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# Federal Corner: Two Surprising Race-Neutral Explanations for the Use of Peremptory Strikes - By F. R. Buck Files Jr.

[1]Features
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*Batson v. Kentucky*, 476 U.S. 79 (1986), is such a familiar case that judges writing on a peremptory challenge issue commonly refer to it as *Batson* without giving the full title of the case or the citation. This is not surprising because a *Batson* issue has been raised and written about in 4,734 federal cases (110 in the first 29 days of 2015); the United States Court of Appeals for the Fifth Circuit has decided 648 of these cases (3 in the first 45 days of 2015); and Texas appellate courts have decided a *Batson* issue in 1,552 cases (4 in the first 45 days of 2015).

On January 29, 2015, a panel of the United States Court of Appeals for the District of Columbia Circuit [Senior Judge Nebeker and Associate Judges Fisher and Easterly (opinion by Judge Nebeker)] held that as a matter of first impression, *being soft-spoken and non-assertive were race-neutral explanations for the use of peremptory strikes;* and a prosecutor was *not* engaged in purposeful discrimination when exercising peremptory strikes. *Johnson v. U.S.*, ___ A.3d.___, 2015 WL 358272 (D.C. Jan. 29, 2015) [emphasis added].

Bobby Johnson was convicted of various firearms charges in the Superior Court of the District of Columbia. Judge Michael L. Rankin was the trial judge. This case was a pleasure to read because Judge Rankin was a cautious trial judge?with an obvious sense of humor?and Judge Nebeker authored a very readable opinion that contains the following:

> ?appellant contends that either the trial court failed to make a *Batson* finding that the government?s peremptory strikes were not the result of purposeful discrimination or the trial court?s *Batson* finding of no purposeful discrimination was clearly erroneous. Second, appellant contends that some of his convictions merge. We affirm appellant?s convictions, and remand for the trial court to merge the appropriate offenses and resentence appellant consistent with this opinion.
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> [Note: This article is only concerned with the *Batson* issue]
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> During *voir dire*, the court asked several questions of each juror and both appellant and the government were offered an opportunity to ask follow up questions. Following *voir dire*, the government used peremptory strikes on jurors number 018 and 442, two African American males. The trial court had questioned these jurors during *voir dire*, but the government did not ask them additional questions. The

trial court *sua sponte* pressed the government for a race-neutral explanation for the strikes:

the court: Would counsel approach the bench.

(Bench conference.)

THE COURT: I want the government to explain these two strikes, juror 442 and juror 018.

MS. ACEVEDO: 442 is the older man, I thought he was very soft spoken and I thought that he would get pushed around in a jury.

THE COURT: *That doesn?t pass muster* [emphasis added].

MS. ACEVEDO: That he?s soft spoken? To me he seems like somebody who would not?who would not express himself and could get pushed around by other jurors.

THE COURT: What about the other one?

MR. TRUONG: Your Honor, that gentleman because?similar reason, given his youth, we have to believe that he?d not be an assertive member of the jury if he has an opinion or given the fact that he?s inexperienced in his youth, and we are concerned that he may not have the confidence to voice his views during deliberation.

THE COURT: *Let me ask you a question: Did it occur to either one of you to ask either of those jurors questions going to that? I mean, we had him up here. If that was a concern, could you have asked some kind of question about that* [emphasis added]?

MS. ACEVEDO: It is our experience, Your Honor, jurors don?t admit that they would be.

THE COURT: *But you could see his reaction, sort of like cross-examination, people don?t confess but you ask them questions that would allow you to draw reasonable inferences* [emphasis added].

MR. TRUONG: We thought the Court?s questioning of both jurors gave us enough?we thought that the Court?s questioning of both jurors gives enough information to form an opinion whether we would like them to be on the jury. My impression of 018 was that he was kind of shy, and coupled with the fact that he?his age and my concern that he?s not forceful in expressing his views if there is a vigorous deliberation of the facts.

THE COURT: *I guess that I could see that in the way he answered the questions. I don?t think I see any of that in the way the older man answered those questions. I don?t get that at all* [emphasis added]. What did he say? Did you make any notes on him?

MS. ACEVEDO: Yes, Your Honor, my notes for him was that he was soft spoken. His tone of voice was very quiet. He didn?t seem like?

THE COURT: *So you like screamers, you like yellers* [emphasis added]?

MS. ACEVEDO: Not screamers, Your Honor, but I believe jurors have to be very willing to express their opinions, and he didn?t?based upon his?in his gentle manner, he didn?t seem like somebody who would.

MR. TRUONG: The concern is not only expressing their opinion, but to defend it also.

THE COURT: *All right. I want you to know that I?m going to have a keen eye going forward. We get panels that don?t necessarily have a lot of black males to start with, and if you start striking black males because they?re soft spoken, it raises my eyebrow. All right*

[emphasis added].

?Do you have anything on this?

MR. McCANTS: Just, we want to make a challenge, and we felt as if the government has targeted black males. Striking the only two black males in the jury. Without articulating any unbiased reason.

THE COURT: *Well, I think that they?I think that?s exactly what I asked them to do, and I believe they did articulate non-race based reasons. I guess it?s not my job to agree with them or disagree with them but to listen and see whether the reason is based on anything that the jurors said or any behavior that the juror demonstrated, so I?d have to say at this point that it does not raise to the level of a legitimate challenge, but my antenna is definitely up* [emphasis added].

?Let?s go forward.

[End of bench conference.]

After trial, the court sentenced appellant to an aggregate sentence of 336 months? incarceration. The sentences for PFCV, AAWA, and UPF are consecutive as to each count, while the sentences for the remaining charges are concurrent as to each count and with AAWA. Appellant timely appealed.

