal, Appellant contends the State's failure, and the trial court's failure to require the State, to set forth a race-neutral reason for exercising its peremptory challenge against a minority venire person denied Appellant an impartial jury composed of a fair cross-section of the community in violation of Federal and State constitutional provisions. Appellant's argument is well-taken. Even though Appellant was not a "man of color," once he objected to the State's exercise of a peremptory challenge against a minority, the State was required by law to state a race-neutral explanation for the exercise of a peremptory challenge of a minority juror. *Powers v. Ohio*, 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Green v. State*, 1993 OK CR 30, ¶¶ 5-9, 862 P.2d 1271, 1272.

The State contends the trial court properly "concluded the defendant had not made a prima facie showing that the State had exercised peremptory

challenges on the basis of race." However, "the threshold prima facie case for a discriminatory strike is met by challenging a strike on racial or gender grounds.. . . The burden then shifts to the striking party to articulate a race-neutral or gender-neutral reason for the strike. The neutral reason should be accepted by the court if it is supported by the record." *Cleary v. State*, 1997 OK CR 35, ¶ 6, 942 P.2d 736, 742, *cert. denied*, -- U.S. -- , 118 S.Ct. 1528, 140 L.Ed.2d 679 (1998).

This Court has held reversal is the only appropriate remedy for a *Batson* violation. *Batson*, 476 U.S. at 100, 106 S.Ct. at 1725; *Powers*, 499 U.S. at 416, 111 S.Ct. at 1373-74; *Ezell v. State*, 1995 OK CR 71, ¶ 9, 909 P.2d 68, 73. Although we have remanded cases for evidentiary hearings to assess *Batson* violations, those cases we have remanded were tried before the holdings in *Powers* and *Batson* and remand was necessary to give the offending party the opportunity to set forth a race-neutral reason for its exercise of peremptory challenge(s) against minority jurors. *See e.g. Nolte v. State*, 1994 OK CR 81, ¶¶ 12-14, 892 P.2d 638, 642 (tried before *Powers*); *Guy v. State*, 1989 OK CR 35, ¶ 24, 778 P.2d 470, 476 (tried before *Batson*); *Brown v. State*, 1988 OK CR 201, ¶ 13, 762 P.2d 959, 962 (tried before *Batson*); *Johnson v. State*, 1988 OK CR 145, ¶ 34, 761 P.2d 484, 490 (tried before *Batson*); *Johnson v. State*, 1987 OK CR 8, ¶ 9, 731 P.2d 993, 999, *cert. denied*, 484 U.S. 878, 108 S.Ct. 35, 98 L.Ed.2d 167 (1987), *overruled in Green v. State*, 1993 OK CR 30, ¶¶ 5-9, 862 P.2d 1271, 1272 (tried before *Batson*).

Here, the State flatly refused to give a reason for the exercise of its second peremptory challenge against a minority, and the trial court did not require the State to give a reason. The trial judge should have required the State to articulate a race-neutral reason for exercising its second peremptory challenge to remove Mr. Mason. Its failure to do so requires that this case be reversed and remanded for a new trial. *Green*, 1993 OK CR 30, ¶ 8, 862 P.2d at 1272.

Remand is inappropriate in this case where the record clearly reflects the State set forth *no reason*, race-neutral or otherwise, for its exercise of its second peremptory challenge against Mr. Mason. The law concerning this issue was well-settled at the time this matter was tried. Therefore, we find Appellant's convictions (Counts I-IV) in Greer County Case No. CRF 98-21 must be reversed and remanded for new trial. As reversal is required on all Counts, the remaining propositions need not be addressed.

Decision

The Judgments and Sentences of the trial court (Counts I-IV) are **REVERSED AND REMANDED FOR NEW TRIAL**.

AN APPEAL FROM THE DISTRICT COURT OF GREER COUNTY
THE HONORABLE MIKE WARREN, ASSOCIATE DISTRICT JUDGE

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OPINION BY: JOHNSON, J.:
STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS
CHAPEL, J.: CONCURS
LILE, J.: DISSENTS

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LILE, JUDGE: DISSENTS

The rule established in *Batson v. Kentucky,* 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712, is that "purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." The state's use of peremptory challenges thus came under scrutiny; previously peremptory challenges were thought to be exercisable for any reason at all. Thereafter, the prosecutor could not exercise peremptory challenges on account of race. However, neither the *Batson* decision, nor the related decisions that have followed, have required that every time a peremptory challenge is used to exclude a minority venireman that a neutral non-discriminatory reason be given.

In this case, at the time that the prosecutor excused juror Mr. Mason, the defendant had not established any case whatsoever for discriminatory use of peremptory challenges. The juror was black, the defendant was not. We have no evidence in the record as to the total number of black or other minority jurors in the pool or in the jury box.

The majority opinion states that a "prima facie case for a discriminatory strike is met by challenging a strike on racial or gender grounds..." citing *Cleary v. State,* 1997 OK CR 35, ¶6, 942 P.2d 736, 742, cert. denied, -- U.S. --, 118 S.Ct. 1528, 140 L.Ed. 2d 679 (1998), where this mistaken language does in fact appear. This is not the law, it

is simply the first time we made this mistake. Merely challenging a minority venireman is not sufficient to make a case of discriminatory use of peremptory challenges.

In *Batson*, Justice Powell wrote:

> "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."

No pattern had been established and no other factors showing discrimination were apparent. Appellant had not shown that he was entitled to a race neutral explanation at that juncture. As stated in *Batson*, "once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation." The record at this point was devoid of such a prima facie showing. Because the prosecutor argued wrongly that *Batson* did not apply because the defendant was not black, and because the Court did not correct the prosecutor on the record, we are left with uncertainty concerning the courts' reasons for allowing this peremptory challenge and for later allowing a second peremptory challenge of a black juror (the prosecutor

offered an explanation for the second challenge). This uncertainty might warrant a remand for further findings but a new trial is not warranted upon this record.

In *Purkett v. Elem*, 115 S.Ct. 1769, 514 U.S. 765, 131 L.Ed. 2d 834, the rule was restated that the opponent of the peremptory strike has the burden of proving purposeful discrimination.

This record does not support Appellant's burden of showing purposeful discrimination.