No. 95-2280-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. **ERRATA SHEET**

LYNN H. MICKLE,

Defendant-Appellant.

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PLEASE TAKE NOTICE that the attached opinion is to be substituted for the above-captioned opinion which was released on March 27, 1996.

Dated this 3 day of December, 2006.

COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1996

No. 95-2280-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LYNN H. MICKLE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed*.

NETTESHEIM, J. Lynn H. Mickle appeals from a judgment of conviction for disorderly conduct pursuant to § 947.01, STATS.[1] The issue on appeal is whether the State improperly struck four male members from the jury pool in violation of Mickle's equal protection rights. We conclude that

[1] Mickle was convicted as a repeat offender pursuant to § 939.62(1)(a), STATS.

the State's strikes were gender neutral and did not otherwise demonstrate purposeful discrimination.

Before we recite the facts, we set out some introductory law on the subject. In ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the state from challenging potential jurors on the basis of race. In ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. ___, ___, 114 S. Ct. 1419, 1422 (1994), the Supreme Court extended the ***Batson*** principle to juror strikes based on gender. *See also* ***State v. Joe C.***, 186 Wis.2d 580, 585, 522 N.W.2d 222, 224 (Ct. App. 1994). We will later address the methodology by which a trial court applies these principles.

The facts are undisputed. Mickle was charged with disorderly conduct and battery as the result of an alleged domestic abuse incident. When making its four peremptory strikes, the State struck four males. Mickle immediately objected. We set out the prosecutor's initial response in detail:

> Judge, the reasons I struck those jurors was when I was looking at them they didn't make eye contact with me, and I tried to—I know none of them admitted to being involved in batteries or anything like that but when I looked at them to me they looked like individuals who would use violence against their kids or—I mean, I am just speculating as I sit there and try to guess what they are like at home. I had—That is one of the reasons I struck the jurors as I did; and in my last selection, Judge, I almost struck Anne Konczal. I was debating. To me it was like eenie-meenie-miine mo as I was sitting here. I was going eenie-meenie-miine-mo and I ended up picking Richard LaBar. It was between him and Anne Konczal. It was those two I wanted to strike, but I don't know if you saw me waving my pen but I was going eenie-meenie-

> miine mo and it landed on Richard LaBar as the person to strike.

Really, everybody in the panel was good for me. I didn't really know who to strike.

The trial court then asked the prosecutor whether the strikes were gender based. The prosecutor responded:

> No sir … but I basically looked at those people and I said who would—who seems to be involved in violence in the home, and I could not see any of that in any of the women's eyes but I saw it in the four men that I selected.

The trial court then overruled Mickle's objection, stating, "The Court does not believe that [the prosecutor] intentionally struck the four people that he struck because of the fact that they were males …."

Mickle then pursued his objection further, contending that there was nothing about the appearances of the four struck jurors which supported the prosecutor's stated reasons for taking the strikes. Confirming its prior ruling, the trial court responded:

> The court notes that at times jurors are selected based upon merely hunches and that [the prosecutor] has indicated that as strictly a hunch he noticed that certain persons looked wrong to him, not based on gender but looked—but based upon their facial expressions and furthermore based upon the fact that they did not have eye contact with him; and furthermore [the prosecutor] has explained that the last juror was actually selected based on an actual eenie-meenie-miine mo process and that therefore that was between a lady and a man and just so happened that the man ended up being the person eliminated.

Application of the ***Batson*** principles involves a three-step process. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of gender. *See* ***Batson***, 476 U.S. at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a gender-neutral explanation for striking the jurors in question. *See* ***id***. at 97-98. Third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. ***Id***. at 98.

However, where the prosecutor initially defends the use of the peremptory strikes without any prompting or inquiry from the trial court, the first ***Batson*** step is eliminated. ***Hernandez v. New York***, 500 U.S. 352, 359 (1991). Therefore, in this case, we are concerned with the second and third steps of the ***Batson*** methodology.

Next, we address our standard of review. The parties correctly agree that the third step of the ***Batson*** analysis—whether the state's strikes constituted purposeful discrimination—presents a question of fact. *See* ***Hernandez***, 500 U.S. at 364; *see also* ***State v. Davidson***, 166 Wis.2d 35, 41-42, 479 N.W.2d 181, 183-84 (Ct. App. 1991). However, Mickle contends that the second step—assessing whether the prosecutor's explanation for the strikes represents a gender-neutral basis—is a question of law. The State contends that the issue is one of fact governed by the clearly erroneous standard of review.

