

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0420, State of New Hampshire v. Martin Mullen, the court on July 12, 2006, issued the following order:

The defendant, Martin Mullen, appeals his convictions for aggravated felonious sexual assault, attempted felonious sexual assault, sexual assault, and simple assault. We affirm.

The defendant was a correctional officer at the New Hampshire State Prison for Women; the victim was a female inmate. Prior to trial, the State moved in limine to exclude evidence of, inter alia: (1) the victim's two prior DWI convictions; (2) the victim's use of the medication Zoloft, arguing that there was no evidence that it affects one's ability to perceive, remember, or recount events; and (3) that the victim was seeing a psychiatrist, or the reasons therefor, arguing that the victim did not suffer from a mental incapacity that affected her ability to perceive, remember, or recount events. After a hearing, the court granted the requested relief.

During jury selection, the defendant challenged the State's exercise of its peremptory challenges to strike three male jurors as gender-based. The prosecutor explained that one juror was stricken, first, due to his age, and second, "to avoid . . . his cultural background." The prosecutor explained that the juror was born in Lebanon, and that counsel believed that there are certain cultures that have "attitudes about women which might not be favorable to an evaluation of the victim's credibility in this case." The defendant then limited his objection to the striking of this juror, arguing that excusing the juror because he is of Middle Eastern descent is not permissible under Batson v. Kentucky, 476 U.S. 79 (1986). The defendant concluded by arguing that the prosecutor's reliance upon age was simply a pretext. The trial court ruled that the State had made a proper peremptory challenge.

On appeal, the defendant first argues that the State opened the door to admission of the victim's prior DWI convictions through its direct examination of the victim. The transcript reveals that when this issue arose at trial, however, the defendant withdrew his argument at the bench, agreeing with the court when it concluded, "Okay. Then there's no issue." Accordingly, we do not address it.

Next, the defendant argues that the State violated the pretrial order excluding evidence of the victim's psychiatric history by its questioning of Dr. Patricia Barr, a clinical psychologist who saw the victim the day after the assault as well as after she was released from prison. During cross-examination, the

defendant asked Dr. Barr how long she had been treating the victim and whether the victim was still her patient. The State objected to both questions on relevancy grounds, and the court sustained the objections.

On appeal, the defendant argues that he should have been permitted “greater latitude on cross-examination in light of the State’s gaining an unfair tactical advantage by introducing psychiatric and therapy testimony that was supportive of its theory of the case, despite the pre-trial order that any such testimony . . . was specifically excluded.” He contends that his trial counsel “[i]n essence . . . sought to revisit the pre-trial ruling . . . under the doctrine of ‘curative admissibility,’” citing State v. Rogan, 151 N.H. 629 (2005). We first note that this argument was not made to the trial judge. The defendant did not object to the State’s examination that allegedly violated the pretrial order, argue that the State thereby opened the door to his questions, or ask the court to revisit its pretrial ruling. Furthermore, the defendant fails to demonstrate how inquiring into how long Dr. Barr had been treating the victim or whether the victim was still her patient would have put evidence introduced by the State into its “proper context” or otherwise cure any allegedly misleading impression. The admissibility of evidence is generally within the trial court’s sound discretion. Rogan, 151 N.H. at 631. The defendant has not demonstrated an unsustainable exercise of that discretion. See id. at 631-32.

The defendant next complains that the trial court’s pretrial ruling excluding evidence of the victim’s use of Zoloft was fundamentally at odds with a later ruling at trial that permitted the State to cross-examine a defense witness regarding her addiction to and use of heroin. As the trial court noted, there was no indication that the victim’s use of Zoloft resulted in side effects affecting her credibility. In contrast, during voir dire, the defense witness testified that her perceptions and memory were affected both while she was taking heroin and while she was undergoing withdrawal from heroin. While the witness testified that withdrawal from heroin took three days to a week, and her testimony centered upon events occurring approximately two weeks after she entered prison, the trial court concluded that given the proximity in time, the State should be allowed to inquire as to her heroin use. Rather than being “fundamentally at odds” with its pretrial ruling regarding the use of Zoloft, the trial court’s ruling was rationally based upon the evidence before it of the effects of heroin use and withdrawal. Nothing in that ruling required the trial court to reconsider its pretrial ruling.

Finally, the defendant challenges the trial court’s ruling permitting the State to use a peremptory challenge. The defendant did not raise a State constitutional issue below. Accordingly, we will address his claim under only the Federal Constitution. See State v. Fowler, 132 N.H. 540, 545 (1989).

In Batson, the Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. Batson, 476 U.S. at 96-98. The defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of a protected classification. If the requisite showing has been made, the burden then shifts to the prosecutor to articulate a neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. See State v. Taylor, 142 N.H. 6, 9 (1997).

The defendant argues that the juror was an Arab-American or of Middle Eastern descent, and that we should recognize this group as a protected class. He appears to concede, as he should, that age is not a protected classification under Batson. See Taylor, 142 N.H. at 9. Neither party raises any issue as to whether the defendant had, or whether he carried, a burden to prove that the group in question is a cognizable group that has been or is currently subjected to discriminatory treatment. See United States v. Marino, 277 F.3d 11, 23 (1st Cir. 2002) (concluding that Italian-Americans are not a protected class under Batson). We will therefore assume, without deciding, that the juror belongs to a protected class.

In this case, the prosecutor defended her peremptory strike below and the trial court ruled on the ultimate question of discrimination. Under these circumstances, whether or not the defendant made a prima facie showing of discrimination is moot. See Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion).

Turning to the second step of the Batson analysis, we note that the prosecutor first articulated a neutral reason for exercising her peremptory strike – age. See Taylor, 142 N.H. at 9. She then articulated a second reason that arguably was not neutral – the juror’s “cultural background.” While we are hard pressed to see the distinction the State seeks to make between the prosecutor’s reliance in this case upon “cultural background” and reliance upon the juror’s ethnicity, we need not decide this issue. We will assume, without deciding, that the reliance upon “cultural background” was not a neutral explanation.

Although the State posits a third justification for striking the juror – that he overheard arguments at the bench concerning him – the trial court found after questioning the juror that he should not be excused for that reason. Because the evidence supports the trial court’s finding, we will not consider this argument further.

The defendant has raised no issue, either below or on appeal, regarding the effect, if any, upon the three-step Batson analysis resulting from the prosecutor’s articulation of both a neutral and a non-neutral reason for exercising her

peremptory challenge. Cf., e.g., Gattis v. Snyder, 278 F.3d 222, 234-35 (3d Cir.) (noting federal cases that have applied mixed motive analysis in Batson context), cert. denied, 537 U.S. 1049 (2002). He has simply contended, both below and on appeal, that age was a pretext, implying that the trial court should therefore have found that he carried his burden of proving purposeful discrimination. Accordingly, we address only the argument that has been made by the defendant. See State v. Blackmer, 149 N.H. 47, 48-49 (2003) (court will not consider issue on appeal unless contemporaneous and specific objection is made below and issue is fully briefed on appeal).

The Supreme Court has explained that the trial court's decision on the ultimate question of discriminatory intent (the third step of the Batson analysis) represents a finding of fact accorded great deference on appeal. Hernandez, 500 U.S. at 364. "Since the trial judge's findings in the context under consideration here largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." Id. (quotation omitted). Here, the trial court had the opportunity to evaluate the credibility of the prosecutor in light of the defendant's argument that her reliance upon age was a pretext. The court could also consider the fact that the first reason given by the prosecutor for exercising the peremptory strike was age. Given our deferential standard of review, we cannot conclude that the trial court erred by rejecting the defendant's argument that age was a pretext.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**