

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019

108256

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

ALBERT MAY,

Appellant.

Calendar Date: April 24, 2019

Before: Lynch, J.P., Mulvey, Devine, Aarons and Rumsey, JJ.

Henry C. Meier III, Delmar, for appellant.

D. Holley Carnright, District Attorney, Kingston (Joan Gudesblatt Lamb of counsel), for respondent.

Mulvey, J.

Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered February 9, 2016, upon a verdict convicting defendant of the crimes of driving while intoxicated (two counts) and aggravated unlicensed operation of a motor vehicle in the first degree.

Defendant was charged by indictment with two counts of driving while intoxicated and one count of aggravated unlicensed operation of a motor vehicle in the first degree. Following trial, defendant was convicted as charged. County Court sentenced him to concurrent prison terms of 1 to 3 years for each conviction. Defendant appeals.

County Court did not err in denying defendant's Batson challenge. "When a party raises a Batson challenge, courts engage in a three-step process" (People v Acevedo, 141 AD3d 843, 846 [2016] [citations omitted]; see generally Batson v Kentucky, 476 US 79 [1986]). "At step one, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Once a prima facie case of discrimination has been established, the burden shifts, at step two, to the nonmoving party to offer a facially neutral explanation for each suspect challenge. At the third step, the burden shifts back to the moving party to prove purposeful discrimination and the trial court must determine whether the proffered reasons are pretextual" (People v Hecker, 15 NY3d 625, 634 [2010] [internal quotation marks and citations omitted], cert denied sub nom. Black v New York, 563 US 947 [2011]). "While the step-two determination focuses only on the facial neutrality of the explanation, the step-three determination 'is a question of fact, focused on the credibility of the race-neutral reasons,' and it is incumbent on the moving party 'to make a record that would support a finding of pretext' at step three" (People v Acevedo, 141 AD3d at 846, quoting People v Smocum, 99 NY2d 418, 422 [2003]).

Defendant is a black male. When the People exercised a peremptory challenge to excuse juror No. 4 on the first panel of prospective jurors, defendant made a Batson application, asserting that juror No. 4 was the only black person on that panel and had given no obvious reason for the People to excuse her. The People responded that, because prospective juror No. 4 was married to an attorney, they worried about having a juror with a mindset of an attorney who might bring outside knowledge that would affect her deliberations. Defendant replied that juror No. 4's husband did not practice criminal law and said juror confirmed that she could be fair and impartial.

Inasmuch as the People stated a race-neutral reason for the exercise of their peremptory challenge and County Court ruled on the ultimate issue, the sufficiency of defendant's step-one showing is now moot (see People v Smocum, 99 NY2d at 423; People v Acevedo, 141 AD3d at 846). The People's

explanation was facially neutral. In the third step, defendant failed to prove purposeful discrimination. Defendant argues on appeal that the People's use of a peremptory challenge on juror No. 4 was pretextual based on their subsequent failure to exercise a challenge on a prospective juror in the second round of jury selection who was also married to an attorney. However, defendant did not preserve this argument by renewing his Batson application after the later developments, which would have provided the People an opportunity to address the claim and County Court a chance to rule on it (see People v Jiles, 158 AD3d 75, 79 [2017], lv denied 31 NY3d 1149 [2018]; People v Toliver, 102 AD3d 411, 412 [2013], lv denied 21 NY3d 1011 [2013]; People v Hardy, 61 AD3d 616, 616-617 [2009], lv denied 13 NY3d 744 [2009]).¹ Therefore, the court did not err in denying defendant's Batson challenge regarding prospective juror No. 4 (see People v Thomas, 155 AD3d 1120, 1123 [2017], lv denied 31 NY3d 1018 [2018]).

Lynch, J.P., Devine, Aarons and Rumsey, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court

¹ For example, the record does not establish the race of this later potential juror.