The State correctly notes that ***State v. Lopez***, 173 Wis.2d 724, 729, 496 N.W.2d 617, 619 (Ct. App. 1992), states that the clearly erroneous standard

applies to each of the ***Batson*** steps. Nonetheless, we agree with Mickle on this dispute. We do so for three reasons. First, we note that the ***Lopez*** court never reached the second step of the ***Batson*** analysis because the court concluded that the defendant had not satisfied his burden on the first step. *See* ***Lopez***, 173 Wis.2d at 731, 496 N.W.2d at 620. Second, it does not appear from the context of the ***Lopez*** decision that the standard of review was in dispute. Third, and most importantly, when stating that the clearly erroneous standard of review applied to all the ***Batson*** factors, the ***Lopez*** court relied on language of ***Hernandez*** which pertained to the third step of the ***Batson*** analysis, *not the second step.* ***Lopez***, 173 Wis.2d at 729, 496 N.W.2d at 619. For these reasons, we construe the ***Lopez*** decision, insofar as it pertains to the second step of the ***Batson*** analysis, as dicta.

We agree with Mickle that the question posed by the second ***Batson*** step is one of law. We base this conclusion on the following language from ***Hernandez***: "In evaluating the [gender] neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause *as a matter of law*." ***Hernandez***, 500 U.S. at 359 (emphasis added). Moreover, when applying this second ***Batson*** step, the trial court does not assess the credibility of the prosecutor. "A neutral explanation … means an explanation based on something other than the [sex] of the juror. *At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation*." ***Hernandez***, 500 U.S. at 360 (emphasis added).

Rather, the credibility assessment of the prosecutor's gender-neutral explanation is left for the third step—assessing whether the gender-

neutral basis for the exercise of the peremptory challenges shows purposeful discrimination. As we have already noted, the parties correctly agree that this involves a finding of fact by the trial court. *See* ***id***. at 364.

Our conclusion that the second ***Batson*** step presents a question of law is in keeping with well-established Wisconsin law which holds that the application of a given set of facts to a constitutional principle presents a question of law for independent appellate review. "[T]his court may independently review the facts … to determine whether any constitutional principles have been offended." ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987).

We now assess the second ***Batson*** step—whether the prosecutor's explanation constituted, on its face and taking it as true, a gender-neutral explanation for the peremptory strikes—as a question of law. We will then move to the third step to determine whether the explanation nonetheless constitutes purposeful discrimination.[2]

Mickle contends that the prosecutor's reason for striking the four male jurors was not gender neutral because it "reflects the stereotype that men are more violent than women, and men are more likely than women to be aggressor in violence against women and children." Strikes premised on such stereotypes are improper. "We shall not accept as a defense to gender-based

[2] Our research has not indicated whether the trial court must nonetheless move to the third ***Baston*** step if the prosecutor fails to provide a gender-neutral explanation for the strikes. Regardless, it would seem that the defendant has carried the burden on the third step as a matter of law if the prosecutor's explanation fails the second step.

peremptory challenges 'the very stereotype the law condemns.'" ***J.E.B.***, 511 U.S. at ___, 114 S. Ct. at 1426 (quoting ***Powers v. Ohio***, 499 U.S. 400, 410 (1991)).

However, we do not read the prosecutor's explanation as excluding women per se as persons capable of violence. Rather, the prosecutor eye-balled the jurors *in this case* and picked up certain vibes or sensations which, while difficult to verbalize, prompted his jury selection decisions. The prosecutor said, "I could not see any of that in any of the women's eyes but I saw it in the four men that I selected." This explanation portends that had the prosecutor picked up similar sensations from female jurors, he would have struck such jurors. Thus, taking the prosecutor's reasons as true, they represent a gender-neutral statement for the strikes.

We therefore move to the third ***Batson*** step—whether the prosecutor's gender-neutral explanation nonetheless represents purposeful discrimination. As we have noted, the parties properly agree that this presented a finding of fact for the trial court which we review under the clearly erroneous standard of review.

In conducting this reivew, we properly bear in mind the words of ***Hernandez***:

> There will seldom be much evidence bearing on [this] 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.

Hernandez, 500 U.S. at 365 (quoted source omitted).

Mickle contends that the prosecutor gave only vague, confusing and contradictory explanations for the peremptory challenges. We disagree. While the prosecutor's statement may not have been artfully stated, the message was nonetheless conveyed. We do not see this explanation as "implausible or fantastic" such that we can label it a pretext. *See* ***Purkett v. Elem***, 514 U.S. ___, ___, 115 S. Ct. 1769, 1771 (1995).

Mickle also faults the trial court for not walking through the ***Batson*** methodology step by step. As such, Mickle concludes that the court did not understand what ***Batson*** requires. We note, however, that while Mickle's counsel properly raised a ***Batson*** objection, neither did he lay out the ***Batson*** methodology for the benefit of the trial court. Nor did Mickle's counsel ever complain that the court had not fully performed a ***Batson*** analysis.

Moreover, although the trial court's ruling was not elaborate, we conclude that the court's remarks satisfied the ***Batson*** inquiry. The court accepted the prosecutor's explanation for the strikes, a statement which we construe as the court's acceptance of the prosecutor's credibility. In addition, the court explained that the reasons for the strikes were based not on the gender of the jurors but on the perceptions and nuances which the prosecutor sensed during the jury selection process. We do not see ***Batson*** as requiring more.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.