Appellant argues that the trial court did not properly conduct the *Batson* analysis. At oral argument, appellant contended that the trial court did not (as it should have) make a factual finding determining whether the strikes of the jurors were a result of purposeful discrimination. In his brief, appellant suggests that, if there was such a finding, it was clearly erroneous. We disagree with both arguments.

### A. The *Batson* Framework

*Batson* requires a three-part inquiry into whether the prosecutor engaged in purposeful discrimination while using a peremptory strike.

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

*Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). *Although the burden of producing evidence shifts during this inquiry, ?the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.? Id.* at 768, 115 S.Ct. 1769 [emphasis added].

### B. The Trial Court?s Ruling

The trial court?s comments must be read in the context of this three-step process. The court?s initial reaction was to state that the government?s explanation for striking juror number 442 ?doesn?t pass muster.? Appellant contends that this statement constitutes a factual finding of purposeful discrimination, but it is important to recognize that it was made at the outset of the inquiry, not at step three of the analysis. After this comment was made, the court and the prosecutors engaged in a long discussion, and the court ultimately concluded that the reasons given by the prosecutors did indeed ?pass muster,? in the sense that they were ?non-race based reasons.?

When defense counsel asserted that the prosecutors had not articulated ?any unbiased reason? for striking the two jurors, the trial court responded:

> I believe they did articulate non-race based reasons. I guess it?s not my job to agree with them or disagree with them but to listen and see whether the reason is based on anything that the jurors said or any behavior that the juror demonstrated, so I?d have to say at this point that it does not raise to the level of a legitimate challenge. . . .

The judge?s analysis properly recognized that, at step two of the *Batson* inquiry, it was not his ?job to agree . . . or disagree with? the prosecutors? strategy for exercising peremptory strikes. ?Although the prosecutor must present a comprehensible reason, ?[t]he second step of this process does not demand an explanation that is persuasive, or even plausible?; so long as the reason is not inherently discriminatory, it suffices.?*Rice v. Collins,* 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (quoting *Purkett, supra,* 514 U.S. at 767?68, 115 S.Ct. 1769). Although the trial judge quickly moved from step two to step three of the inquiry, he clearly held that the prosecutors had satisfied step two by ?articulat[ing] non-race based reasons.?

The court then focused on step three of the *Batson* procedure to determine whether appellant had carried his burden of proving that the prosecutors were engaged in purposeful racial discrimination when exercising their pe-remp-tory strikes. At this stage, ?the trial court must evaluate not only whether the prosecutor?s demeanor belies a discriminatory intent, but also whether the juror?s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.? *Snyder v. Louisiana,* 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). The court echoed these principles by commenting that its job was ?to listen and see whether the reason is based on anything that the jurors said or any behavior that the juror demonstrated. . . .? His ultimate assessment was: ?I?d have to say at this point that it does not raise to the level of a legitimate challenge. . . .? Considered in context, this conclusion is properly interpreted as a ruling on stage three of the Batson process.

**C. Legal Analysis**

Only the third step of the analysis is challenged on appeal. Because the prosecutors gave reasons for their strikes, the existence of a prima facie case is moot, *see Epps v. United States,* 683 A.2d 749, 752 (D.C.1996), and appellant concedes that ?the government did articulate a race and gender-neutral reason for each strike.? This court?s case law does not specifically address whether being soft spoken or non-assertive are qualities that survive step two of a *Batson* challenge, but many courts have held that they do. *E.g., People v. English,* 119 A.D.3d 706, 988 N.Y.S.2d 697, 699 (2014) (soft spoken); *State v. Carroll,* 34 S.W.3d 317, 320 (Tenn.Crim.App.2000) (non-assertive); *Magee v. State,* 994 S.W.2d 878, 889 (Tex.Ct.App.1999) (soft spoken). *We hold today that being soft spoken or non-assertive are both race-neutral explanations for a peremptory strike* [emphasis added].

For the reasons already stated, we reject appellant?s argument that the trial court failed to make a ruling on the issue of purposeful discrimination. We now turn to appellant?s attack upon the finding that was made.

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*The trial court observed the prosecutor and the jurors, and used these observations to make the finding quoted above. Given that the trial court is not required to make detailed factual findings, we hold that the trial court?s explanation is sufficient to satisfy the third part of Batson* [emphasis added].

Appellant contends that the trial court clearly erred in finding the race-neutral explanations credible because the prosecution did not ask the two African American male jurors questions during *voir dire.*

This court rejected a very similar objection in *Jefferson v. United States*, 631 A.2d 13, 16 (D.C.1993) (rejecting an objection when the prosecution ?excluded a black male who had not answered a single question during *voir dire*?). Since the trial court asked questions of these two jurors, could observe their responses first hand, and *sua sponte* pressed the prosecutors for more detailed ex-planations about why they wanted to strike these two jurors, the trial court was in the best position to make these critical credibility determinations.

Considering all of the circumstances presented, we are not persuaded that the trial court?s finding of no purposeful discrimination was clearly erroneous.

For the reasons already stated, we reject appellant?s argument that the trial court failed to make a ruling on the issue of purposeful discrimination.

**My Thoughts**

- I would have missed this one. When I made it down to Judge Rankin?s comment that the prosecutor?s reasons for exercising his peremptory strike ?doesn?t pass muster,? I would have guessed a different result. Wrong.
- Most of us have been there. One side or the other has raised a *Batson* issue and the trial judge has called for a reason for the strike. Sometimes, the explanation is totally understandable. On other occasions, it sounds as though the lawyer is stretching for an explanation that was probably not the basis for his strike?if the truth be known.
- What *Johnson* reaffirms is the lesson that *Batson* issues are decided on a case by case basis and that an appellate court?federal or Texas?will probably not find error in the trial judge?s ruling on the peremptory strike. Once again, we win or lose in the trial court.



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